ONE OF THESE FAMILIES IS NOT LIKE THE OTHERS: THE LEGAL RESPONSE TO NON-NORMATIVE QUEER PARENTING IN CANADA

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A growing number of lesbians and gay men are choosing to become parents. In response, provincial parentage laws have become increasingly inclusive of same-sex parents, though the presumption underlying most of the reforms is that queer parenting will adhere to a nuclear family model. The effect of this preference for the nuclear family is that queer parents who engage in non-normative arrangements continue to find themselves outside the law. Perhaps most vulnerable are gay men, particularly in situations where they co-parent with a lesbian couple. This article uses the recent decisions of the Alberta Court of Queen's Bench and Court of Appeal in D.W.H. v. D.J.R. *to illustrate the challenges facing non-normative queer families and gay male parents in particular. It argues that even in provinces with recent parentage law reforms, deviation from the nuclear family norm poses serious risks for queer parents.*

L'homoparentalité est de plus en plus répandue. En conséquence, les lois provinciales de parenté incluent de plus en plus de parents de même sexe, bien que la présomption fondamentale de la majorité des réformes soit que les parents homosexuels respecteront le modèle de la famille nucléaire. La conséquence de cette préférence pour la famille nucléaire est que les parents homosexuels qui adoptent des arrangements non normatifs continuent à se trouver en dehors de la loi. Les hommes homosexuels sont sans doute les plus vulnérables, surtout lorsque le coparent est un couple de lesbiennes. Cet article fait appel aux récentes décisions de la Cour du Banc de la Reine de l'Alberta et de la Cour d'appel dans D.W.H. v. D.J.R.*, dans le but d'illustrer les difficultés auxquelles font face les familles homosexuelles non normatives et les parents homosexuels mâles en particulier. L'auteur fait valoir que même les provinces où les lois de parenté ont été modifiées, l'écart de la norme de la famille nucléaire pose un risque grave pour les parents homosexuels.*

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I. INTRODUCTION

As an increasing number of lesbian and gay couples in Canada choose to become parents, family law has been challenged to respond. Though significant legal barriers remain, litigation initiated by lesbian couples, as well as statutory reform, have created a number of mechanisms that can be used to establish legal parentage within lesbian and gay families. In most instances, the reforms have focused on solidifying parentage within the same-sex

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nuclear family by extending the rights and responsibilities of parenthood to the spouse of the birth parent. Same-sex second parent adoptions,[1] gender-neutral birth certificates that permit a non-biological mother to be listed as a "co-parent,"[2] and even legislatively assigned presumptive parentage for non-biological mothers where conception is achieved via assisted reproduction[3] (and, in a very small number of provinces, non-biological gay fathers where conception is achieved via a surrogacy arrangement),[4] are now fairly common features of the Canadian legal landscape.

While cumbersome, imperfect, and only available in some provinces, the legal parentage mechanisms available to same-sex couples do a reasonably good job of protecting what might be referred to as "traditional" lesbian and gay families: those who raise their children within a two-parent, nuclear family model where the third party gamete provider is an anonymous donor and, thus, absent from the child's life. With the exception of British Columbia's new *Family Law Act*,[5] provincial laws do not expressly envisage the possibility of a *known* gamete donor, let alone his or her participation in the family as a third parent. In fact, non-normative family structures are largely absent from debates about the recognition of lesbian and gay families even within lesbian and gay communities themselves.[6]

Due to the fact that lesbians can, more easily than gay men, create the types of families envisaged by the law — nuclear families where the donor is anonymous — the reforms tend to offer a more favourable framework for lesbians. While gay men can be the intended parents of a child conceived using the eggs of an anonymous donor, they require a surrogate to carry the child and, because all Canadian provinces, whether they have laws pertaining to surrogacy or not, consider a birth mother to be a presumptive legal parent, gay men cannot easily create the nuclear family upon which most existing laws are premised. Lesbian women who conceive with known donors also find themselves stymied by the law's preference for

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1 Second parent adoptions are available in all Canadian provinces and territories except Prince Edward Island and Nunavut. See generally *Re K* (1995), 23 OR (3d) 679 (Ont Prov Ct); *Re A* (1999), 253 AR 74 (QB); *Re Nova Scotia (Birth Registration No 1999-02-00420)* (2001), 194 NSR (2d) 362 (SC); *Adoption Act*, CCSM 1997, c A2, s 10; *Adoption Act*, SNL 1999, c A-2.1, s 20; *Adoption Act*, SS 1998, c A-5.2, s 23; *Adoption Act*, RSBC 1996, c 5 ss 5, 29; *Adoption Act*, SNWT 1998, c 9, s 5.

2 Gender-neutral birth certificates are available in six Canadian provinces and are largely the product of litigation brought by lesbian couples. See generally *Gill v Murray*, 2001 BCHRT 34; *AA v New Brunswick (Department of Family and Community Services*), [2004] NBHRBID No 4; *MDR v Ontario (Deputy Registrar General)*, [2006] 81 OR (3d) 81 (SC), OJ no 2268 (QL) [*MDR*]; *Fraess v Alberta (Minister of Justice and Attorney General)*, 2005 ABQB 889, 390 AR 280; *Vital Statistics Act*, RSM 1997, c V60, s 3(6).

3 Five Canadian provinces have legal parentage laws, applicable in situations of assisted conception, which include lesbian couples within their purview (*Vital Statistics Act*, CCSM, c V60, s 3(6); *Civil Code of Quebec*, SQ 1991, c 64, arts 538-42; *Family Law Act*, SA 2003, c F-4.5, s 5.1(1)(a) [*FLA*]; *Family Law Act*, SBC 2011, c 25, s 20(1) [*FLA* BC]; *Child Status Act*, RSPEI 1988, c C-6, ss 9(5)-9(6)). While Nova Scotia's *Vital Statistics Act*, RSNS 1989, c 494, makes no mention of same-sex couples or assisted reproduction in its birth registration provisions, regulations under the *Act* permit the mother's spouse, male or female, to register as a legal parent where a child is conceived via "assisted conception," defined as "conception that occurs as a result of artificial reproductive technology, using an anonymous sperm donor." See *Birth Registration Regulations*, NS Reg 390/2007.

4 *FLA* BC, *ibid*, s 29; *FLA*, *ibid*, s 8.2.

5 *FLA* BC, *ibid*.

6 Note for example, the strong emphasis on the same-sex nuclear family within the lesbian and gay community itself, both in the context of legal parentage litigation, as well as during the same-sex marriage debate in Canada. For a discussion of this trend see Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: UBC Press, 2011) at 53-65 [Kelly, *Transforming Law's Family*].

the same-sex nuclear family.[7] In fact, the more a lesbian or gay family deviates from traditional norms — because it includes a third or fourth parent, because a child is intentionally parented across more than one household, or because a gamete donor is involved in the child's life in a non-parenting capacity — the less responsive the law. I have chosen to call these families "queer families" to reflect not only the sexual orientation of their members, but also the ways their structures and practices serve to "queer" traditional familial norms.[8]

The members of queer families who experience the greatest legal challenges are non-biological parents, who are sometimes relegated to the status of legal stranger to their child. The marginalization of non-biological queer parents can become even more pronounced in the case of a non-normative queer family, because both biological parents are known and participating in the child's life. While the challenges experienced by non-biological lesbian mothers have received considerable academic attention in Canada,[9] the experiences of non-biological gay fathers have yet to be fully explored. Because gay fathers, let alone non-biological gay fathers, are not the intended beneficiaries of many of the new parentage reforms, they can rarely rely on them to bolster their claims. Second parent adoptions are designed to permit the birth mother's partner to adopt the child, gender neutral birth certificates still require the birth mother's details to be included, and most provincial statutes that include gays and lesbians within their parentage provisions do not recognize the possibility of a non-biological gay father.

The challenges faced by non-biological gay fathers are well demonstrated by the recent Alberta Court of Queen's Bench decision of *D.W.H. v. D.J.R.*,[10] a case involving a gay male couple who entered into an agreement with a lesbian couple to conceive a child who would be raised by the two men. After years of trying to obtain access to his daughter under provincial family law legislation, the non-biological father was forced to resort to section 15 of the *Charter* to secure his legal parentage.[11] The decision in *DWH* also demonstrates that even *biological* gay fathers may find their parentage under threat. Though it was the non-biological father who brought the parentage application in *DWH*, in the course of the

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7 For a discussion of the legal challenges lesbian mothers with known donors may face see Fiona Kelly, "Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families" (2013) 64 UNB Law Review 253 [Kelly, "Equal Parents, Equal Children"].

8 My use of the term "queer" reflects the work of Judith Butler who understands the term as a category in constant formation. As Butler argues, it is a term which is, in the present, never fully defined. Rather, it is flexible and responsive, an identity category that has no interest in consolidating or even stabilizing itself. Queer families are, therefore, families who cannot be easily pinned down. The only characteristic they share with each other is their non-normative nature. See Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (New York: Routledge, 1993).

9 See, eg, Kelly, *Transforming Law's Family*, *supra* note 6; Angela Campbell, "Conceiving Parents Through Law" (2007) 21:2 Int'l J L Pol'y & Fam 242; Robert Leckey, "Two Mothers in Law and Fact" (2013) 21:1 Fem Legal Stud 1; Robert Leckey, "Law Reform, Lesbian Parenting, and the Reflective Claim" (2011) 20:3 Soc & Leg Stud 331; Katherine Arnup & Susan Boyd, "Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood" in Didi Herman & Carl Stychin, eds, *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (Philadelphia: Temple University Press, 1995) 77; Shelley Gavigan, "Equal Families, Equal Parents, Equal Marriage: The Case of the Missing Patriarch" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Human Rights* (Markham: LexisNexis Butterworths, 2006); Fiona Kelly, "Nuclear Norms or Fluid Families: Incorporating Lesbian and Gay Parents and their Children into Canadian Family Law" (2004) 21:1 Can J Fam L 133; Fiona Nelson, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families* (Toronto: University of Toronto Press, 1996).

10 *DWH v DJR*, 2011 ABQB 608, 209 ACWS (3d) 66 [*DWH* ABQB].

11 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

litigation the parentage of the biological father was questioned on the basis that the child was conceived via donor insemination, and thus the biological father was a "donor" and not a "parent" under the relevant law. While statutory provisions that sever the parentage of sperm donors[12] were justifiably introduced to protect lesbian mothers from the *unintended* incursions of known donors,[13] *DWH* demonstrates how the categorization of male gamete providers solely as "donors" limits the ability of a group of individuals who wish to create a non-normative queer family from realizing that goal.

This article explores the failure of our existing legal mechanisms to respond to non-normative queer parenting, particularly in situations where gay men are active parents. The first half of the article draws on case law and legislation to provide an overview of how Canadian law responds to non-normative queer parenting, focusing in particular on the impact of existing laws on gay men who wish to actively parent within non-normative families. The second half of the article uses the decision in *DWH* as a case study to explore how, even in provinces that have legislative provisions expressly designed to respond to same-sex parenting, non-normative queer parenting remains marginalized. While the law has travelled some distance in recognizing lesbian nuclear families, non-normative queer families of any kind, but particularly those that include primary gay fathers, find the law far less receptive. Given that it is much harder for gay men to create a two-parent nuclear family than it is for lesbian women, especially if they want at least one party to share a biological connection to the child,[14] the legislative preference for the queer nuclear family disproportionately harms gay fathers.

II. THE JUDICIAL AND LEGISLATIVE RESPONSE TO NON-NORMATIVE QUEER FAMILY

While most queer families with children resemble the traditional nuclear family, a growing body of research[15] suggests that a small but significant number of non-normative queer families are created via private arrangements between lesbian women and gay men. The families identified by the research are extremely varied, making it impossible to define one particular family configuration as the "typical" non-normative queer family. The possible family configurations identified include: (1) where three or more individuals agree to co-parent a child across two households; (2) where it is agreed that a gay man (and his partner) are parents and have regular contact, but the child lives with the lesbian woman or couple; or (3) where a gay couple raises a child conceived via surrogacy, but agree that the birth

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12 Some provinces have been careful not to categorize individuals who donate genetic material solely as donors. For example, Quebec's *Civil Code* establishes parentage in cases of assisted conception on the basis of who was engaged in a "parental project." In most instances, the parties to the parental project will be an intimate couple, whether opposite or same-sex, but it is possible for a man and woman to engage in a parental project whereby the man provides his sperm for the purpose of conception in circumstances where they are not sexual partners (*CCQ*, *supra* note 3, art 538).

13 For an overview of why these types of reform were needed see Fiona Kelly, "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" (2009) 40:2 Ottawa L Rev 185.

14 As Angela Cameron noted in a case comment on one of the earlier judgments in the *DWH v DJR* dispute, the rules around sperm donation in Canada make it very difficult for gay male couples to become parents. See Angela Cameron, "Regulating the Queer Family: *The Assisted Human Reproduction Act*" (2008) 24:1 Can J Fam L 101.

15 Kelly, *Transforming Law's Family*, *supra* note 6; Susan Goldberg & Chloe Brushwood Rose, eds, *And Baby Makes More: Known Donors, Queer Parents, and Out Unexpected Families* (London, ON: Insomniac Press, 2009); Rachel Epstein, ed, *Who's Your Daddy? And Other Writings on Queer Parenting* (Toronto: Sumach Press, 2009).

mother (and her partner) will also be involved in the child's life. The common characteristic in these scenarios is that the parties *intend* to create a non-normative family. Not included are situations in which a known donor seeks access or parental status contrary to the terms of a pre-conception agreement. Such families were not *intended* to be non-normative.

The actual creation of non-normative queer families can be extremely challenging in Canada because of an effective ban on gay men using the services of fertility clinics. To utilize the services of a fertility clinic, parties must comply with the *Processing and Distribution of Semen for Assisted Conception Regulations*.[16] The *Regulations*, however, discriminate against gay men as well as men who donate sperm to women who are not their sexual partners. For example, men who have had sex with other men are prohibited from donating sperm in Canada.[17] The only way to get around this exclusion is to proceed through the "special access" program[18] that permits the use of semen from a donor who would otherwise be excluded by the *Regulations*, provided that he and the recipient follow the rules outlined in the *Guidance on Donor Semen Special Access*. The special access rules require the donor's semen to be tested for infectious diseases, quarantined for six months, and then retested. If all the tests are negative, the woman's physician may apply to Health Canada for a special access authorization. The physician must indicate that he or she has explained and identified any health risks to the recipient woman. Health Canada must then review the application and either approve or reject it. There is no certainty that a donor will be approved by virtue of going through the process. Similarly, if a man donates sperm to someone other than his sexual partner, the sperm must be tested for a variety of diseases, stored for six months, and then tested again, adding time and cost burdens for the parties.[19] Men who are over the age of 40 can also only donate under the "special access" program.[20] Due to these restrictions, and the financial, time, and emotional implications they have, few non-normative families use the services of a fertility clinic. Instead, conception usually occurs via self-insemination in the birth mother's home. While home insemination may have some advantages,[21] the lack of choice around the issue marks the first legal barrier to the realization of a non-normative queer family. Some women will not be able to conceive without medical assistance and may therefore be forced to sacrifice the family arrangement they desired in order to engage the services of a clinic.

Unlike queer families created via anonymous donor insemination or adoption, non-normative queer families have few legal mechanisms available to protect their parenting relationships. Because the existing legal options mirror the heterosexual nuclear family, and

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16 *Processing and Distribution of Semen for Assisted Conception Regulations*, SOR/96-254 [*Regulations*].

17 A directive issued under the *Regulations* excludes certain men from donating sperm, including "men who have had sex with another man, even once since 1977"(Health Canada, *Technical Requirements for Therapeutic Donor Insemination*, online: Health Canada <http://www.hc-sc.gc.ca/dhp-mps/alt_formats/hpfb-dgpsa/pdf/prodpharma/semen-sperme_directive-eng.pdf>, s 2(1)(c)(i)). This exclusion was challenged and upheld in both *Jane Doe v Attorney-General of Canada* (2003), 68 OR (3d) 9 (Sup Ct J); *Susan Doe v Attorney-General of Canada*, 2007 ONCA 11, 84 OR (3d) 81, in part because the federal government introduced the *Guidance on the Processing and Distribution of Sperm for Assisted Conception Regulations*, GUIDE-0041 (1 September 2004) [*Regulations* Guide] under which men falling into one of the excluded categories can now donate, provided they go through a "special access" program.

18 *Regulations* Guide, *ibid*.

19 *Regulations*, *supra* note 16.

20 *Ibid*.

21 Fiona Kelly, "An Alternative Conception: The Legality of Home Insemination under Canada's *Assisted Human Reproduction Act*" (2010) 26:1 Can J Fam L 149 at 157-60.

are thus premised on a child having only two parents, they inevitably deny recognition of one or more of the parents in a non-normative queer family. Due to the omission of their families from the existing legislative frameworks, non-normative queer parents interviewed for a study on lesbian parenting consistently noted that attempting to legally formalize their arrangements made little sense.[22] As one biological mother, who co-parented with a gay couple (now separated) and a non-conjugal female partner noted, "'the distance [that law] would have to travel to get to [my] family reality [is] so far' that it seems pointless to engage."[23] The same study found that the absence of legal recognition of non-normative family arrangements made prospective lesbian mothers less willing to create such a family structure. For example, several women noted that they would have been more open to a co-parenting relationship with their known donor (and his partner) if the law was capable of protecting the parties' respective roles.[24] Of particular concern was the mothers' belief that the law would favour the biological connection of the donor father over the actual parenting labour of the non-biological mother. For example, a non-biological mother who was very open to a three-parent family ultimately chose otherwise because of her perceived legal vulnerability. She stated:

> We've organized ourselves in this way mostly because [of] the way the law currently is and because we feel that we have to do this to protect ourselves and our children. To be exclusionary. Otherwise we would be quite open to, to the idea of having the sperm donor thought of as a "parent". It's just not wise legally for us. It's a *big* mistake to ever use that word.[25]

Comments such as this suggest that the failure of existing provincial law to protect the parenting roles of each member of a non-normative queer family actually curtails the exploration, or realization, of such families. In other words, if the law were more responsive to non-normative queer parenting, we might actually see more non-normative queer families.

There are two instances in which Canadian law has legally validated non-normative queer families: the Ontario Court of Appeal decision of *A.A. v. B.B.*[26] and British Columbia's new *Family Law Act*.[27] The judgment in *AA*, considered groundbreaking by many, was the first instance of judicial willingness to expressly recognize the legal status of three (queer) parents. While courts have previously found that more than two individuals can have some of the rights and responsibilities associated with parenthood,[28] until *AA* no Canadian court had held that a child could have more than two legal parents. In *AA*, the biological mother, the non-biological mother, and the biological father — who had provided the sperm to the lesbian couple, was listed on the child's birth certificate as the "father," and was involved in the child's life, though he did not live with him — petitioned to have the non-biological mother added to the child's birth certificate and declared a third legal parent. While the

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22 Kelly, *Transforming Law's Family*, *supra* note 6 at 86.
23 *Ibid* at 86.
24 *Ibid* at 109.
25 *Ibid*.
26 *AA v BB* (2007), 83 OR (3d) 561 (CA) [*AA*].
27 *FLA* BC, *supra* note 3.
28 Under provincial family law statutes, individuals who "stand in the place of a parent" (*in loco parentis*) may be granted some of the rights and responsibilities of parenthood, such as access rights or child support liability. However, this designation does not bestow legal parenthood upon that individual. See *Chartier v Chartier*, [1999] 1 SCR 242 [*Chartier*].

decision in *MDR*[29] enabled two women to appear on a child's birth certificate, and Ontario's *Family Law Act* permitted a court to find that a non-parent had demonstrated a settled intention to treat a child as a child of his or her family and could therefore be awarded some of the rights and responsibilities of parenthood,[30] neither of these options responded to the parties' desire to have all three of them recognized as equal legal parents. Ontario also lacked any legislation specifically designed to address lesbian and gay parenting which can, as the decision in *DWH* demonstrates, hinder the recognition of a non-normative queer family.

In making its decision in *AA*, the Court of Appeal refused to be constrained by the existing legal framework, invoking its *parens patriae* jurisdiction to declare it was in the child's best interest that each of the individuals acting as his parents be given legal status as such. Adding some contemporary content to the *parens patriae* power, the Court of Appeal held that children conceived using reproductive technologies, many of whom are raised in alternative family models, "are deprived of the equality of status that declarations of parentage provide."[31] Such a situation is contrary to the best interests of the children involved and thus warranted the Court's use of its *parens patriae* power.[32] However, because the *parens patriae* power is discretionary, the decision in *AA* should not be read as allowing all children to have more than two parents. In fact, as Nicole LaViolette has argued, while judgments such as *AA* draw our attention to significant legislative gaps in the recognition of lesbian and gay family, their *ad hoc* nature means that they "are unable to fill these gaps in any coherent, consistent and policy driven way."[33]

The only other circumstance in which non-normative queer families have been extended legal recognition is under British Columbia's new *Family Law Act*, which came into force in March 2013.[34] In section 30 of the *Act*, provision for the legal recognition of a multiple parent family is made. The section refers to two possible situations to which it might apply. First, it provides for legal enforcement of a pre-conception written agreement between an intended parent or parents and a birth mother that all three parties are the child's legal parents (for example, an agreement between a single man or gay couple and a surrogate). Second, it provides for legal enforcement of an agreement between a birth mother, or a birth mother and her spouse, and a gamete donor that the parties to the agreement are the child's legal parents (for example, an agreement between a single woman or a lesbian couple and a donor). Thus, a child can clearly have three legal parents under section 30.[35] What section 30 does not permit, however, is for the partner of a donor to also be a legal parent. Section 30 may permit a fourth parent, but only where that parent also shares a biological tie with the

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29 *MDR*, *supra* note 2.

30 *FLA*, *supra* note 3, s 1.

31 *AA*, *supra* note 26 at para 35.

32 *Ibid*.

33 Nicole LaViolette, "Dad, Mom — and Mom: The Ontario Court of Appeal's Decision in *A.A. v B.B.*" (2007) 86:3 Can Bar Rev 665.

34 *FLA* BC, *supra* note 3.

35 Heterosexual couples that intend to co-parent with a donor or surrogate can also utilize section 30. However, it is clear from the White Paper produced by the British Columbia Attorney-General's department during the law reform process that the provision was designed to respond to the needs of non-normative queer families. For example, when discussing section 30 the White Paper cites *AA v BB* and provides as the example of the type of arrangement that might be covered by the section: an agreement between a lesbian couple and their donor. Ministry of Attorney General (Justice Services Branch, Civil Policy and Legislation Office), *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (July 2010), online: <http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf> at 29.

child (for example, a second gamete donor). This suggests that one of the underlying reasons for section 30 is not necessarily to acknowledge the complexities of queer families, but to provide a means to establish a legal relationship between a child and *both* of his or her biological parents.

The only other way in Canada in which a party to a non-normative queer family could attract some of the rights and responsibilities of parenthood is via the doctrine of *in loco parentis*, meaning "to stand in the place of a parent." The doctrine of *in loco parentis* is designed to respond to the situation where an individual voluntarily assumes caregiving and financial responsibility for a child with whom they share no biological relationship, typically the son or daughter of their spouse. It could, therefore be utilized by a non-biological queer parent. The doctrine takes statutory form in section 2(2)(b) of the *Divorce Act*, which states that a spouse who "stands in the place of a parent" may have rights and responsibilities in relation to a child of the marriage.[36] Provincial family law legislation does not mirror section 2(2)(b) exactly, but most provinces have a similar provision. In some provinces, the doctrine of *in loco parentis* also permits individuals who are not legal parents to apply for a custody or access order without seeking leave of the court.[37]

The Supreme Court of Canada, in its decision in *Chartier*, addressed how a court determines whether an individual stands in the place of a parent.[38] While the overriding concern of the court is the best interests of the child,[39] the Supreme Court developed a number of factors against which to assess an application, each of which is intended to infer the individual's intention. The criteria include whether: (1) the child participates in the extended family in the same way as a biological child; (2) the person provides financially for the child; (3) the person disciplines the child as a parent; (4) the person holds him or herself out in the world as a parent to the child; and (5) the nature of the relationship between the child and the absent biological parent.[40]

The doctrine of *in loco parentis* offers some solace for non-biological queer parents parenting within non-normative queer families, as its focus is on the parenting behaviours of the individual, and not just biology. Many non-biological queer parents who are actively engaged in parenting would meet the criteria provided by the Supreme Court in *Chartier*. However, those who do not reside regularly with their child will be unlikely to succeed. In addition, because the doctrine rests on the accumulation of particular behaviours it can only be applied retrospectively, typically in a situation of conflict. It cannot be applied at birth. The doctrine is therefore only of benefit to a non-biological queer parent who has engaged in a parenting relationship of some length and who is asserting his or her parentage in a situation of conflict. Two additional problems remain. First, the doctrine does not provide the individual who stands in the place of a parent with the *same* rights and responsibilities as a legal parent. Thus, those who stand in the place of a parent will always be subservient to those who can demonstrate a better claim to parenthood. Second, judges may be reluctant to use the doctrine in the context of a queer family if extending some rights and

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36 *Divorce Act*, RSC 1985, c 3, ss 2(1)-2(2).
37 See e.g. *FLA*, *supra* note 3, s 35(2).
38 *Chartier*, *supra* note 28.
39 *Ibid* at para 21.
40 *Ibid* at para 39.

responsibilities to the non-biological parent is perceived as undermining the role of a biological parent. For example, if a biological mother opposes the parentage of a non-biological father, as she did in *DWH*, it may become more challenging for the non-biological father to succeed.

Thus, the options for recognizing a non-normative queer family in Canada are minimal. The effect of this legal gap is twofold. For some, the risks associated with the law's inability to recognize non-normative queer family relationships are too great, and the option of creating such a family is rejected. For those who choose to proceed, there is a cloud of legal uncertainty to contend with and, in situations where the relationships unravel, the possibility of a court reconfiguring the parenting relationships involved. The individuals who are most vulnerable in these cases are non-biological parents, with non-biological gay fathers perhaps the most vulnerable of all. In the next section, the decision in *DWH* is used to demonstrate exactly how challenging the law finds non-normative queer family relationships and how few options judges have available to them even if they want to extend parentage to all of the individuals involved.

III. *DWH v. DJR*: A NON-NORMATIVE QUEER FAMILY GOES TO COURT

The complex set of queer family relationships created by the parties in *DWH*, while difficult to categorize, clearly fall within the domain of the non-normative queer family. The case therefore provides numerous examples of the types of legal barriers parties to non-normative queer families might experience. In addition, it demonstrates the particular challenges that gay fathers, especially non-biological fathers, might experience in establishing parentage. *DWH* has had many incarnations over the years, beginning as an access dispute in 2007 and ultimately ending as a successful *Charter* challenge to Alberta's parentage laws in 2011. Given that each judgment demonstrates different aspects of the marginalization of non-normative queer parenting, each will be discussed.

A. THE FACTS

In 2002, a gay male couple, D.H. and D.R., who were part of a "loving and committed relationship,"[41] agreed with a lesbian couple, Ms. D. and Ms. C., to have two biological children together, with one child living with and being parented by each couple.[42] The biological parents were the same for each child but the children lived in separate homes. The first child, Baby S., who was conceived by Ms. D. via home insemination using D.R.'s sperm, was born in May 2003. Ms. D. lived with D.H. and D.R. for the first two and a half months of S.'s life, participating in her care, including breastfeeding, on a daily basis. Ms. D. then moved back to her house but continued to see S. on a regular basis. The two men continued to parent S. as "dual primary caregivers"[43] and by all accounts were loving and involved parents. A second child, N., also conceived using D.R.'s sperm, was born to Ms. D. in October 2005. N. resided with his two mothers from birth. The other couple regularly

41 *DWH* ABQB, *supra* note 10 at para 5.
42 For a complete review of the facts, see generally *ibid* at paras 3-14.
43 *Ibid*.

visited the children, though each child had their primary residence with one couple and understood the adult pair they lived with to be their parents. S. referred to her two parents as "Papa" and "Daddy."

Early in S.'s life D.H., the non-biological father, talked to D.R. about adopting S. but was deterred from doing so by D.R., who did not want to "rock the boat" with Ms. D. As time went on, the relationship between D.H. and D.R. became strained.[44] D.R. began to turn to Ms. D. for parenting advice, sometimes ignoring D.H.'s input altogether. In 2006, when S. was three, her fathers separated. Acting in concert, the two biological parents of S., Ms. D. and D.R., refused to allow D.H. to have contact with S., arguing that he was not a legal parent and, as an HIV positive man, was an inappropriate care provider. Angered by the access refusal, D.H. applied in October 2006 for an interim contact order granting him access to S.

B. THE CONTACT DISPUTE: COURT OF APPEAL

D.H. provided two arguments to support the interim contact application under the *FLA*: (1) that he was a parent and thus entitled to apply for contact; or (2) he satisfied the *in loco parentis* test under section 48 of the *FLA* and contact was in the child's best interests.[45] The chambers judge failed to comment specifically on either submission. Instead, he granted D.H. leave to apply for contact — which means he did not regard D.H. as a parent or a person who stands in the place of a parent, as neither require leave to apply for contact — but held that contact was not in the child's best interests.[46] Applying cases involving access applications by third parties, such as grandparents and platonic friends of the mother, he held that the wishes of the child's "parents," D.R. and Ms. D., were entitled to considerable deference and that D.H. had failed to show how contact would contribute to the child's best interests when her "parents" felt otherwise.

D.H. appealed to the Court of Appeal, which overturned the decision of the chambers judge and permitted contact.[47] The Court of Appeal held that it was incumbent upon the chambers judge to consider whether D.W.H. "stood *in loco parentis* to the child and to assess the desirability of contact with that relationship in mind."[48] The failure to do so constituted a reversible error. In reassessing the circumstances of the case, the Court of Appeal held that it was particularly important to determine whether D.W.H. was a person standing in the place of a parent because "there is a presumption in favour of contact that is rooted in a recognition that the unique relationship between these persons [parents and their children] ought not to be easily or readily abandoned or displaced."[49] Thus, if D.W.H. was found to stand in the place of a parent, he would enjoy a de facto presumption that, in the absence of evidence to the contrary, contact was in S.'s best interests.

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44 *Ibid*.

45 In the event that a party establishes that he or she is a parent under section 48 of the *FLA*, *supra* note 3 (the "standing in the place of a parent" provision), it is then necessary to demonstrate that contact is in the child's best interests under section 35(5) of the *Act*.

46 The chambers decision is not available. Information about it has been gleaned from subsequent judgments in the dispute: *DWH v DJR*, 2007 ABCA 57, 412 AR 34 [*DWH* ABCA]; *DWH v DJR*, 2009 ABQB 438, 478 AR 109 [*DWH* ABQB 2009].

47 *DWH* ABCA, *ibid*.

48 *Ibid* at para 14.

49 *Ibid* at para 16.

Section 48 of the *FLA* states that a person stands in the place of a parent if the person:

> (a) Is the spouse of the mother or father of the child 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.

Considering section 48 in light of the facts, the Court of Appeal held that "the uncontested evidence supports the conclusion that [D.H.] stood in the place of a parent to the child."[50] D.H. and D.R. were in a relationship of interdependence of some permanence at the time of the child's birth and a settled intention on the part of D.H. to be a parent can be gleaned from subsequent events: D.H.'s role in preparing for the birth; his presence at the birth; his attention to the child's needs; caring for her for three years (often in the absence of D.R. who frequently travelled for work); and that the child knew him as "Papa." The Court then turned to the question of whether contact should be ordered. Section 35(5) of the *FLA* lists the factors courts must consider when making a contact order:

> 35(5) Before the court makes a contact order, the court shall satisfy itself
>
> (a) that contact between the child and the person for whom contact with the child is proposed is in the best interests of the child, including whether
>
> (b) the child's physical, psychological or emotional health may be jeopardized if contact between the child and the person for whom contact with the child is proposed is denied, and
>
> (c) the guardians' denial of contact between the child and the person for whom contact with the child is proposed is unreasonable.

No evidence was provided by D.R. or Ms. D. to suggest that contact was not in the best interests of S. Nor did any of their evidence acknowledge the clear benefits S. would "derive from additional affection from someone who has been directly involved in her parenting since birth"[51] or the "potential for emotional harm occasioned by the sudden withdrawal of parental attention and support."[52] Accordingly, the Court awarded reasonable access pending trial or further court order. Because the Court was able to rely on section 48 to resolve the question of D.H.'s ability to apply for access, the question of whether D.H. was a legal parent was left unresolved. While the outcome of the case was positive for D.H., securing the contact order required him to jump over a series of hurdles that biological queer parents, and even non-biological lesbian mothers in Alberta, do not have to meet. In addition, because there was no finding with regard to legal parentage, the legal relationship between D.H. and his daughter remained precarious.

Following the Court of Appeal's order, D.H. began exercising contact. However, it was almost immediately frustrated by D.R. and Ms. D. Following a particularly unpleasant

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50 *Ibid* at para 18.
51 *Ibid* at para 19.
52 *Ibid*.

interaction between the parties, D.R. requested that a child psychologist be hired and a consent order appointing such an individual, Dr. Pezzot-Pearce, was secured in May 2007. Dr. Pezzot-Pearce's report was issued in November 2007 and recommended that D.H. have no further contact with S.[53] Following receipt of the report, D.R. and D.D. immediately brought an application to discontinue contact and the order was granted by a chambers judge who stated that, based on the evidence of D.R, D.D., and Dr. Pezzot-Pearce, contact posed a "substantial risk of harm to the child."[54] Following the chambers order, S. lived with D.R., visiting Ms. D. and Ms. C. on alternate weekends.[55] For close to two years, D.H. had no contact with his daughter.[56]

C. THE CONTACT DISPUTE CONTINUED: COURT OF QUEEN'S BENCH

In 2009, D.H. initiated a second application for contact with his now six-year-old daughter.[57] The application was made on two grounds: (1) that D.H. was a person standing in the place of a parent under section 48 of the *FLA* and contact was in S.'s best interests; or (2) drawing on the reasoning in *AA*, that D.H. was a person who could be considered a parent in law.[58] Repeating much of the reasoning of the Court of Appeal in its 2007 decision, Justice Eidsvik confirmed that D.H. stood in the place of a parent and was thus able to bring his contact application without leave.[59] Justice Eidsvik also agreed with the Court of Appeal that there exists a presumption that it is in a child's best interests to maintain maximum contact with his or her parents, absent evidence to the contrary, and a person standing in the place of a parent enjoys this presumption.[60] Analyzing the evidence before her in light of the section 35 best interest factors, Justice Eidsvik concluded there was no evidence to suggest that contact between S. and D.H. would be anything but positive. The relationship S. enjoyed with D.H. prior to the conflict had been strong, the two contact visits between D.H. and S. that occurred after the conflict began had been successful, and S. was at an age (six) where she was happy to interact with new people.[61] The Judge also expressed concern about S.'s long-term welfare if contact were to continue to be denied. She stated, "it is my view, S.'s emotional health may be jeopardized in the long run if she does not have this parental relationship re-established. She has been torn away from someone whom she came to love and played an integral part of her conception, birth and early life.… The court will not countenance this occurring."[62] The only evidence suggesting contact was not in S.'s best interests — the report of Dr. Pezzot-Pearce — was swiftly rejected by Justice Eidsvik, who stated that the report failed to make the appropriate paradigm shift in evaluating the family, treating S. as having "a mother and a father in a basically normal nuclear family … whose views should be respected above all others."[63] Reasonable and generous contact was ordered with a recommendation that the parties receive professional assistance with the initial

53 *DWH* ABQB 2009, *supra* note 46 at para 55.
54 *Ibid*.
55 *Ibid* at para 56.
56 *Ibid*.
57 *Ibid*.
58 *Ibid* at para 65.
59 *Ibid* at para 66.
60 *Ibid* at para 41.
61 *Ibid* at para 102.
62 *Ibid* at para 103.
63 *Ibid* at para 91.

transition. Due to Justice Eidsvik's conclusion that D.H. could be awarded contact under section 48, it was again unnecessary to determine whether D.H. was a legal parent.[64]

While Justice Eidsvik did not expressly address D.H.'s parental status, her analysis under section 35 required her to identify S.'s guardians.[65] Starting with section 1 of the *FLA*, which defines the "mother" of a child as the woman who gives birth, Justice Eidsvik concluded that, absent an adoption, Ms. D. was S.'s mother. Justice Eidsvik felt that this result did not sit well with the reality of the family. As she explained, "we have this odd situation where Ms. D. is not a custodial parent — or primary residential parent — of the child S., and only exercised access rights, but she is [a] legal guardian under the Act."[66] The oddities continued when Justice Eidsvik considered the legal status of D.R., the child's custodial and biological father. Applying section 13(3) of the *FLA*, which designates parentage where assisted conception is used, Justice Eidsvik was forced to conclude that D.R. was neither a legal father nor a guardian. Section 13(3) stated:

> Subject to the exceptions in the regulations, *a male person whose sperm* is used in an assisted conception involving an egg of a female person who is neither his spouse nor a person with whom he is in a relationship of interdependence of some permanence *is not the father* of the resulting child and acquires no parental or guardianship rights or responsibilities of any kind as a result of the use of his sperm.[67]

Because conception was assisted and D.R. was not Ms. D.'s spouse or in a relationship of interdependence with her, the only conclusion available to Justice Eidsvik was that D.R. was not a legal parent. The only other option for D.R. to establish parentage under the *Act* was to register as a father under sections 1 (definition of "biological father") and 8 (registration as a father). However, Justice Eidsvik held that the specificity of section 13 would overrule the generality of sections 1 and 8, because to hold otherwise would permit all sperm donors to become legal fathers, an outcome clearly not intended by the *Act*.[68] It was therefore Justice Eidsvik's conclusion that S.'s sole parent and guardian was Ms. D. This finding did not mean that D.R. had no parental rights to S. Like D.H., he could apply under section 48 as someone who stands in the place of a parent. However, at the time of the decision no such application had been made.

Justice Eidsvik expressed considerable concern about the effect of her conclusions, noting that they were not in the best interests of the child. She stated, "these sections are not user friendly for the very rare circumstances that the children S. and N. were born into, i.e. into

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64 *Ibid* at para 68.
65 One of the section 35 (*FLA*, *supra* note 3) best interest factors is the "reasonableness of the guardians' contact denial."
66 *DWH* ABQB 2009, *supra* note 46 at para 84.
67 *Supra* note 3 [emphasis added].
68 *DWH* ABQB 2009, *supra* note 46 at para 78.

gay and lesbian families."[69] Justice Eidsvik also noted that heterosexual couples that conceive using donated gametes do not face the same challenges under the *Act* as gay and lesbian families.[70] As she explained:

> It is of interest to note that had these relationships been heterosexual however there would have been more opportunity under *the Act* for a presumption of mother, father, or guardianship definition to apply. For instance, when there is a heterosexual relationship and the woman has an assisted conception with another male's sperm, if the male partner consented in advance of the conception to being a parent of the resulting child, then, under section 13 (2) (b) he is the 'father' of that child.… Further, under the presumptions in section 8 there are a number of ways that Mr. H. could have been presumed to be a 'father' if he was cohabiting with a female who gave birth and brought that child home to live with them. Similarly, under section 20, several rights of guardianship apply to heterosexual relationship partners when a child is born amidst a relationship. Indeed *the Act* presumes parenthood for non-biological parents (especially fathers) in many instances because it is obviously in the best interests of the children to have parents deemed at law to care for them.[71]

Justice Eidsvik concluded by noting that while none of the parties had suggested that the *Charter* applied to their case, what they were experiencing may well amount to discrimination under section 15.[72] As she explained:

> The facts in this case … highlight, in my view, how the lack of clarity and applicability of *the Act* to gay and lesbian parental units can *injure children* in that here, it appears that the children S. and N. have no legal father presumed under *the Act*, the guardianship assumptions under section 20 do not work well here, and the relationships with the non-biological homosexual parents are not presumptively acknowledged.[73]

Perhaps inspired by Justice Eidsvik's words, D.H. launched a new application challenging the parentage provisions in the *FLA* and the *Vital Statistics Act*[74] on the basis that they discriminated against him on the grounds of gender and sexual orientation contrary to section 15 of the *Charter*.

D. THE *CHARTER* CHALLENGE

In his *Charter* challenge, D.H. asked the court to: (1) declare that sections 8, 12, and 13 of the *FLA* violated his right to equality pursuant to section 15 of the *Charter*;[75] and (2) to

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69 *Ibid* at para 73. While I agree with the sentiment of Justice Eidsvik's statement, she is mistaken to suggest that gay and lesbian families are "very rare." The 2006 Canadian Census found that of the 20,610 female couples who were willing to have their relationships recorded, 3,359 (16.3 percent) were raising children. Arguably the census underestimates the number of lesbians raising children because not all lesbians would have chosen to respond candidly to the question. Nor do the census figures include those lesbian mothers who are single or separated from their child's other parent, or who are non-custodial parents (Statistics Canada, *Family Portrait: Continuity and Change in Canadian Families and Households in 2006*, 2006 Census (Catalogue no 97-553-XWE2006001) (Ottawa: Statistics Canada, 2007)).

70 *DWH* ABQB 2009, *supra* note 46 at para 81.

71 *Ibid*.

72 *Ibid* at para 82.

73 *Ibid* [emphasis added].

74 RSA 2000, c V-4 [*VSA*].

75 Subsequent to rendering her decision, Justice Bensler was informed that DH's application was made on the basis of incorrect legislation and that given the date of the child S's birth, the application should have been brought pursuant to the *Domestic Relations Act*, RSA 2000, c D 14 [*DRA*], not the *FLA*. She produced supplemental reasons addressing the error, but ultimately reached the same conclusion with

read in any language necessary to recognize the parental rights of "intended parents" in a gay male relationship.[76] He also sought an order declaring that the *VSA* violated his section 15 equality rights by failing to provide for recognition of a non-biological gay male "intended" parent on a birth certificate. D.R. and Ms. D. opposed the application, as did the Minister of Justice and Alberta Attorney-General, who joined the litigation as interveners. It is evident from the judgment of Justice Bensler that the interveners raised the majority of the arguments against D.H., and the arguments themselves indicate significant opposition to the legal recognition of the non-normative queer family and non-biological gay fathers in particular.

The sections of the *FLA* that D.H. asserted violated his *Charter* equality rights were those that addressed presumptions of parentage (section 8), surrogacy (section 12), and parentage in the case of assisted conception (section 13).[77] D.H. argued that the sections discriminated against him on the basis of gender and sexual orientation by failing to grant him status as a parent or guardian by operation of law. Justice Bensler began her analysis by applying the section 15 test established in *R. v. Kapp*.[78] It was the interveners' argument that *Kapp* confirmed the role of comparator groups at the initial stage of analysis and the appropriate comparator group in this case was a couple where neither party could carry a child.[79] When compared to this group, the interveners argued that D.H. was treated no differently under the *FLA*.[80] The interveners also argued that the *FLA* never operated to assign parentage on the basis of intention alone and instead required both intention and a biological connection.[81]

Justice Bensler rejected the interveners' framing of the comparison, holding instead that the focus of the analysis should be on whether D.H., as a gay man and in the context of his same-sex relationship with D.R., was treated differently from other "couples who require assistance in conceiving a child" and thus find themselves within the realm of sections 12 (surrogacy) and 13 (assisted conception) of the *FLA*. Thus the question to be answered, according to Justice Bensler, was whether the *FLA* permits the assignment of parentage on the basis of intention alone when a heterosexual couple uses surrogacy or assisted conception to become parents, but refuses to permit intention-based parentage when the members of the couple are of the same sex.

Comparing the situation of D.H. and D.R. with a heterosexual couple that relies on assisted conception to become parents, Justice Bensler concluded that both sections 12 and

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regard to DH's claim. However, Justice Bensler reached a different conclusion with regard to the issue of whether DR was a parent. Because the *DRA* failed to even contemplate parentage in cases of assisted reproduction, DR was not a "donor" and thus precluded from parentage. Under the *DRA*, DR could register as a parent under section 78(1)(e) ("presumptions of parentage"). The *DRA* is no longer in force in Alberta. Instead, the issue of parentage is governed by the amended *FLA*, which precludes DR's parentage on the basis that he is a sperm donor. Justice Bensler's supplemental reasons can be found at *DWH v DJR*, 2011 ABQB 791, 518 AR 165.

76 *DWH* ABQB 2011, *supra* note 10.

77 The version of the *FLA* that Justice Bensler was required to consider was that which was in force when the case was heard. An amended version of the *Act* that was introduced several months later (*Family Law Statutes Amendment Act*, SA 2010, c 16) rendered some of the Judge's findings moot.

78 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

79 *DWH* ABQB 2009, *supra* note 46 at para 38.

80 *Ibid*.

81 *Ibid* at para 43.

13 discriminated against D.H. (and D.R.) on the basis of the intersecting grounds[82] of gender and sexual orientation. Focusing primarily on the impact of the provisions on D.H., Justice Bensler noted that both sections 12 and 13 of the *FLA* extend parentage to the male partner of a biological mother based on intention alone. For example, section 13(2)(b) provides that a male who is in a spousal relationship (or its equivalent) with a female who becomes pregnant through assisted conception is the father of the resulting child, even if his sperm was not used in the fertilization process, provided he consented in advance to being a parent. As Justice Bensler noted, this section is "clearly an instance of an individual becoming a parent by operation of law based solely on intent, as opposed to biology without having to resort to the adoption process."[83] However, given its wording, it is only available to heterosexual couples; the male partner of a biological father is excluded from the regime.

Justice Bensler also pointed to the differential treatment of biological gay fathers under the *Act*. Confirming Justice Eidsvik's finding, Justice Bensler concluded that D.R. was also not a parent under the *Act*, notwithstanding that his sperm was used in the fertilization process *and* he intended to be a parent.[84] As Justice Bensler explained, because section 13 bases male parentage in situations of assisted reproduction on the existence of a spousal relationship with the birth mother, an occurrence that can never be realized in a gay male relationship, "the spouses in a gay union [can] never be recognized as parents by operation of law."[85] Given this conclusion, Justice Bensler held that the treatment of gay men under the *FLA* amounted to an adverse distinction based upon an enumerated or analogous ground. As she explained:

> The *FLA*'s limited recognition of parenthood in this regard operates to an unfair disadvantage to gay couples where both partners in a gay union fully intend to act as parents to the child. As shall be seen, the forced election as to which individual in a gay couple is to donate genetic material creates an additional disadvantage for the non-donor spouse. As a result, the *FLA* confers upon heterosexual spouses a benefit (parental presumption under s. 13(2)(a) and (b) or parental status under a relatively easy process under s. 12) that is denied to homosexual spouses. As is apparent upon reading *Fraess*, this distinction is even more pronounced in the case of a homosexual male couple, given the presumption of parentage that is linked to the existence of a spousal relationship with the birth mother. As such, I find that the Applicant has established an adverse distinction based upon an enumerated or analogous ground.[86]

Turning to the second stage of the section 15 analysis, Justice Bensler examined whether the impugned legislation had a purpose or effect that was discriminatory within the meaning of the equality guarantee. The first submission made by D.H. was that, in the case of a surrogacy arrangement where the intended parents are a gay couple, the *FLA* treats the wrong person (Ms. D) as a legal parent. Rather, the *Act* should only recognize the intended gay male

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82 Justice Bensler followed the recent statement in *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para 58 [footnotes omitted]: "An individual or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt."

83 *DWH* ABQB 2011, *supra* note 10 at para 44.

84 *Ibid* at para 48.

85 *Ibid* at para 49. Justice Bensler noted that section 8.1 of the amended *FLA* alleviated this situation somewhat by including gay men within the surrogacy provisions. Section 8.1 is, however, premised on the consent of the surrogate, which Ms D was clearly not going to provide.

86 *Ibid* at para 50.

fathers as parents and guardians by operation of law.[87] Justice Bensler rejected this argument on the basis that in any instance of surrogacy, even when the intended parents are heterosexual and the egg is supplied by the intended mother, the birth mother is a legal parent under the *Act*. Gay male couples are treated no differently from heterosexual (or lesbian) couples in this regard.[88] Justice Bensler further noted that there are good reasons for maintaining the presumption that the birth mother is the legal mother. Forcing a capable mother to relinquish a child is contrary to both the best interests of the child and women's autonomy.[89]

The second argument made by D.H. was based on inclusivity: the *FLA* was discriminatory because it failed to recognize D.H. as a parent *in addition to* Ms. D. In response to this argument, Justice Bensler began with the fact that the *FLA* does not envisage gay couples as parents by operation of law *in any circumstances*. As she explained:

> While the *Act* does not draw any distinction in its provisions which operate to remove the birth mother as a parent by operation of law, I find that it fails to treat gay couples the same as heterosexual couples when it comes to inclusive provisions. In the case of a gay male couple, neither individual is considered a parent under the *Act*, even if the genetic material of one of the male spouses is used in the assisted conception. Had Mr. R. been in a heterosexual relationship with Ms. D. at the time of conception, he would have been considered S.'s father under the *Act* by operation of s.13(2)(a). Had Mr. H. been in a heterosexual relationship with Ms. D. he would have been the child S's father under the *Act* by operation of s. 13(2)(b). The *FLA* simply does not contemplate situations of gay couples as co-parents.[90]

Since the Alberta Court of Queen's Bench decision in *Fraess v. Alberta (Minister of Justice and Attorney General)*,[91] lesbian couples have been included within the section 13 regime. In *Fraess*, the Court held that the original version of section 13(2)(b) of the *FLA* was unconstitutional on the basis that it extended presumptive parentage to the male partner of a birth mother who conceived via assisted conception, but not to the female partner of a birth mother conceived via the same method. While D.H.'s case could be distinguished from *Fraess* on the basis that he was not in a relationship with the birth mother, Justice Bensler did not find the distinction fatal.[92] By definition, a gay man will never be in a spousal relationship with the biological mother and will thus always be excluded from presumptive parentage under section 13(2)(b). As such, gay males are denied an advantage (declaration of parentage by operation of law) that is bestowed upon all other individuals who meet the requirements of section 13(2)(b). In addition, both section 13(2)(b) and *Fraess* confirm that the *FLA*, as a matter of policy, accepts that a person can be a parent through intention alone.[93] While heterosexual and lesbian couples enjoy the benefits of this underlying policy, gay male

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87 *Ibid* at paras 55-56.
88 *Ibid* at paras 58-83.
89 *Ibid* at para 59.
90 *Ibid* at para 66.
91 *Fraess v Alberta (Minister of Justice and Attorney General)*, 2005 ABQB 889, 390 AR 280.
92 *DWH* ABQB 2009, *supra* note 46 at para 81.
93 *DWH* ABQB 2011, *supra* note 10 at para 81. The interveners suggested that the distinction experienced by DH could be alleviated by an application for guardianship. Justice Bensler rejected this argument, noting that guardianship does not include all of the rights and responsibilities associated with legal parentage and that it was an affront to the human dignity of gay men to expect them to be satisfied with a lesser status. While Justice Bensler noted that human dignity is no longer an element of the post-*Kapp* section 15 analysis, it remained "an essential value underlying the s 15 equality guarantee" (*ibid* at para 89).

couples do not. By failing to provide a similar benefit to gay men, "the *FLA* creates a distinction that transcends the mere operation of biology."[94] Considering the application of the *FLA* to the facts of the case, Justice Bensler concluded: "It is difficult to see how this arrangement, whereby the *FLA* acknowledges the parentage of only the birth mother while excluding both the biological and intended/consensual father, can be seen as operating in the best interests of the child S."[95]

Having found that the impugned provisions of the *FLA* infringed upon D.H.'s section 15 equality rights, the final issue for Justice Bensler to determine was whether the law could be saved under section 1 of the *Charter*. The interveners argued, and Justice Bensler agreed, that a pressing and substantial objective of the *FLA* was the assurance of childrens' well being. As the Judge noted, "in order to ensure the safety and security of children, the *FLA* operates to identify an adult(s) to assume responsibility for the child, to protect the child and to make essential decisions on behalf of the child."[96] Justice Bensler then turned to the question of rational connection, noting that to demonstrate the requisite link, the intervener "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic."[97] Justice Bensler held that the interveners failed to do so. While the interveners established a connection between the need for clear parentage rules and the objective of ensuring the well being of children, Justice Bensler concluded that the *FLA* was under inclusive in this regard. In fact, the operation of the *FLA* in this particular case created a perverse scenario where neither of the child's primary caregivers were legal parents, while the child's sole parent and legal guardian was someone who had never exercised day to day care and control over her, "did not accept primary responsibility for her, and who had never contributed financially towards her expenses."[98] Furthermore, "while the *FLA* has as an objective the protection of children through the naming of a clearly identifiable parent and guardian, it arguably does not achieve this goal when same-sex male parents are involved."[99] Unable to find a rational connection between the infringement and the goal of protecting children, Justice Bensler held that the impugned provisions of the *FLA* could not be saved by section 1.

During the course of the litigation, the Alberta Legislature repealed sections 12 and 13 of the *FLA*. Justice Bensler held, however, that had section 13 not been repealed, she would have held that it had no force and effect. Section 13 of the *FLA* was replaced by new provisions that were considerably more inclusive.[100] The new provisions did not, however, apply retroactively. Justice Bensler was thus left to rely on her *parens patriae* jurisdiction to fill the legislative gap. Citing the reasoning of the Ontario Court of Appeal in *AA*,[101] Justice Bensler held that advances "in both reproductive technology and societal attitudes [had] created a parenting gap, whereby children of same-sex couples [are] deprived of the

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94 *Ibid* at para 84.
95 *Ibid* at para 85.
96 *Ibid* at para 96.
97 *Ibid* at para 98, citing *RJR-MacDonald Inc v Canada (Attorney General*) [1995] 3 SCR 199 at para 153.
98 *Ibid* at para 99.
99 *Ibid* at para 100.
100 Most notably, the new provisions extended parentage to gay men engaged in a surrogacy arrangement. It remained necessary, however, for the surrogate to relinquish her parental rights to the child, something Ms D may not have been willing to do (*FLA*, *supra* note 3, s 8.1(2)(c)).
101 *AA*, *supra* note 26.

equality status that a declaration of full parentage provides."[102] Though the amended *FLA* may close the gap,[103] because it did not apply retroactively "there is no other method of correction for this deprivation outside of the exercise of the *parens patriae* jurisdiction."[104] D.H. was thus declared to be a legal parent of S.

The final issue Justice Bensler addressed was whether S. could have three parents. The Judge noted that the amended *FLA* expressly states under both section 13 (the new surrogacy provisions) and section 9 (declarations respecting parentage) that no application may be brought under the *Act* if it results in a child having more than two parents.[105] Thus, Justice Bensler had no alternative but to declare that S. had only two legal parents: D.H. and Ms. D.[106] The child's biological father, D.R., who was her legal gurdian and with whom she resided, was not a legal parent. As Justice Bensler noted, if D.R. wished to pursue parental status under the amended *FLA*, he would have to challenge the constitutionality of the two parent limitation.[107]

Though the final result in *DWH* was a victory for the non-biological gay father, it was hardly a satisfactory outcome for non-normative queer families. Rather than appropriately recognizing the nature of each of the parties' relationships to the child, the effect of the decision was to exclude the biological and intended father from legal parentage, while elevating the biological mother, who never intended to exercise day to day care and control over the child or reside with her, to the status of legal parent. It also took almost six years for D.H. to establish his parentage and for much of that time he was denied a relationship with his child. While the decision in *DWH* is troubling for adults who are contemplating creating a non-normative family, it is also important to note, as Justice Bensler does,[108] the potentially devastating effects of the existing law on children. While probably too young to understand the complexities of the situation, S.'s interest in a secure and stable family life, one where the people acting as her parents are legally recognized as such, is undermined by the Alberta parentage provisions. For neither of S.'s intended parents to be considered her legal parents under the *Act* is a perverse outcome that jeopardizes S.'s familial stability. While D.H. was able to demonstrate that the existing law was discriminatory, at least with regard to his parentage, gay and lesbian parents and their children should not have to endure six years of litigation to achieve what heterosexual parents achieve via legislative presumption.[109]

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102 *DWH* ABQB 2011, *supra* note 10 at para 136.

103 Justice Bensler refused to evaluate the adequacy of the amended *FLA*, arguing that the matter was not before her and thus "must be left for another day" (*ibid* at para 133).

104 *Ibid* at para 139.

105 *FLA*, *supra* note 3, ss 9, 13.

106 *DWH* ABQB 2011, *supra* note 10 at para 141.

107 *Ibid*.

108 *Ibid* at para 136.

109 DR immediately appealed Justice Bensler's decision that DH was a legal parent and guardian of S, advancing three grounds of appeal (*DWH v DJR*, 2013 ABCA 240, 28 ACWS (3d) 1013). First, he submitted that Justice Bensler erred in declaring DH to be a parent and guardian of S because the originating notice of motion filed by DH did not seek such declarations. Second, DH argued that Justice Bensler erred in the exercise of her *parens patriae* jurisdiction in three ways: (1) the welfare of a child must be "at risk" before a court can exercise the jurisdiction to fill a legislative gap; (2) Justice Bensler exercised the jurisdiction for the benefit of DH; and (3) there was not enough evidence before Justice Bensler for her to make a determination regarding S's best interests. The final ground of appeal was that Justice Bensler contravened section 9(7) of the current version of the *FLA* by creating a situation in which S has three parents. The appeal was rejected by the majority of the Alberta Court of Appeal. With regard to the first ground, the Court of Appeal held that the DH's original claim clearly sought recognition as a parent and that the relief sought was recognition as such. Thus, while the application did not use the term "declaration of parentage" it was obvious that this was what DH sought. With

IV. CONCLUSIONS

The two substantial legislative gaps experienced by non-normative queer families that are highlighted by *DWH* are: (1) the failure of surrogacy laws (where they even exist) to account for gay male couples; and (2) the absence of laws enabling a child to have more than two legal parents. As *DWH* demonstrates, the effect of these gaps can be devastating for non-normative families. While D.H. was eventually awarded the status of legal parent, it took six years of litigation to achieve that result. The effect of the delay was that his relationship with his daughter was put on hold for several crucial years of her life. This is obviously not just damaging for the parent, but also for the child.

As noted above, some provincial legislatures have recently attempted to tackle the legal challenges raised by non-normative families. Perhaps the best model is offered by British Columbia's new *Family Law Act*, which not only includes surrogacy provisions available to both opposite-sex and same-sex couples, but also permits a child to have more than two legal parents in certain circumstances.[110] Beyond British Columbia's *Family Law Act*, there is virtually nothing available to non-normative queer families by way of legal recognition. In fact, as Justice Bensler noted, Alberta's recently amended *FLA* expressly *prohibits* a finding that a child has more than two legal parents,[111] suggesting there may be a desire on the part of some legislatures to expressly curtail the creation, or at least the legal recognition, of non-normative queer families.

While the legal recognition of non-normative lesbian and gay families may be controversial, the current situation leaves parents and children with significant instability and uncertainty. As Justice Bensler states in *DWH*:

> The damaging effects engendered by the exclusion of same-sex couples using assisted conception from parental status by operation of law are numerous and severe. They re-enforce outdated concepts which do not accurately reflect the realities of today's family in Canada.[112]

It is thus not surprising that one of the reasons provided by the British Columbia legislature for reforming parentage laws was that children should not be discriminated against on the basis of their method of conception or the structure of the family into which they are born. For example, the explanatory materials produced by the British Columbia Ministry of Justice for the *Family Law Act* stated that the new parentage rules treat "children equally, regardless of the circumstances surrounding their birth, protect children's best interests and promote *stable family relationships*."[113] Material accompanying Canada's *Uniform Child Status Act*, model legislation drafted by the Uniform Law Conference of Canada that includes presumptions of parentage based on pre-conception intention, similarly

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regard to ground two, the Court of Appeal held that DR had mischaracterized the *parens patriae* power of the court, rendering his argument unsustainable. Ground three was dismissed on the basis that Justice Bensler *had not* declared that S had three parents. Rather, she declared S's parents were her biological mother and DH. The parentage of DR could only be resolved via court application.

110 *FLA*, *supra* note 3, ss 29-30.

111 *DWH* ABQB 2011, *supra* note 10 at para 141.

112 *Ibid* at para 115.

113 BC Ministry of Justice, "The Family Law Act Explained" (2012), online: <http://www.ag.gov.bc.ca/legislation/family-law/pdf/notes-binder.pdf> at Part 3 [emphasis added].

states that the presumptions provide "*stability for the child* and *equal treatment* for children regardless of the method of their conception."[114] Thus, while it may be controversial to extend legal recognition to non-normative queer families, the British Columbia Attorney-General and the Uniform Law Conference of Canada suggest that children's equality demands it.[115] Whether the concern is equality for children or for gay and lesbian adults who wish to create non-normative families, what is clear from the decision in *DWH* is that the existing position is untenable.

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114 Civil Law Section, *Uniform Child Status Act* (2010), Uniform Law Conference of Canada, online: <http://www.ulcc.ca/images/stories/2010_pdf_en/2010ulcc0021.pdf> [emphasis added].

115 For a fuller discussion of the equality dimensions of the debate see Kelly, "Equal Parents, Equal Children," *supra* note 7.