



**Law Reform
Commission of
Saskatchewan**

Assisted Reproduction & Parentage

Final Report

December 2018

Legal parentage is a lifelong formal status, creating rights and responsibilities for the parent, and affecting the child's identity and entitlement to a variety of benefits. Saskatchewan's parentage legislation has not been updated to provide clear rules on who the parents of a child born through assisted reproduction should be. This final report makes several recommendations for reform of *The Children's Law Act, 1997* in order to provide certainty and clarity with respect to the legal parentage of children born through the use of assisted reproduction.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission*, proclaimed in force in November 1973, and began functioning in February 1974.

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues background or consultation paper to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

The Commissioners are:
Michael Milani, Q.C., Chair
The Honourable Darryl J. Brown
Professor Ronald C. Cuming, Q.C.
Darcy McGovern, Q.C.
Dr. Barbara von Tigerstrom

Leah Howie is the Director of the Commission.

The Commission can be contacted at:
Law Reform Commission of Saskatchewan
University of Saskatchewan
Room 184, College of Law
15 Campus Drive
Saskatoon, SK S7N 5A6
Telephone: (306) 966-1625
Fax: (306) 966-5900
E-mail: director@lawreformcommission.sk.ca

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Summary of Recommendations

Legal parentage is an important lifelong status, creating rights and responsibilities for the parent, and affecting a child's identity and entitlement to a variety of benefits. The use of assisted reproduction to conceive children is increasing in Canada, however, Saskatchewan's parentage legislation does not provide clear rules on who the parents of a child born through assisted reproduction should be. The Commission's recommendations are based on the need to ensure certainty and clarity at the earliest possible time for intended parents and their children, the need for all individuals to receive equal treatment before the law, the best interests of children, and a desire for Saskatchewan's parentage legislation to be as harmonious as possible with other Canadian jurisdictions. The Commission recommends:

1. The Commission recommends that the terms "parent" and "birth parent" be used in the *CLA, 1997* to replace "mother" and "father" to the extent possible. If it remains necessary to use the terms "father" and "mother" in some instances, the Commission recommends the *CLA, 1997* refer to "a father/mother" as opposed to "the father/mother."
2. The Commission recommends a donor be able to be legal parent of the child in addition to the intended parent(s) if the donor and the intended parent(s) have entered into a pre-conception written agreement and received independent legal advice prior to executing the agreement.
3. The Commission recommends there be no distinction in the *CLA, 1997* between traditional and gestational surrogacies.
4. The Commission recommends the *CLA, 1997* include surrogacy-specific parentage provisions. The intended parent(s) should be the parent(s) of the child (and the surrogate will cease to be a parent of the child) once the surrogate provides written consent to relinquish her entitlement to parentage after the birth. The provision should require a pre-conception written agreement and for each party to have received independent legal advice prior to entering into the agreement.
5. The Commission recommends there be no requirement for there to be a genetic link between the child and one of the intended parents in order for the surrogacy parentage provisions to apply.
6. The Commission recommends the *CLA, 1997* incorporate an administrative type of procedure following the birth of a child from a surrogate, provided certain conditions are satisfied. The intended parents and the surrogate should each be required to complete a declaration indicating that they entered into a pre-conception written agreement and received independent legal advice. The surrogate will also need to indicate she consents to relinquishing her entitlement to parentage on the form. The Commission further recommends that the surrogate be required to submit a certificate of independent legal advice along

with the declaration to vital statistics in order to add an additional measure of oversight to the administrative process.

7. The Commission recommends that the *CLA, 1997* specify that any provision in a surrogacy agreement that purports to determine parentage is not enforceable, but may be employed by a court as evidence of the intention of the parties to the agreement.
8. The Commission recommends the *CLA, 1997* allow for up to four parents without the need for an application to the court for a declaration of parentage.
9. The Commission recommends a spouse of a deceased person to be able to apply to the court for a declaration that the deceased person is a parent of a child conceived after his or her death through assisted reproduction. The application should only be made after the child is born, and it should be made within 90 days of the child's birth. The deceased must have consented in writing to be a parent of a child conceived posthumously through assisted reproduction and must not have withdrawn their consent before his or her death.
10. The Commission recommends the recognition of extra-provincial declaratory order sections of the *Uniform Act* (sections 13 – 17) be adopted in Saskatchewan.
11. The Commission recommends that s. 18 of the *Uniform Act* – which addresses birth certificates issued to children born outside of Canada recognizing individuals as parents that would not be recognized as parents under Saskatchewan's parentage legislation - be adopted in Saskatchewan.

1. Introduction

[1] Assisted reproduction is used by individuals who want to become single parents, heterosexual couples experiencing fertility issues, and same-sex couples who want to create a family. Assisted reproduction encompasses sperm, ovum, and embryo donation, *in vitro* fertilization procedures, and the use of surrogates.

[2] Historically, parentage has been determined solely based on biology, and until the advent of assisted reproduction, biology was the logical way to determine a child's parentage. The birth mother of the child was determined to be the child's legal mother, and the birth mother's spouse or partner was presumed to be the father of the child and thereby determined to be the legal father of the child.

[3] Apart from a heterosexual couple using their own reproductive material or *in vitro* fertilization to conceive a child, the use of assisted reproduction introduces another individual, or individuals - either through the donation of reproductive material or through gestation in the case of a surrogate - into the conception and birth of a child. As a result, the intention to parent becomes a relevant consideration in addition to biology.

[4] Saskatchewan's parentage legislation largely reflects the historical approach and has not been updated to provide clear rules on who the parents of a child born through assisted reproduction should be. Several jurisdictions in Canada, and internationally, have considered this issue and reformed their legislation accordingly.

[5] This project on how the parentage of children conceived through assisted reproduction should be determined was initiated following requests by a lawyer and an academic residing in Saskatchewan that the Law Reform Commission study this issue.

[6] The Commission published the Assisted Reproduction & Parentage Consultation Paper (the Consultation Paper) in March 2018. The Consultation Paper asked the following questions:

1. What guiding principles should the Commission consider when making its recommendations?
2. Should any guiding principle be of higher importance than the others?
3. What presumptions of parentage should apply in cases of assisted reproduction using gamete and embryo donation?
4. Should the Act state that gamete and embryo donors are not parents solely on the basis of their donation?
5. Should the Act allow donors to opt into legal parenthood if certain conditions are met? If so, what conditions?

6. Should there be an intermediate status for known donors in order to ensure that donors that play a role in the child's life are not subsequently treated as parents by the courts? What rights and responsibilities should attach to that status?
7. If so, under what circumstances should a donor be able to obtain this status?
8. Should the assisted reproduction parentage provisions apply to situations of assisted reproduction using sperm donation through sexual intercourse? Why or why not?
9. If so, should a pre-conception agreement be required in order for a sperm donor to not be determined to be a legal parent where sperm donation has occurred via sexual intercourse? Are there any other conditions that should be imposed on this arrangement?
10. What presumptions of parentage should apply to a surrogacy?
11. Should there be different presumptions of parentage and procedures for traditional and gestational surrogacies? If so, how should the presumptions should differ?
12. Should the presumptions of parentage for a surrogacy apply to a surrogacy where neither intended parent has a genetic link to the child, or should that situation be subject to adoption procedures?
13. Should relinquishing/transferring parental status be possible prior to birth? Why or why not?
14. Should relinquishing/transferring of parental status be an administrative or judicial procedure?
15. What conditions or requirements should be imposed on a procedure to relinquish/transfer parental status?
16. Should surrogacy agreements, including provisions related to parentage, be enforceable? Should there be a distinction between traditional and gestational surrogacies? Why or why not?
17. If parentage related provisions in surrogacy agreements should not be enforceable, should other types of provisions in surrogacy agreements be enforceable? Should legislation specify which types of provisions are and are not enforceable? Why or why not?
18. Should there be conditions on whether the surrogacy agreement, or a certain type of provision the agreement, is enforceable? If so, what should those conditions be?
19. Should the legislation allow for more than two parents? Why or why not?

20. If the legislation allows for more than two parents, what requirements or conditions should be imposed?
21. Should Saskatchewan’s legislation contain a provision dealing with posthumous conception and parentage? Why or why not?
22. If so, how should the parentage of children conceived posthumously be determined? What conditions should be attached?
23. Should a “contrary to public policy” exception be added to s. 52 of the CLA, 1997? Why or why not?
24. Should declaratory orders be possible to recognize the parentage of individuals listed on a birth certificate issued outside of Canada in situations where those individuals would not be considered parents under Saskatchewan’s legislation? Why or why not?
25. Should there be any restrictions on the process (administrative or judicial) for transferring parentage in cases where surrogates are used based on the location of the child’s birth? Why or why not?

[7] The Commission engaged in an extensive consultation process following the publication of the Consultation Paper. The Consultation Paper and an accompanying survey were posted on the Commission’s website and the Commission received seven responses to the online survey. The Commission’s Director met with lawyers (primarily family law practitioners) at several law firms in Saskatoon and Regina. Focus group meetings with lawyers who have experience assisting clients who have created their families using assisted reproduction were also conducted in both Saskatoon and Regina.¹ The focus groups reviewed the results of the consultation process, provided further insight into the issues raised by the project, and offered their opinions on the questions posed in the Consultation Paper. The Commission also received a written response to the Consultation Paper from the Canadian Bar Association (Saskatchewan Branch).

[8] This Final Report draws on the responses to the Consultation Paper and the Commission’s independent research to recommend reform to Saskatchewan’s parentage laws to address the parentage of children conceived through assisted reproduction.

¹ The Commission would like to express its gratitude to the individuals who responded to the survey, submitted written comments, attended the CBA section meetings, to the law firms that met with the Director to discuss the Consultation Paper, and to the following lawyers who participated in the working groups in Saskatoon and Regina: Anna Singer, Matthew Wiens, Tiffany Paulsen Q.C., Maya Scott, Wanda Wieggers, Sherri Woods, Caitlin Turnbull, Lindsay Hart, Mary Neufeld Q.C., Marisha Paquin, Christine Hansen-Chad, Kylee Wilyman, Maria Markatos, and Jim Vogel

2. Background

2.1 Assisted Reproduction

2.1.i Assisted Reproduction Overview

[9] Assisted reproduction includes a variety of procedures used to conceive a child without sexual intercourse. Artificial insemination involves inserting sperm directly into the reproductive organs of a woman and requires donated sperm. *In vitro* fertilization involves fertilizing an ovum outside of a woman's body, and then implanting the fertilized ovum (embryo) into a woman's uterus. *In vitro* fertilization can make use of donated sperm, donated sperm and ova, or donated embryos.

[10] A child conceived through assisted reproduction can also be gestated by a surrogate, who will gestate and deliver the child and then the child will be raised by the intended parents. There are two types of surrogacy: traditional and gestational. In a traditional surrogacy, the surrogate's own ovum is used to create the child. Conception could occur through artificial insemination, *in vitro* fertilization, and potentially through sexual intercourse. In a gestational surrogacy, the surrogate's reproductive material is not used, and *in vitro* fertilization is used to conceive the child.

[11] The use of assisted reproduction is increasing in Canada. In 2010 there were 11,806 *in vitro* fertilization treatments received in Canada, resulting in 3,188 live births.² In 2015, 6,379 babies were born in Canada as a result of *in vitro* fertilization procedures.³ In 2016 there were 15,344 cycles of *in vitro* fertilization initiated in Canada, 2801 of which involved donated eggs.⁴ In 2016 there were 639 babies born to gestational surrogates, an increase from 533 in 2015.⁵ The number of births resulting from artificial insemination cannot be determined, as this procedure does not have to take place in a medical clinic. The same can be said for traditional surrogacies.

² Manitoba Law Reform Commission, *Assisted Reproduction: Legal Parentage and Birth Registration* (2014), online: Manitoba Law Reform Commission <http://www.manitobalawreform.ca/pubs/pdf/additional/assisted_reproduction-legal_parentage_and_birth_registration.pdf> [Manitoba Report] at 4.

³ Canadian Fertility and Andrology Society, Press Release, "Multiple pregnancy rate resulting from IVF at an all-time low of 9.7% in Canada" (November 1, 2017), online: Canadian Fertility and Andrology Society <<https://cfas.ca/public-affairs/media/>>.

⁴ *Ibid.*

⁵ *Ibid.*

2.1.ii *Federal and Provincial Jurisdiction Over Assisted Reproduction*

[12] Both the provincial and federal governments have jurisdiction over certain aspects of assisted reproduction, depending on whether each specific aspect falls under either the federal or provincial heads of power as set out in sections 91 and 92 of the *Constitution Act, 1867*.⁶

[13] The federal government, through its jurisdiction over criminal law, exercises jurisdiction over some aspects of assisted reproduction in the *Assisted Human Reproduction Act (AHRA)*.⁷ The *AHRA*, enacted in 2004, regulates and prohibits several assisted reproduction related practices, but does not define the parents of a child conceived through assisted reproduction. Section 6 of the *AHRA* prohibits commercial surrogacy. Section 7 prohibits the purchase or sale of sperm, ova, and embryos. The *Assisted Human Reproduction (Section 8 Consent) Regulations*⁸ set out requirements for the consent provisions in s. 8 of the *AHRA*, which requires the donor's consent for the use of reproductive material to create an embryo, for posthumous removal of human reproductive material, and for the use of an embryo. The federal government recently proposed new regulations under the *AHRA* which aim, in part, to increase clarity on the reimbursement of a surrogate's expenses.⁹

[14] The provincial government has jurisdiction over aspects of assisted reproduction touching on subject matters under provincial jurisdiction. Provinces have jurisdiction over family law, including determinations of parentage, and Saskatchewan exercises this jurisdiction through *The Children's Law Act, 1997 (CLA, 1997)*.¹⁰ The provinces also have jurisdiction over whether surrogacy contracts are enforceable, through their jurisdiction over matters of property and civil rights.¹¹

[15] The Law Reform Commission of Saskatchewan's mandate is to recommend reform of provincial legislation. This consultation paper is focussed solely on parentage issues arising when assisted reproduction is used to conceive a child.

⁶ *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

⁷ *Assisted Human Reproduction Act*, SC 2004, c 2 [*AHRA*].

⁸ SOR/2007-137. The federal government has recently published regulations amending these regulations in the Canada Gazette. The consultation period closes in January 2019. The proposed regulations can be accessed online at: <<http://gazette.gc.ca/rp-pr/p1/2018/2018-10-27/html/reg5-eng.html>>.

⁹ These regulations were published in the Canada Gazette on October 27, 2018. The consultation period closes in January 2019. The proposed regulations can be accessed online at: <<http://www.gazette.gc.ca/rp-pr/p1/2018/2018-10-27/html/reg3-eng.html>>.

¹⁰ *The Children's Law Act, 1997*, SS 1997, c C-8.2 [*CLA, 1997*].

¹¹ Angela Campbell, "Law's Suppositions about Surrogacy Against the Backdrop of Social Science" (2012) 43 *Ottawa L Rev* 29 at 31 [Campbell, "Law's Suppositions"].

2.2 Parentage Law Overview

2.2.i Parental Status

[16] Legal parentage is a lifelong formal status, creating rights and responsibilities for the parent, and affecting the child's identity and entitlement to a variety of benefits. Professor Wanda Wiegers describes the importance of legal parentage status as follows:

Recognition of the status of a parent provides an opportunity for adults to experience and enjoy a long-lasting relationship with a child. These emotional connections to children are seen as ever more important to adults in a world marked increasingly by conjugal and economic insecurity. The financial implications of parental status are also significant, as parents can be liable for child support in excess of 18 years. For children, of course, their identity is largely shaped by their parentage, which determines their names, relationships, nationality, financial status, and lineage. Parentage, for both parents and children, establishes affective ties, economic and emotional-wellbeing, and to a great extent, one's life path and development. Many of the most meaningful rights, benefits and obligations flow through parentage.¹²

[17] The Ontario Court of Appeal has identified several rights and responsibilities flowing from a legal declaration of parentage:

- It allows the parent to fully participate in the child's life;
- The declared parent has to consent to any future adoption;
- The declaration determines lineage;
- The declaration ensures that the child will inherit on intestacy;
- The declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for the child;
- The child of a Canadian citizen is a Canadian citizen, even if born outside of Canada;
- The declared parent may register the child in school; and
- The declared parent may assert her rights under various laws, such as the *Health Care Consent Act, 1996*¹³

[18] Legal parentage is assigned at birth and can only be reassigned through an adoption or a court application to obtain a declaration of non-parentage or parentage.

[19] Legal parentage is not the sole way an individual can acquire some of the rights and responsibilities of a parent. Individuals who are not considered to be legal parents can, for instance, apply for custody and access orders in relation to a child. However, the process for obtaining a custody and access order, and the rights that flow from such an order, varies considerably from having legal parentage status:

¹² Wanda Wiegers, (2012) 28 Canadian Journal of Family Law 147 at 149.

¹³ *AA v BB*, 2007 ONCA 2 at para 14.

Unlike custody or access orders, which require an application to the court after the child is born, can be varied by subsequent application, and have no force after the child reaches the age of majority, legal parentage operates presumptively at birth, does not require a court application, cannot be varied, and survives the child reaching the age of majority, thus enabling inheritance. Legal parentage therefore provides significant more long-term stability and security than an order for custody and access.¹⁴

In addition, individuals can also be found in certain circumstances to stand *in loco parentis* - in the place of a parent - to the child.

2.2.ii Legal Parentage in Saskatchewan

[20] In Saskatchewan, parentage is determined by the *CLA, 1997*, and the information contained in a birth registration is governed by *The Vital Statistics Act, 2009 (VSA, 2009)*.¹⁵ Being listed as a parent on a child's birth registration creates a presumption of parentage.

[21] The *CLA, 1997* defines mother as "the mother of a child", including a woman declared to be the mother pursuant to ss. 43 or 44, and a woman recognized as the mother pursuant to ss. 50, 51, 55 or 56.¹⁶ Father is defined as "the father of the child", including a man declared to be a father pursuant to ss. 43 or 44, and a man recognized as the father pursuant to ss. 50, 51, 55 or 56. Courts in Saskatchewan have interpreted the definitions of mother and father in the *CLA* as referring to a child's biological mother and father.¹⁷ A parent is defined as "the father or mother of a child" (whether born within or outside the marriage), or the father or mother of a child by adoption.

[22] Both the *CLA, 1997* and the *VSA, 2009* define the birth mother as the mother of the child. This presumption reflects the common law, and until the advent of assisted reproduction, reflected the reality that the birth mother was also the genetic mother of the child. Prior to the advent of genetic testing, however, there was no way to determine the paternity of a child with

¹⁴ Fiona Kelly, "Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families" (2013) UNB LJ 253 at 254 [Kelly, "Equal Parents"].

¹⁵ *The Vital Statistics Act, 2009*, SS 2009 c V-7.21.

¹⁶ Sections 50 and 51 of the *CLA, 1997*, *supra* note 10, provide for the recognition of extraprovincial orders made in and outside of Canada. Sections 55 and 56 address the implications of extraprovincial findings made in and outside of Canada.

¹⁷ *WJQM v AMA*, 2011 SKQB 317 at para. 18: "it refers to a child's biological mother. Such an interpretation is consistent with the ordinary view of parentage which relates to kindred (blood) ties. It is also consistent with the provisions of Part VI of *The Children's Law Act, 1997* relating to a declaration of parentage with respect to a child's father for which the Court may order genetic testing. It would be inconsistent to view the biological father as a parent and not the biological mother."

certainty, and thus the common law developed presumptions of paternity. The presumptions of paternity have been explained as follows:

[T]he presumption of paternity is not based on societal stereotypes in the ordinary sense. Historically, like other rebuttable presumptions, it made certain assumptions about ordinary human behaviour in circumstances where direct proof was difficult. It assumed that a man and woman cohabiting at a child's conception or birth were engaging in sexual intercourse from which procreation might inevitably result. The presumption could be discharged upon a preponderance of evidence that the man had not engaged in sexual intercourse with the mother at or around the time of conception, or had no biological connection with the child, or had not assumed a parental relationship with the child. In the days before DNA testing it was simply a method of facilitating proof at a time before science and technology intervened with more reliable standards.¹⁸

[23] Section 45 of the *CLA, 1997* contains the presumptions of paternity. Section 45(1) provides that unless the contrary is proven on a balance of probabilities, there is a presumption that a man is the father of a child in any one of the following circumstances:

- (a) at the time of the child's birth or conception the man was cohabiting with the mother, whether or not they were married to each other;
- (b) the man and the mother of the child have filed a statutory declaration, acknowledging that the man is the father of the child, with the Registrar of Vital Statistics or an equivalent official in another jurisdiction in Canada;
- (c) the man signed the birth registration form pursuant to *The Vital Statistics Act, 2009*, or any former *Vital Statistics Act* or a form of similar effect pursuant to a similar Act in another jurisdiction in Canada;
- (d) the man married the mother after the child's birth and acknowledges that he is the father;
- (e) the man and the mother have acknowledged in writing that the man is the father of the child;
- (f) the man has been found or recognized by a court in Canada to be the father of the child.

Section 45(3) provides that if there are conflicting presumptions as to the paternity of a child, no presumption is to be made as to paternity, and no person is to be recognized to be the father by virtue of section 45.

[24] Section 43 of the *CLA, 1997* allows a court to make declaratory orders of parentage. Section 43(2) provides that "any person having an interest" may apply for a declaratory order that a man is recognized in law to be the father of the child, or a woman is recognized in law to be the mother of a child. Subsection 43(3) allows a court to find that a woman is or is not in law the mother of a child. Subsection 43(4) allows a court to make a declaratory order of paternity where a presumption of paternity exists pursuant to s. 45 unless it is established on the balance of probabilities that the presumed father is not the father of the child. In addition, where there is no man to which the presumptions of paternity apply, or where there are conflicting

¹⁸ *C(P) v L(S)*, 2005 SKQB 502 at para 20.

presumptions of paternity, or where the presumed father is found not to be the father of the child, s. 43(5) allows the court to make a declaration of paternity if the court finds on the balance of probabilities that a man is the father. Section 44 allows the court to discharge or vary a declaratory order under s. 43 provided certain conditions are met. Clause 45(1)(c) creates a presumption of paternity if a man signs the birth registration. Declarations of parentage under the *CLA, 1997* are not typically obtained if there are no questions or conflicts surrounding parentage.

[25] The *VSA, 2009* ensures that live births of children are registered in accordance with the legislation. Subsection 20(2) places the duty to register the birth on the parents of the child, and if the parents are incapable, a person standing in place of the parents of the child or a person who has knowledge of the birth of the child must ensure the birth is registered. The statement of live birth must contain the name, date of birth, place of birth, and sex of the child, the mother's name, date and place of birth, and health services number, the father's name, date and place of birth, and any additional parent's name, date and place of birth and sex.¹⁹

[26] A birth registration must be completed in order to acquire a birth certificate, which is one of the most fundamental pieces of identification for an individual. The birth certificate will reflect the information on the birth registration, and thus it is of great importance that the birth registration accurately indicates a child's parentage. Birth certificates create a presumptive proof of parentage.

[27] The *VSA, 2009* defines mother as "the woman from whom a child is delivered," and father as "the person who acknowledges himself to be the biological father of a child." Unlike the definition of father, there is no explicit genetic link in the definition of mother in the *VSA, 2009*, as the definition of mother is tied to gestation. In 2009, the term "other parent" was added to the *VSA, 2009* and defined as "a person other than the mother or father who is cohabiting with the mother or father of the child in a spousal relationship at the time of the child's birth and who intends to participate as a parent in the upbringing of the child."

[28] Section 29 of the *VSA, 2009* sets out the circumstances in which amendments can be made to the parentage recorded on the birth registration (other than adoption). Subsection 29(1) requires the registrar to amend the birth registration if a court makes a determination of parentage. In certain circumstances, the registrar may add another parent to the birth registration without a court order, however the registrar is not permitted to remove a parent without a court order.²⁰

¹⁹ Section 20(3) of the *VSA, 2009*, *supra* note 15 and s. 7(1) of *The Vital Statistics Regulations, 2010*, RRS c V-7.21 Reg 1.

²⁰ Section 29(5) of the *VSA, 2009*, *supra* note 15.

2.2.iii *How is Parentage in Saskatchewan Determined When Assisted Reproduction is Used?*

[29] Assisted reproduction can be used in many ways to create a wide variety of families. A heterosexual couple may use sperm, ovum, or embryo donation and have the female partner gestate the child. A heterosexual couple may engage a surrogate to carry a child to term for them, and this child may be genetically related to both intended parents, one of the intended parents, or neither of the intended parents. A female same-sex couple may use a sperm, sperm and ovum, or embryo donor and have one of the partners gestate the child. Same-sex couples may engage surrogates to carry a child that is genetically related to one of the parents (and, in the case of male same-sex couples, it may be unknown to which parent the child is genetically related if their sperm is mixed), or neither of the intended parents. Scientific advances may soon lead to the possibility of same-sex couples being able to combine their genetic material, so that they are both genetically connected to the child. In addition, in some of these scenarios, there may be more than two intended parents. How parentage would be determined under the *CLA, 1997*, and how the birth registration would be completed under the provisions of the *VSA, 2009*, varies in each of these scenarios.

Heterosexual Couple Using Gamete Donation

[30] If a heterosexual couple used a sperm donor, the mother would be listed as the mother on the birth registration. However, the intended father would not be the biological father and would thus not meet the definition of “father” under the *VSA, 2009* (whether this means that the intended father would not be recorded as the father on the birth registration is another issue). The intended father could, however, be listed as an “other parent” on the birth registration.

[31] If a heterosexual couple used a donated embryo, or a donated ovum and sperm, the intended mother would be listed on the birth registration as the child’s mother, as the definition of mother in the *VSA, 2009* is tied to gestation and not to genetics. The intended father would not meet the definition of “father” in the *VSA, 2009* (whether or not this means that the intended father would not be recorded as the father on the birth registration is another issue). The intended father could, however, be listed as an “other parent” on the birth registration.

[32] If a heterosexual couple used an egg donor, and fertilized it with the male partner’s sperm, both intended parents would be identified as the mother and father of the child on the birth registration.

[33] Whether or not the couple would, however, be recognized as parents under the *CLA, 1997* would depend on whether their biological material was used. If the intended parents’ biological material was not used to conceive the child, the *CLA, 1997* leaves open the possibility that the gamete donors could be declared to be the mother and father of the child.

Heterosexual Couple Using Surrogate

[34] The *VSA, 2009* defines mother as the birth mother, which results in both a traditional or gestational surrogate being listed on the birth registration as the mother. Whether or not the intended parents can be listed on the birth registration (as the father or other parent), or, if a gestational surrogate was used, be considered as the mother and father under the *CLA, 1997* depends on whether their gametes were used.

[35] If the intended father is the biological father of the child, he could be identified as the “father” on the birth registration and the intended mother could then be identified as an “other parent” on the birth registration. The intended father would also be considered as the father under the *CLA, 1997*. If the intended mother provided the ovum, then she would be considered as the mother under the *CLA, 1997*, but, as noted above, could not be listed as the mother on the birth registration.

[36] If the intended father is not the biological father of the child, then the birth registration is further complicated: neither the intended mother (regardless of whether or not her ovum was used) or intended father could be listed on the birth certificate as the mother, father, or other parent, as an other parent must be in a spousal relationship with the mother or father of the child at the time of the child’s birth (note that there is a possibility in these circumstances that the intended father would be listed as the father on the birth registration despite not meeting the definition of “father” in the *VSA, 2009*).

[37] Surrogates do not intend to parent the child they have gestated for the intended parents. Despite this, surrogates are recorded as the child’s mother on the birth registration. A court application is required to declare that a gestational surrogate is not the legal mother of the child and to remove the surrogate from being listed as the child’s “mother” on the birth registration. If the child was created with the intended mother’s ovum, then the intended mother could also bring an application for a declaration that she is the child’s mother, pursuant to s. 43 of the *CLA, 1997*. However, if the intended mother was not the biological mother of the child, she would not be considered a parent under the *CLA, 1997*. The intended mother would have to adopt or seek a declaration under s. 43.

[38] If a traditional surrogate was used, the surrogate would be considered the child’s mother under both the *VSA, 2009*, and the *CLA, 1997*.

Female Same-Sex Couple Using Gamete Donation

[39] If a female same-sex couple uses gamete donation, the partner gestating the child would be defined as the child’s mother under the *VSA, 2009*. The birth mother’s partner could be added to the birth registration as an “other parent.” The sperm donor could potentially also be included on the birth registration as the “father.”

[40] The birth mother's partner would not be considered a parent under the *CLA, 1997* as the presumptions of paternity are explicitly limited to males.

[41] The limitation of the presumptions of paternity to males in s. 45(1)(a) of the *CLA, 1997* was challenged as being contrary to s. 15 of the *Canadian Charter of Rights and Freedoms* in *C(P) v L(S)*.²¹ The petitioner, argued s. 45(1)(a) was discriminatory because a male cohabiting with a mother is presumed in law to be the father of the child, while a same-sex partner is not entitled to the same presumption. The Court dismissed the application, stating:

The Court cannot aspire to affect the fundamentals of biology that underlie the presumption purely in the interests of equal treatment before the law.

... this application does not bring into question any other aspect of the issue beyond the alleged discriminatory effect of the presumption of paternity arising from cohabitation. It does not challenge the statutory assumption that precludes more than one mother, or more than one father (other than in the case of adoptions), or indeed multiple parents of any description, when making declarations of status and parentage "for all purposes" under *The Children's Law Act, 1997*. To the contrary, the petitioner's application assumes the legislation as it stands does entertain that very concept – an assumption that is flawed having regard to the analysis provided in the relevant Ontario decisions.²²

Same-sex Couple Using Gestational Surrogate

[42] If a male same-sex couple used a surrogate to gestate their intended child, the surrogate would be listed as the "mother" on the birth registration form, and if one of the men had contributed their sperm, that individual could be listed as the "father." In that case, the other intended father could be added as an "other parent." An application could then be made to the court to remove the surrogate from the birth registration. If the surrogate was a gestational surrogate, she would not be considered the child's mother under the *CLA, 1997*, however if the surrogate was a traditional surrogate, she would also be considered the child's mother under the *CLA, 1997*.

[43] An application to remove a gestational surrogate from the birth registration in this type of scenario was made in *WJQM v AMA*.²³ Following the birth of the child, the surrogate was listed as the mother on the birth registration, and the intended father whose sperm was used to fertilize the donor egg was listed as the father. The other intended father was listed as the other parent. The petitioners subsequently applied pursuant to s. 43(3) of the *CLA, 1997* and/or s. 11

²¹ *Supra* note 18.

²² *Ibid.* at paras 20 – 24.

²³ *Supra* note 17.

of *The Queen's Bench Act, 1998*²⁴ for a declaration that the gestational surrogate was not the mother of the child and for an order directing the registrar of vital statistics to amend the registration of live birth by removing the gestational surrogate's name. The Court issued the declaration, as it was clear that the gestational carrier was not the biological mother of the child and had never intended to assume any parental rights or obligations.²⁵

[44] If neither of the men contributed sperm to create the child, then neither partner would meet the definition of "father" or "other parent" in the *VSA, 2009*. However, as noted previously, there is a possibility in these circumstances that one of the intended fathers would be listed as the father on the birth registration despite not meeting the definition of "father" in the *VSA, 2009*. If this was done, then the other partner could be listed as an "other parent." If this was not done, then neither man would be listed on the birth certificate.

Single Woman Using Gamete Donation

[45] A single woman using donated gametes (in any combination) would be considered the birth mother under the *VSA, 2009*. She would, however, only be considered the mother of the child under the *CLA, 1997* if her own genetic material was used.

Single Man or Woman Using Gestational Surrogate

[46] In both cases where a single man or woman uses a surrogate, the surrogate would be considered the birth mother under the *VSA, 2009*. Neither the single man or woman would be considered an other parent under the *VSA, 2009*. A court application could be brought to remove the surrogate from the birth registration.

[47] If the child was created using the man's genetic material, then he could be listed as the father on the birth registration and would also be the child's father under the *CLA, 1997*. If the child was not created using the man's genetic material, then he would not be the child's father under either statute. If the child was created using the woman's genetic material, then she would be considered the child's mother under the *CLA, 1997*, despite not being listed as the child's birth mother on the birth registration. If the child was not created using the woman's genetic material, then she would not be the child's mother under the *CLA, 1997*.

[48] The foregoing discussion illustrates the diverse types of families that can be created using assisted reproduction, and the wide range of potential complexities of completing birth registrations and determining parentage under the *CLA, 1997* when assisted reproduction is used. While there is great diversity in the types of families that can be created, and the ways

²⁴ *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01. Section 11 allows a judge to "make binding declarations of right whether or not any consequential relief is or can be claimed, and no action or matter is open to objection on the ground that a mere declaratory judgment or order is sought,"

²⁵ *WJQM v AJA*, *supra* note 17 at para. 25.

these families are created, in all situations where assisted reproduction is used there exists an intention to parent a child; these children are never unplanned. Whether or not this common intention to parent results, however, in the intended parents being recognized on the birth registration or as parents under the *CLA, 1997* depends on the interplay between a variety of factors such as the method of assisted reproduction, the source(s) of the genetic material, and the sex of the intended parents.

2.2.iv *Canadian Cases Involving Parentage and Assisted Reproduction*

[49] There have been many cases across Canada dealing with issues in determining parentage of children created with assisted reproduction. This section discusses the cases that are most often referred to by academics and courts, and the cases that have led to law reform in other Canadian jurisdictions.

Rutherford v Ontario

[50] In this 2006 decision,²⁶ the Ontario Superior Court of Justice held that Ontario's vital statistics legislation which prevented both mothers from being registered on the child's statement of live birth discriminated on the basis of sex and sexual orientation, and was thus contrary to s. 15 of the *Charter*.²⁷ In reaching its result, the Court made the following observations regarding the impacts of requiring the non-biological co-mother to obtain a declaration of parentage from a court as opposed to allowing them to be included on the child's birth registration:

Besides threats to their psychological integrity and to feelings of exclusion from a fundamental institution of parentage (or due to not having their parents recognized), the families also pointed to more immediate concrete forms of exclusion. In the case of one applicant recently diagnosed with breast cancer, there was a risk that if her partner had not received a declaration of parentage, that if she died her partner could lose [*sic*] the ability to obtain this right. In cases in which the birth mother dies, becomes incompetent, or has a change of intention, the rights of the lesbian co-mother to recognition as a parent may be threatened.

During the period that a lesbian co-mother is awaiting a declaration of parentage, her ability to act as a parent to her child vis-à-vis the outside world are severely circumscribed. She will not be able to receive documentation on behalf of that child such as a passport, receive medical care for that child, or travel with that child outside Canada. In seeking a CLRA declaration, she will have to make public private family planning decisions.²⁸

²⁶ *Rutherford v Ontario (Deputy Registrar General)*, (2006) 81 OR (3d) 81 (ON SCJ) [*Rutherford*].

²⁷ Section 15(1) of the *Charter* provides as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

²⁸ *Rutherford*, *supra* note 26 at paras 217-218.

A(A) v B(B)

[51] In 2007 the Ontario Court of Appeal released its significant decision in the *A(A) v B(B)* case.²⁹ A female same-sex couple had conceived a child through artificial insemination using a male friend as a sperm donor, with all three parties agreeing that the women would be the child's primary caregivers with the male friend being an active participant in the child's life. The male friend and the birth mother were identified as the child's parents on the birth certificate. When the child was two years old, the non-birth mother applied for a declaration that she was a parent of the child, in addition to the biological parents. A declaration was sought instead of an adoption as none of the parties wanted the father to forfeit his parental rights.

[52] The application for the declaration was unsuccessful at the lower court, on the basis that the Ontario *CLRA* allowed individuals having an interest in a child to apply for a declaration that they be recognized in law as "*the father*" or "*the mother*" of the child.³⁰ Although the Court was of the view that making the declaration would be in the child's best interests, the Court held it was prevented from making a declaration because of the use of the definite article "*the*" in the relevant provisions of the *CLRA*, stating:

The legislator could have left open the possibility of more than one father but, instead, made an express opposite choice. There is no logical reason to suppose the legislator would choose to limit the number of fathers to one while allowing for more than one mother...

Therefore, the plain and ordinary meaning of the word "*the*" is unambiguous, consistent with other expression of legislative intent and not inconsistent with any *Charter* or common law principle

...Part II of the *Children's Law Reform Act* does not afford authority for the court to grant this application.³¹

[53] The decision was subsequently successfully appealed to the Ontario Court of Appeal. The Court of Appeal agreed with the lower court's interpretation of the legislation, but allowed the appeal, relying on its *parens patriae* jurisdiction to issue a declaration that the non-birth mother was also the child's legal mother. In reaching its decision, the Court stated:

Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The *CLRA*, however, does not recognize these forms of parenting and thus the children

²⁹ *Supra* note 13.

³⁰ *AA v BB* (2003), 225 DLR (4th) 371 (ON SCJ).

³¹ *Ibid* at paras 35-38.

of these relationships are deprived of the equality of status that declarations of parentage provide.

It is contrary to DD's best interests that he is deprived of the legal recognition of one of his mothers. There is no other way to fill this deficiency except through the exercise of the *parens patriae* jurisdiction. As indicated, AA and CC cannot apply for an adoption order without depriving DD of the parentage of BB, which would not be in DD's best interests.³²

The result of the Court of Appeal's decision is that the child now has three legal parents: two mothers and one father.

DWH v DJR

[54] In this 2011 decision, the Alberta Court of Queen's Bench³³ allowed an application for a declaration of legal parentage made by a man who had entered into an agreement with his same-sex partner and female same-sex couple to conceive two children. One child would be raised by the men, and one would be raised by the women. A child was conceived with the applicant's partner's human reproductive material using artificial insemination, and then raised by the applicant and his partner, with the women both having regular access to the child.

[55] The applicant did not adopt the child, and he separated from his partner when the child was three. The child continued to reside with the applicant's partner, who then entered into a parenting agreement with the child's birth mother which named both of them guardians of the child. The relationship between the applicant and his former partner and the birth mother deteriorated, and the applicant was denied access to the child. The applicant subsequently brought an application for a declaration of parentage and argued that the parentage provisions in Alberta's *Family Law Act* discriminated against him on the basis of gender and sexual orientation. At the time of the application, Alberta's *Family Law Act* allowed the partner of the birth mother in cases of assisted reproduction to be declared the parent of the child but did not contemplate situations of gay couples as co-parents.

[56] The Court granted the declaration of parentage, holding:

Under the *FLA*, a gay male, regardless of whether he provided sperm for the purposes of the artificial conception, cannot be deemed a parent by operation of law. At the end of the day, the only individuals who can be recognized as parents based upon consent/intent (absent a surrogacy declaration or adoption) are those who are in a spousal relationship with the biological mother. Again, this will never be a gay male. The *FLA* legislates a benefit for individuals in a spousal relationship with the biological mother, which assumes the existence of a heterosexual relationship or (post *Fraess*) a lesbian relationship. By failing to provide a similar benefit for gay

³² *AA v BB*, *supra* note 13 at paras 35 and 37.

³³ 2011 ABQB 608, additional reasons 2011 ABQB 791, affirmed 2013 ABCA 240.

males (whether as genetic donor or intended/consensual father) the FLA creates a distinction that transcends the mere operation of biology.

The effect of the FLA is that when gay males in a committed relationship decide to have a family assisted by a female (in this instance with the assistance of a friend who conceives for them) they should either be satisfied with guardianship status (which they must apply for to receive) or they must undertake the protracted adoption process. Denying a gay father (biological or intended) the status of legal parent has a negative effect on his human dignity...

The ultimate operation of the FLA suggests that same-sex couples are somehow less able, or less worthy, of being parents. This reflects outdated assumptions or understandings about family in Canadian society.

At the end of the day, I find that s. 13(2) discriminates against gay males in that it fails to confer a benefit (recognized paternity) and forces gay male parents to endure an extended and protracted legal process in order to have their guardianship and parentage recognized....

Again, while the best interests of the child are of paramount concern, I do not agree that the wording of the legislation proportionately balances these needs against the discriminatory effects created towards homosexuals wishing to raise a family. While s. 13(2) presumes that a male in a heterosexual relationship with a female who conceives through the use of assisted conception should be recognized as a parent by operation of law (whether or not his sperm is actually used in the procedure) it does not make the same presumption about gay parents. Rather, such individuals must proceed through additional court processes to prove their fitness as guardians (through application) or parents (through adoption) and that their relationship with the child will indeed be in the best interest of that child. 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. As such, I find that the impugned legislation does not survive the final stage of the s. 1 analysis.³⁴

This decision was affirmed by the Alberta Court of Appeal.³⁵

³⁴ *Ibid* at paras 84, 90-92. and 115.

³⁵ 2013 ABCA 240.

3. The Case for Reform

3.1 Why is Reform of Saskatchewan's Parentage Laws Necessary?

[57] There are several reasons why reform of Saskatchewan's parentage laws may be necessary. As outlined in the previous section, the presumptions of paternity and the presumption that the birth mother is the mother of the child in the *CLA, 1997* are arguably neither sufficient nor accurate in cases where assisted reproduction is used to conceive a child. While the *VSA, 2009* does allow an "other parent" to be registered on the birth certificate, as discussed above, this category does not necessarily apply to every intended parent. Further, the *VSA, 2009* creates only a presumption of parentage; in the event of a dispute, parentage would be determined under the *CLA, 1997*. Put another way:

Birth registries are administrative tools and are not determinative of legal parentage...Because birth registries do not provide for definitive determinations of parenthood, provincial reform efforts directed at vital statistics legislation are generally an inadequate substitute for reform of legal parentage laws.³⁶

[58] The *CLA, 1997* does not expressly contemplate same-sex parents or children conceived through the use of assisted reproduction, despite the rising use of assisted reproduction. The use of assisted reproduction thus requires a "re-examination of the basis for assigning legal parentage" in Saskatchewan's legislation where "greater significance be attached to [the] intention to parent."³⁷ Bala & Ashbourne explain the necessity of such a re-examination as follows:

At a time when more and more same-sex couples are choosing to become parents, legislation which continues to rely on 'old legal assumptions that...parenthood is congruent with birth or the fact that a man is married to or in a relationship with a birth mother' remains untenable...

Today, there is an increasing diversity of family forms as well as greater visibility for those such as same-sex partners who may have previously been more secretive about their relationships...There is also a growing acceptance of the legal significance of same-sex partners and the use of ARTs to assist in procreation. However, the law has not yet kept pace with changes in social behaviour and the changing nature of ARTs. Consequently, all jurisdictions in Canada should undertake a review of their legislation governing parentage and children conceived by ARTs.³⁸

[59] From the perspective of a child conceived by assisted reproduction, certainty with regards to their legal parentage is clearly in their best interest. As Wanda Wieggers states, "[u]ncertainty

³⁶ Carol Rogerson, "Determining Parentage in Cases Involving Assisted Reproduction: An Urgent Need for Provincial Legislative Action" in *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) at 96.

³⁷ *Ibid* at 91.

³⁸ Nicholas Bala & Christine Ashbourne, "The Widening Concept of Parent in Canada: Step-Parents, Same-Sex Partners, & Parents by ART" (2012) *Journal of Gender, Social Policy & the Law* 20:3 524 at 555 – 557.

or conflict as to parental status at the outset of a child's life has the potential to critically undermine these benefits [those flowing from parentage] by increasing stress and instability throughout the lives of both caregivers and children."³⁹

[60] The importance to a child conceived through assisted reproduction of having their legal parentage accurately reflect their actual family structure was described in affidavit evidence cited by the Court in the *Rutherford* case:

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

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

Imagine winning the case, it would feel amazing. It would feel like we would not have to lie anymore. We would not have to worry about getting in trouble. Nobody could question who my mothers are anymore. I would feel more secure and safer. We could tell the truth. I could just be who I am, and sign my own signature.⁴⁰

[61] There are also broader equality issues to consider. Assisted reproduction is the only way LGBTQ individuals can conceive a child. Assisted reproduction is also the only way infertile heterosexual couples and single parents can conceive a child. Wanda Wiegers argues:

[G]overnments have an obligation to provide certainty and stability for all children and parents, even those children born by way of unconventional arrangements. The present state of the law on assisted conception within and across jurisdictions, however, gives rise to numerous inconsistencies, inequalities and ad hoc outcomes.⁴¹

[62] Carol Rogerson suggests that failing to provide children conceived through assisted reproduction "with the same legal certainty of parentage from birth as enjoyed by children born without resort to assisted reproduction can be considered discrimination against children on the basis of their birth certificate or family status."⁴²

[63] These equality concerns are echoed in the affidavit evidence provided by parents of children conceived through assisted reproduction and cited by the Court in *Rutherford*:

³⁹ Wiegers, *supra* note 12 at 149.

⁴⁰ *Rutherford*, *supra* note 26 at para 216.

⁴¹ Wiegers, *supra* note 12 at 222.

⁴² Rogerson, *supra* note 36 at 97.

One of the most frequently asked questions of lesbian parents who are parenting together, is "who's the real mom?" In our eyes, the question makes no sense as we are both real moms in the same way heterosexual couples who have children, or adoptive couples, are both "real" parents. But the question implies a hierarchy based on biology, and once again devalues non-biological parents and deems them "lesser than" biological parents.

We do not want to proceed with an adoption because it feels immoral and dishonest. We are both parents to this child; we were both in attendance at the conception and at the birth. We see no difference between our situation and, for example, a heterosexual couple who have had to use donor sperm to conceive.⁴³

[64] Relying on the court's *parens patriae* or general declaratory jurisdiction to make declarations of parentage or non-parentage in individual cases in the absence of clear legislative provisions is not an ideal solution to this issue. This approach does not provide enough certainty to individuals and families contemplating conceiving a child through assisted reproduction, and a lack of certainty regarding a child's legal parentage may lead to conflict and negatively impact family security. Further, deciding these issues in individual cases may not, in other words, provide parties with "general rules to guide their conduct and shape their expectations,"⁴⁴ or create consistencies between Canadian jurisdictions.⁴⁵

[65] Seeking legal recognition for non-biological parents through the doctrine of *loco parentis* is also arguably insufficient as the relationship is "neither a permanent nor full legal status and rests upon uncertain discretionary judicial determinations. It is also a relationship that is developed over time and that is not attained at the moment of birth."⁴⁶ While the doctrine – which allows an individual to be determined to be standing in the place of a parent - may allow a non-biological parent to gain custody or access to the child following a breakdown in the relationship, it is still not the fully recognized status of a legal parent.⁴⁷

[66] While adoption is a possible route to obtaining legal parenthood for the non-biological intended parent of a child conceived through assisted reproduction in certain circumstances, adoption is a lengthy process, requiring the consent of the child's legal parents. Angela Campbell suggests that pursuing an adoption is not an "obvious or simple choice" for non-biological parents, given that:

If the only recognized parent is the child's mother and she supports her partner's adoption, matters might proceed seamlessly. But if the partnership has dissolved, we can easily imagine the birth mother objecting to her partner's adoption. Additionally, if there are outstanding issues related to the child's paternity or if the child has a legally recognized father, consent from the

⁴³ Rutherford, *supra* note 26 at paras 215-216

⁴⁴ Wieggers, *supra* note 12 at 205.

⁴⁵ *Ibid* at 206.

⁴⁶ Rogerson, *supra* note 36 at 95.

⁴⁷ Bala & Ashbourne, *supra* note 38 at 534.

child's father will be necessary. If this is not acquired, possibilities for the partner's adoption will be obliterated, given law's reluctance to recognize more than two parents. A court must also find that the proposed adoption furthers the best interests of the child in question. Finally, even if adoption by a same-sex partner succeeds domestically, there might be problems in attempting to have the filiation validated in other jurisdictions where same-sex marriage and parentage is not recognized. If a lesbian partner does not adopt her spouse's child, her status as a parent of that child is often precarious.⁴⁸

[67] Requiring families to engage in litigation to determine their parentage status may also raise access to justice concerns. Bala & Ashbourne have argued:

Parents and children should not be put to the expense of having to litigate to establish recognition of their relationships. Rather, there should be a legal structure that reflects the psychological realities of children's lives and takes adequate account of the intentions of those individuals who are using ARTs to conceive such children. The availability of appropriate legislative guidance is vitally important for those using ARTs, the children who are conceived in this manner, and the medical and legal professionals who work with these families.⁴⁹

[68] Finally, as will be discussed below, several provinces have already reformed, to various degrees, their parentage laws to deal with assisted reproduction.

3.2 Reform Efforts Across Canada

[69] British Columbia, Alberta and Ontario have comprehensively dealt with assisted reproduction and parentage issues. Other jurisdictions across Canada have dealt with these issues in varying degrees. This section provides a brief overview of each province's legislative reform efforts; a more detailed discussion of the relevant statutory provisions will be provided in Part 4 of this Consultation Paper. A detailed chart comparing each province's statutory provisions in relation to assisted reproduction and parentage can also be found in the Appendix.

3.2.i Provincial Reform

British Columbia

[70] British Columbia's *Family Law Act*⁵⁰ (*BC FLA*) was enacted in 2011 and came into force on March 18, 2013 following years of public consultation. The Act contains separate parentage provisions for determining parentage in cases of adoption, no assisted reproduction, assisted reproduction, assisted reproduction after death, surrogacy, and other arrangements.⁵¹ The *BC*

⁴⁸ Angela Campbell, "Conceiving Parents Through Law" (2007) 21:2 Intl J L Policy and the Family 242 at 252.

⁴⁹ Bala & Ashbourne, *supra* note 38 at 557.

⁵⁰ *Family Law Act*, SBC 2011, c 25 [BC FLA].

⁵¹ *Ibid* at ss. 25 – 31.

FLA provides that donors are not automatically parents,⁵² and that when a surrogate is used, the parents of the child are the intended parents at the birth of the child provided certain conditions are met.⁵³ The transfer of parentage in a surrogacy situation can be dealt with administratively; provided the conditions are met, a court application is not required. These provisions have led some to call BC the most “surrogacy-friendly” province in Canada. The Act also allows for more than two parents in certain circumstances.⁵⁴

Alberta

[71] Alberta introduced legislation in 2005 to determine parentage for children conceived through assisted reproduction, including surrogacy. In 2010, the legislation was amended to incorporate gender-neutral language, allowing these provisions to apply to same-sex couples. Alberta’s *Family Law Act*⁵⁵ (*AB FLA*) provides for applications to be made to the court for a declaration that a surrogate is not a parent of the child if the child is born as a result of assisted reproduction.⁵⁶ The *AB FLA* also provides that gamete donors are not automatically considered to be parents of the child,⁵⁷ and neither are persons who are married to or in a conjugal relationship with a surrogate at the time of the child’s conception.⁵⁸ The *AB FLA* does not allow a child to have more than two parents.⁵⁹

Manitoba

[72] Bill 33, *The Family Law Reform Act* would have substantially reformed Manitoba’s laws surrounding the parentage of children conceived with assisted reproduction. Bill 33 did not, however, advance past second reading following a change in the provincial government in 2016. Bill 33 would have allowed a court to make an order allowing a child to have more than two parents if such an order would be in the best interests of the child. Donors of reproductive material would not be parents by reason only of the donation. Bill 33 also contained a process for obtaining a declaration of parentage where a surrogate was used.

Ontario

[73] Ontario recently reformed several pieces of legislation to clarify the parentage of children conceived using assisted reproduction. The amended *Children’s Law Reform Act (ON CLRA)*⁶⁰

⁵² *Ibid* at s. 24.

⁵³ *Ibid* at s. 29.

⁵⁴ *Ibid* at s. 30.

⁵⁵ *Family Law Act*, SA 2003, c. F-4.5 [*AB FLA*].

⁵⁶ *Ibid* at s. 8.2(6).

⁵⁷ *Ibid* at s. 7(4).

⁵⁸ *Ibid* at s. 7(5).

⁵⁹ *Ibid* at s. 8(12).

⁶⁰ *Children’s Law Reform Act*, RSO 1990, c. C.12 [*ON CLRA*].

provides that donors of reproductive material, including embryos, are not presumed parents of the child by reason of the donation.⁶¹ The birth mother is considered to be a parent of the child, except in cases of surrogacy.⁶² A birth parent's spouse is presumed to be a parent where assisted reproduction is used unless the spouse did not consent to be a parent of the child, or withdrew their consent, prior to conception.⁶³

Quebec

[74] Quebec amended its *Civil Code* in 2002 to create rules for “parental projects,” which begin when intended parents decide to use gamete donation to conceive a child. The spouse of the birth mother is presumed to be the child's other parent.⁶⁴ Gamete donors are not presumed to be parents.⁶⁵ Female same-sex parents are addressed in Article 539.1 which provides that “if both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child.” The *Civil Code* does not permit more than two parents.⁶⁶ A man may donate sperm either by artificial insemination or sexual intercourse, but if sexual intercourse is used, the man may seek a declaration of filiation (parentage) during the first year of the child's life.⁶⁷ Surrogacy agreements are explicitly stated to be null and unenforceable in Article 541.⁶⁸

[75] In 2015, the provincial government established an advisory committee to review several aspects of Quebec's family law, including Article 541 of the *Civil Code*.⁶⁹ The Advisory Committee on Family Law subsequently produced a lengthy report, containing 82 recommendations for family law reform. The provincial government is not, however, currently moving forward on implementing the recommendations.⁷⁰

⁶¹ *Ibid* at s. 5.

⁶² *Ibid* at s. 6.

⁶³ *Ibid* at s. 8(1).

⁶⁴ *Civil Code of Quebec*, S.Q. 2002, s. 6 at art 538.3 [*Civil Code*]. This presumption is rebutted if:

- The child is born more than 300 days after the judgment ordering separation from bed and board of the married spouses, unless they have voluntarily resumed their community of life before the birth; or
- If the child is born within 300 days of the termination of the marriage or civil union, but after a subsequent marriage or civil union of the woman who gave birth of the child.

⁶⁵ *Ibid* at art 538.2.

⁶⁶ *Ibid* at art 538.2

⁶⁷ *Ibid*.

⁶⁸ *Ibid* at art 541.

⁶⁹ Rachel Lau, “Surrogacy in Quebec: The law doesn't protect anyone”, Global News, September 7, 2017, online: Global News <<https://globalnews.ca/news/3718270/surrogacy-in-quebec-the-law-doesnt-protect-anyone/>>.

⁷⁰ Luis Millan, “Family Law Reform Dropped by Quebec Government”, Law in Quebec, June 1, 2017, online: <<https://lawinquebec.com/family-law-reform-shelved-quebec-government/>>.

Nova Scotia

[76] Nova Scotia addresses assisted reproduction in its *Birth Registration Regulations*.⁷¹ The Regulations were modified in 2007 to respond to issues raised by children conceived through assisted conception, however, “assisted conception” is limited to conception using an anonymous sperm donor.⁷² The Regulations provide that the spouse of the birth mother of the child conceived through assisted conception must be registered as the child’s other parent.⁷³ If the birth mother is unmarried, the birth mother can acknowledge an individual to be the child’s other parent, and if that person files a statutory declaration acknowledging they intend to assume the role of parent of the child, the birth registration must show that person as the child’s other parent.⁷⁴ Section 5 of the Regulations deals with surrogacy, and it allows the intended parents to apply to the court for a declaratory order of parentage, provided that one of the intended parents has a genetic link to the child.⁷⁵

Newfoundland & Labrador and Yukon

[77] Newfoundland was the first province to address assisted reproduction and parentage. Section 12 of the *Children’s Law Act*,⁷⁶ enacted in 1988, outlines the presumptions of parentage in cases of artificial insemination. The section is limited to insemination of a man’s female partner by another man’s sperm and provides that the male partner will be considered in law to be the father of the child if he consents in advance to the insemination.⁷⁷ If, however, the couple is cohabiting but unmarried, the male partner will not be presumed to be the father of the child if it is proved that he refused to consent to assume the responsibilities of parenthood.⁷⁸ If a married or cohabiting man did not consent to the insemination (or in the case of unmarried partners, also fail to consent to assume the responsibilities of parenthood), he will be considered to be the father of the resulting child if he has demonstrated a settled intention to treat the child as his child, unless it can be proved that he did not know that the child resulted from artificial insemination.⁷⁹ The Act also provides that a sperm donor who is not married to or cohabiting with the birth mother at the time of insemination is not in law the father of the resulting child.⁸⁰

[78] The Yukon Territory enacted an identical provision in 2002 in its *Children’s Law Act*.⁸¹

⁷¹ *Birth Registration Regulations*, N.S. Reg. 390/2007.

⁷² *Ibid* at s. 2(b).

⁷³ *Ibid* at s. 3(1).

⁷⁴ *Ibid* at s. 3(2).

⁷⁵ *Ibid* at s. 5(2)(e).

⁷⁶ *Children’s Law Act*, RSNL 1990, c C-13.

⁷⁷ *Ibid* at ss. 12(3) and (4).

⁷⁸ *Ibid* at s. 12(4).

⁷⁹ *Ibid* at s. 12(5).

⁸⁰ *Ibid* at s. 12(6).

⁸¹ *Children’s Law Act*, RSY 2002, c 31 at s. 13.

Prince Edward Island

[79] Prince Edward Island's *Child Status Act*⁸² was amended in 2008 to address presumptions of parentage where "assisted conception" has been used. "Assisted conception" is defined as conception by a means other than sexual intercourse, and includes *in vitro* fertilization using the mother's ovum.⁸³ Subsection 9(5) uses gender-neutral language, providing that a person is presumed to be the parent of a child if at the time of insemination they were the spouse of, or cohabiting in a conjugal relationship with, the mother, unless the person did not consent in advance to the assisted conception and did not demonstrate a settled intention to treat the child as their own, or the person did not know that the child was born by assisted conception. The Act also states that gamete donors are not by that reason alone a parent of the child.⁸⁴ Birth mothers are deemed to be the mother of the child, and there can be no more than two parents.⁸⁵ The amendments do not address surrogacy.

Northwest Territories

[80] The *Children's Law Act*⁸⁶ was amended in 2011 based on the Uniform Law Conference of Canada's *Uniform Child Status Act*. The Act allows any interested person to apply to the court for a declaratory order that they are or are not to be recognized in law as a parent of a child born as a result of assisted reproduction.⁸⁷ Gamete and embryo donors are not presumed to be parents, and cannot be declared to be parents, by reason only of the donation.⁸⁸ Section 8.1 sets out the presumptions of parentage where assisted reproduction is used. A person is a parent of a child born as a result of assisted reproduction if he or she was married to or cohabiting with the birth mother at the time of conception and consented to be a parent of a child born as a result of assisted reproduction.⁸⁹ This presumption of parentage does not apply if the birth mother is a surrogate.⁹⁰ The Act does not contain any surrogacy specific parentage provisions.

⁸² *Child Status Act*, RSPEI 1988, c C-6 at s. 9 [*PEI CSA*].

⁸³ *Ibid* at s. 9(2).

⁸⁴ *Ibid* at s. 9(6).

⁸⁵ *Ibid* at ss. 9(7) – (8).

⁸⁶ *Children's Law Act*, SNWT 1997, c 14.

⁸⁷ *Ibid* at s. 5.1(1).

⁸⁸ *Ibid* at s. 5.1(3). Section 5.1(4) clarifies that s. 5.1(3) does not apply in respect of a person who provides his or her own human reproductive material or an embryo created with his or her own human reproductive material for use in assisted reproduction for his or her own reproductive use.

⁸⁹ *Ibid* at s. 8.1(1). Section 8(2) provides that a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if, at the time of conception, the person was married to the birth mother or was cohabiting with the birth mother in a relationship of some permanence.

⁹⁰ *Ibid* at s. 8.1(3).

3.2.ii *Uniform Law Conference of Canada*

[81] In 2010, the Uniform Law Conference of Canada (ULCC) approved the *Uniform Child Status Act (Uniform Act)*⁹¹ and recommended its adoption to all jurisdictions in Canada. The purpose of the Act is to modernize and replace the former *Uniform Child Status Act (1992)* in order to provide basic rules for determining the parentage of all children. The Act provides rules for determining the parentage of all children, including those born through assisted reproduction. The Act provides that donors are not parents by virtue of their donation, allows for more than two legal parents, and sets out a process to determine parentage in cases of surrogacies. This process only applies if at least one of the intended parents has a genetic connection to the child.

3.3 Reform Efforts Outside Canada

3.3.i *New Zealand*

[82] New Zealand prohibits commercial surrogacy⁹² but allows altruistic surrogacy. Altruistic surrogacies must, however, be approved by the National Ethics Committee on Assisted Reproductive Technology. The Advisory Committee on Assisted Reproductive Technology has created guidelines for approval, including requirements that: at least one of the intended parents have a genetic link to the child; the mother must not be able to undertake pregnancy due to a medical reason; each party has received medical advice, independent legal advice and counselling; and the parties have discussed the ongoing contact and care of the child.⁹³

[83] Parentage of children is determined by the *Status of Children Act 1969*.⁹⁴ Part 2 of this Act, added in 2005, sets out the rules for determining the status of children conceived as a result of assisted reproduction. The partner of the birth mother is presumed to be the legal parent of a child born through assisted reproduction.⁹⁵ Donors are not presumed to be legal parents, unless they become the birth mother's partner after the conception.⁹⁶

⁹¹ *Uniform Child Status Act (2010)*, online: Uniform Law Conference of Canada < <http://www.ulcc.ca/en/home/86-josetta-1-en-gb/uniform-actsa/child-status-act/1371-child-status-act-2010>> [*Uniform Act*].

⁹² Commercial surrogacy is prohibited in the *Human Assisted Reproductive Technology Act 2004* (NZ) 2004/92.

⁹³ New Zealand National Ethics Committee on Assisted Reproductive Technology, *Guidelines on Surrogacy Arrangements involving Assisted Reproduction Procedures* (December 2013), online Advisory Committee on Assisted Reproductive Technology: < <https://acart.health.govt.nz/publications-and-resources/guidelines-and-advice-issued-ecart/guidelines-surrogacy-arrangements>>.

⁹⁴ *Status of Children Act 1969* (NZ) 1969/18.

⁹⁵ *Ibid* at s. 18(2).

⁹⁶ *Ibid* at ss. 19 – 25.

[84] The *Status of Children Act 1969* does not contain any provisions allowing parentage to be transferred from the surrogate to the intended parents; the intended parents are required to adopt the child after it is born, or apply for a guardianship order, even if the intended parents are the genetic parents of the child.

[85] The Law Commission of New Zealand released its *New Issues in Legal Parenthood Report* in 2005.⁹⁷ The Commission made several recommendations, including that adoption not be required for surrogacies where the child is the genetic child of one or both intending parents. In these cases, the Commission recommended that the court be able to transfer parental status provided certain conditions are met. The Commission also recommended that a court process be created to resolve disputes and determine parentage, guardianship and care of the child in the event the surrogate mother changes her mind.⁹⁸

3.3.ii Australia

[86] Similar to Canada, legislation dealing with assisted reproduction and parentage varies between the Australian states and territories. However, five of the jurisdictions have statutory provisions deeming the birth mother's same-sex partner to be a parent of the child conceived using assisted reproduction, and providing that a donor is not presumed to be a parent by reason only of the donation.⁹⁹

[87] Australia is also similar to Canada in that commercial surrogacy is prohibited, and altruistic surrogacy is permitted in all jurisdictions. However, several jurisdictions have placed restrictions or conditions on the practice of altruistic surrogacy.¹⁰⁰ Some jurisdictions require there to be a genetic connection between at least one of the intended parents and the child.¹⁰¹ The process for determining parental status in cases of surrogacy remains complex; as summarized by the Manitoba Law Reform Commission, "[m]ost states have rules about who qualifies as an intended parent or surrogate mother, and some require the involvement of lawyers or mandatory counselling. In Western Australia and Victoria, a statutory agency must give approval for the process before conception."¹⁰²

[88] The Victorian Law Reform Commission published its final report on Assisted Reproductive Technology & Adoption, containing 202 recommendations, in 2007.¹⁰³ In 2008, the *Assisted*

⁹⁷ New Zealand Law Commission, *New Issues in Legal Parenthood* (Report No 88, 2005), online: New Zealand Law Commission: <<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R88.pdf>> [New Zealand Report].

⁹⁸ *Ibid* at xix-xx.

⁹⁹ Manitoba Report *supra* note 2 at 20.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*.

¹⁰² *Ibid* at 21.

¹⁰³ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007), online: Victorian Law Reform Commission:

*Reproductive Treatment Act*¹⁰⁴ was passed, implementing most of the Commission's recommendations.¹⁰⁵

3.3.iii United Kingdom

[89] The United Kingdom (UK) enacted legislation dealing with surrogacy in 1985. The *Surrogacy Arrangements Act 1985*¹⁰⁶ prohibits commercial surrogacies,¹⁰⁷ and provides that surrogacy agreements are not enforceable.¹⁰⁸ In 1994, regulations made under this legislation allowed married couples to apply for parentage orders for children born to a surrogate. The *Human Fertilisation and Embryology Act 2008*¹⁰⁹ sets out the rules for determining parentage of children conceived with assisted reproduction.

[90] For heterosexual couples using artificial insemination, the male partner is presumed to be a legal parent of the child unless it can be shown that the husband did not consent.¹¹⁰ If the couple is unmarried, the partner is the legal father if conception took place at a licensed clinic and both parties signed consent forms electing the male partner to be treated as a parent.¹¹¹ The same rules apply for female same-sex partners either in a civil partnership or not in a civil partnership.¹¹² For male same-sex partners, the biological father and the birth mother are the legal parents of the child. If the partners are in a civil partnership, the non-biological father, and the biological father and birth mother may sign a parental responsibility agreement to give responsibility to the non-biological father, allowing him to make parental decisions, but not conferring the full legal status of a parent.

[91] In regards to surrogacy, the surrogate is named as the mother on the birth certificate, and the intended parents must apply for a court order to be recognized as legal parents.¹¹³ The surrogate mother and her partner must consent to the court order.¹¹⁴ The child must also have been created with the gametes of at least one of the intended parents.¹¹⁵ Parental order reports

<<http://www.lawreform.vic.gov.au/sites/default/files/ART%20%26%20Adoption%20Report%20FINAL.pdf>>
[Victorian Report].

¹⁰⁴ *Assisted Reproductive Treatment Act 2008* (Vic).

¹⁰⁵ Victorian Law Reform Commission, "Assisted Reproductive Technology & Adoption", online: Victorian Law Reform Commission <<http://www.lawreform.vic.gov.au/all-projects/art-adoption>>.

¹⁰⁶ *Surrogacy Arrangements Act 1985* (UK) c 49.

¹⁰⁷ *Ibid* at s. 2.

¹⁰⁸ *Ibid* at s. 1A.

¹⁰⁹ *Human Fertilisation and Embryology Act 2008* (UK) c 22. The legislation was enacted in 1990 and updated and revised in 2008.

¹¹⁰ *Ibid* at s. 35.

¹¹¹ *Ibid* at s. 36.

¹¹² *Ibid* at ss. 42 and 43.

¹¹³ *Ibid* at s. 54.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*.

(PORs) are prepared by social workers for consideration by the court when making the requested parental order.¹¹⁶ The social workers investigate the surrogacy arrangement and the best interests of the child.¹¹⁷ Karen Busby notes that these processes are:

[E]xpensive, time consuming and invasive. Rarely, if ever, are parental orders, denied, and research demonstrates that the PORs themselves are not sure what they are assessing and they wonder about the efficacy of the inquiries. Moreover, as the paramount consideration since 2010 is the child's welfare, one wonders whether the elaborate POR investigations in Britain are still necessary.¹¹⁸

The Law Commission (United Kingdom) has recently launched a project on surrogacy. In addition to consideration of the legal parentage of children born via surrogacy, the project will also consider the regulation of surrogacies and international surrogacy arrangements.¹¹⁹

3.3.iv *Uniform Law Commission (US)*

[92] There is a significant amount of variation between the states regarding assisted reproduction and parentage determinations, and as to whether commercial surrogacy and traditional surrogacies are permitted.

[93] The Uniform Law Commission revised and updated the *Uniform Parentage Act in 2017 (UPA (2017))*.¹²⁰ The *UPA (2017)* updated the surrogacy provisions in Article 8 of the UPA, 2002 (which had been enacted in only two states) and includes a new Article 9 dealing with the right of children born using assisted reproduction to access medical and identifying information regarding gamete donors. Article 8 permits both traditional and gestational surrogacy arrangements but regulates them differently. Traditional surrogates are entitled to withdraw their consent up until 72 hours after birth. Article 9 requires the disclosure of non-identifying medical history information from the donor. It does not require the disclosure of the identity of a gamete donor, but it requires gamete banks and fertility clinic to ask the donor whether their identifying information should be disclosed to the child when they turn 18. The *UPA (2017)* also provides that donors are not parents.

¹¹⁶ Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere (2013) 25 Can J Women & Law 284 at 307.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Law Commission, online: <<https://www.lawcom.gov.uk/project/surrogacy/>>.

¹²⁰ *Uniform Parentage Act (2017)*, online: Uniform Law Commission <http://www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf> [*UPA (2017)*].

4. Recommendations

4.1 Guiding Principles for Reform

[94] There are many guiding principles that may be relevant to recommendations regarding the rules of, and processes for, assigning parentage of children born through assisted reproduction. For instance, the Manitoba Law Reform Commission suggests that the following principles are relevant to the reform of parentage laws to address assisted conception:

- The law respecting legal parentage and birth registration must comply with the *Charter* and ensure equality of treatment for persons using assisted reproduction and their children;
- Children should have equal status in law and the same legal protections regardless of the circumstances of their conception or the status of their parents;
- Children and their parents benefit from clarity and certainty of status at the earliest reasonable time. Accordingly, out-of-court processes should be preferred for establishing parentage whenever possible;
- Markers of legal parentage generally include biology, gestation and the intent to parent the child formed before conception. With respect to children born as a result of assisted reproduction, the intent to parent the child before conception is a principal marker;
- The child's best interests are a paramount consideration in all decisions concerning parentage.¹²¹

[95] The New Zealand Law Commission adopted five guiding principles in arriving at its recommendations in its *New Issues in Legal Parenthood* report:

1. The child's welfare and best interests;
2. The desirability of clarity and certainty at the earliest possible time in the child's life and of simple procedures to achieve this;
3. The need for individuals to access information about their genetic and gestational parentage;
4. The desirability of autonomy and collaboration in parenting; and
5. The equality of children regardless of the circumstances of their creation or family form.¹²²

[96] The principles guiding the provincial government in British Columbia as it reformed its family law legislation were stated to be:

- Promoting family stability;
- Providing certainty of parental status as soon as possible;

¹²¹ Manitoba Report, *supra* note 2 at 23.

¹²² New Zealand Report, *supra* note 97 at xvii.

- Treating children fairly, regardless of the circumstances of their birth;
- Protecting vulnerable persons; and
- Preferring out-of-court processes where possible.¹²³

[97] Wanda Wiegiers suggests there should be three norms guiding legislative reform in this area: equality of family status, security of the family, and preventing discrimination against the LGBTQ community by taking account considerations of equality in terms of both gender and sexual orientation.¹²⁴ Wiegiers suggests that parentage should not be determined by considering the children’s interests in isolation from their parent’s interests as the “expectation and reliance interests of intending parents are in fact relevant to children’s best interests because they directly affect their experience of familial stability”¹²⁵ and it is well established “that conflict between parents and added stress in their lives is generally harmful for children.”¹²⁶ Therefore, Wiegiers asserts that “[r]ules that can provide guidance for the secure recognition of parentage at and from a child’s birth and the avoidance of ongoing conflict in their lives will generally be in the best interests of both caregivers and children.”¹²⁷

[98] In the Consultation Paper, the Commission asked for input as to what guiding principles should be considered when the Commission makes its recommendations, and whether any guiding principle should be of higher importance than the others. Generally, the responses received indicated that the child’s best interests and equality of family status are of the utmost importance. The responses also indicated that certainty and clarity regarding parentage and the processes for determining parentage are desirable, as they promote stability for the child and the family. The Saskatoon Focus Group suggested that harmonization or consistency with the other Canadian jurisdictions that have reformed their parentage legislation to address assisted reproduction should also guide the Commission’s recommendations, in order to reduce the possibility of forum shopping.

[99] The Canadian Bar Association (Saskatchewan Branch) suggested the Commission consider the following key principles:

- a. The best interests and welfare of the child. The CBA acknowledges this principle as one of key importance throughout Saskatchewan’s existing family law regime. The best interests of the child is currently of utmost importance in determining a number of family law issues surrounding parentage, custody and access, and should remain a key focus.
- b. Equal status before the law. This principle should be applied to both parents and children. It is important that parents in “traditional” heterosexual families, heterosexual families using assisted reproductive services, and single parent families using reproductive

¹²³ British Columbia 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) at 31 [BC White Paper].

¹²⁴ Wiegiers, *supra* note 12 at 171.

¹²⁵ *Ibid* at 170.

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

services, have equal status under the law and in compliance with the *Charter*. Further, it is also important that children have equitable status and protection under the law regardless of the circumstances of their conception;

- c. Clarity and certainty for both children and parents at the earliest possible time. As the literature provided by the Commission states, applications for parentage and/or adoption can be time consuming. Further, establishing the status of *in loco parentis* is neither permanent nor equal to legal parentage and takes time to develop under the law. Intervening factors such as the death or incapacitation of the partner holding legal parentage, the breakdown of the relationship between the legal parent and the other intended parent, the introduction of a new partner to the legal parent, and/or the unexpected exercise of parental rights from a surrogate or donor who holds presumed parentage, all pose potential threats to the status of intended parents as well as the wellbeing of the child. The sooner legal parentage can be established for all intended parents, the better off the parties will be. This will further facilitate structure and security for the child; and
- d. Access to justice. Requiring families to seek a court order to be identified as a parent(s) to their child, and to exercise the corresponding rights of a parent(s), poses significant expense to families. It stands to reason that not all families in need of assisted reproductive services, especially when factoring in the high cost of many assisted reproductive services, will have the necessary funds to seek legal assistance for such court applications. This has the potential to cause significant disparity among the legal rights of parents based on financial circumstance and/or economic class.

[100] The Commission has relied on the following guiding principles in making its recommendations regarding the rules of, and processes for, determining the parentage of children born through assisted reproduction:

- Clarity and certainty for intended parents and children as early as possible
- Equal status before the law
- Best interests of the child
- Harmonization with other Canadian jurisdictions

4.2 Terms/Language

[101] The Commission recommends that the terms “parent” and “birth parent” be used in the *CLA, 1997* to replace “mother” and “father” to the extent possible. If it remains necessary to use the terms “father” and “mother” in some instances, the Commission recommends the *CLA, 1997* refer to “a father/mother” as opposed to “the father/mother.”

4.3 Parentage: Intended Parents Using Gamete and Embryo Donation

[102] Gamete and embryo donation can be used by heterosexual couples, same-sex couples, and women intending to be single parents. In each of these cases, the birth mother, who may or may not be related to the child, intends on being a parent to the child. Assisted reproduction involving ovum or embryo donation always require the services of a medical clinic, whereas assisted reproduction involving sperm donation may or may not require the services of a medical clinic and may or may not involve sexual intercourse.

[103] In each jurisdiction that has addressed this issue, the birth mother is a parent of the child, whether or not her own reproductive material was used,¹²⁸ and the birth mother's partner or spouse is presumed to be a parent of a child conceived through assisted reproduction provided they consented to be a parent of the child at the time of conception. Individuals who become partners of the birth mother after conception and who wish to become legal parents of the child would have to adopt the child.

[104] In Alberta, the presumptions of parentage in various cases of assisted reproduction are set out in s. 8.1 of the *FLA*. The "partner" (the spouse or a person in a conjugal relationship of interdependence of some permanence) of the birth mother is deemed to be the parent of the child if they consented to be a parent of the child at the time of conception.¹²⁹ Subsection 8.1(6) states that the person's consent is presumed unless the contrary is proven.

[105] In British Columbia, the "partner" (a person who was married to, or in a marriage-like relationship with the child's birth mother) of the birth mother at the time of conception is presumed to be the legal parent of a child conceived through assisted reproduction, unless there is proof that the person did not consent to be a parent, or withdrew their consent.¹³⁰

¹²⁸ *BC FLA*, *supra* note 50 at s. 27(2); *AB FLA*, *supra* note 55 at s. 8.1; *ON CLRA*, *supra* note 60 at s. 6(1); *Quebec Civil Code*, *supra* note 64 at art 538.1; *Uniform Act*, *supra* note 91 at s. 3(2).

¹²⁹ Section 8.1(2) of the *AB FLA*, *supra* note 55 applies if the reproductive material of a male person was used – the parents are deemed to be the birth mother and the male person, unless the birth mother is a surrogate. Section 8.1(3) applies if the reproductive material of a female person (including an embryo) was used – the parents are deemed to be the birth mother and the person who was married to or in a conjugal relationship of interdependence with the birth mother at the time of conception and who consented to be a parent of the child. Section 8.1(4) applies if the reproductive material or an embryo from both a male and female person is used – the parents are deemed to be the birth mother and the male person. Section 8.1(5) applies if neither the female or male person provided the human reproductive material – the parents are the birth mother and the person who was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of conception and who consented to be a parent of the child.

¹³⁰ *BC FLA*, *supra* note 50 at s. 27(3).

[106] In Ontario, the “spouse” (the person to whom a person is married or living in a conjugal relationship) of the birth parent at the time of conception is a parent of the child, unless the spouse did not consent to be a parent to the child or withdrew the consent.¹³¹

[107] In Quebec, the “spouse” (married or civil union) of the birth mother is presumed to be the child’s other parent in cases of assisted procreation if the child is born during the marriage or civil union or within 300 days after its dissolution or annulment.¹³²

[108] The *Uniform Act* contains the following presumption of parentage provision:

5(1) A person is presumed to be and is recognized in law to be a parent of a child born as a result of assisted reproduction, if the person

- a) Was married to or in a common-law partnership with the birth mother at the time of the child’s conception, and
- b) Consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent prior to the child’s conception.

(2) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to the birth mother or was in a common-law partnership with the birth mother at the time of the child’s conception.

(3) Despite subsections (1) and (2), a person who was married to or in a common-law partnership with a surrogate at the time of the child’s conception is not presumed to be nor is recognized in law to be a parent of the child born as a result of assisted reproduction.

4.3.i *Recommendations*

[109] In the Consultation Paper, the Commission asked what presumptions of parentage should apply in cases of assisted reproduction using gamete and embryo donation. Those consulted agreed with the approaches described above: the birth mother’s partner/spouse (if any) at the time of conception should be the child’s parent, unless that individual did not consent to be a parent of the child or withdrew their consent prior to conception. The intention of the parents at conception is what is determinative.

[110] The Commission recommends the “spouse” (the person to whom a person is married or with whom a person is living in a conjugal relationship) of the birth parent at the time of conception should be deemed to be a parent of the child, unless the spouse did not consent to be a parent to the child or withdrew their consent prior to conception. The spouse’s consent is presumed unless the contrary is proven.

¹³¹ *ON CLRA*, *supra* note 60 at s. 8(1) and (3).

¹³² Article 538.3 of the *Civil Code*, *supra* note 64 provides that this “presumption is rebutted if the child is born more than 300 days after the judgment ordering separation from bed and board of the married spouses, unless they have voluntarily resumed their community of life before the birth. The presumption is also rebutted as regards the former spouse if the child is born within 300 days of the termination of the marriage or civil union, but after a subsequent marriage or civil union of the woman who gave birth to the child.”

4.4 Parental Status of Donors

[111] The *CLA, 1997* does not clarify the rights and responsibilities of gamete donors. The potential to be declared a legal parent under the *CLA, 1997* may limit the number of individuals willing to act as known gamete donors, given that most donors are interested in helping others to become parents as opposed to becoming parents themselves.

[112] The *AB FLA* provides that gamete donors are not automatically considered to be parents of the child.¹³³ Section 24(1) of the *BC FLA* provides as follows:

- (1) If a child is born as a result of assisted reproduction, a donor who provided human reproductive material or an embryo for the assisted reproduction of the child
 - (a) is not, by reason only of the donation, the child's parent,
 - (b) may not be declared by a court, by reason only of the donation, to be the child's parent, and
 - (c) is the child's parent only if determined, under this Part, to be the child's parent.

Section 6 of the *Uniform Act* provides:

- (6) A person who donates human reproductive material or an embryo for use in assisted reproduction is not, by reason only of the donation, a parent of a child born as a result and may not, by reason only of the donation, be declared under this section to be a parent of the child.

[113] Ontario's *CLRA* similarly provides that a "person who provides reproductive material or an embryo for use in the conception of a child through assisted reproduction is not, and shall not be recognized in law to be, a parent of the child unless he or she is a parent of the child under this Part."¹³⁴ Article 538.2 of Quebec's Civil Code states that the "contribution of genetic material to the parental project of another cannot be the basis for any bond of filiation between the contributor and the child consequently born."

[114] The Manitoba Law Reform Commission recommended that legislation should provide that: (1) donors are not, by reason only of the donation, a parent of a child born as a result, and (2) donors may not be declared to be a parent of the child by reason only of the donation.¹³⁵

[115] The New Zealand Law Commission recommended a more nuanced approach to this issue in their 2005 report, recommending that there be a mechanism for a known donor to be recognized as a legal parent upon the birth of the child in certain circumstances. In the Commission's view:

¹³³ *AB FLA*, *supra* note 55 at s. 7(4): A person who donates human reproductive material or an embryo for use in assisted reproduction without the intention of using the material or embryo for his or her own reproductive use is not, by reason only of the donation, a parent of a child born as a result.

¹³⁴ *ON CLRA*, *supra* note 60 at s. 5.

¹³⁵ Manitoba Report, *supra* note 2 at 25.

There are no apparent policy reasons why a child and family should lose the advantage of having a legal father, where the genetic father wishes and intends to act as a father from birth, simply because of the method of conception. The child will lack the legal rights he or she would otherwise obtain from his or her father such as citizenship or inheritance. Similarly, a genetic father who intends and wishes to take on all the rights and responsibilities of parenthood should not lose that legal relationships with his child purely because of the method of conception.¹³⁶

[116] The Commission recommended there be a simple scheme in the legislation enabling donors to opt into parenthood with the consent of the birth mother, or the birth mother and her partner.¹³⁷ The Commission recommended there be different requirements, however, depending on whether the sperm donor is going to be the child's second or third legal parent, in recognition of the different type of relationship that may exist between the donor and the birth mother in each case and the increased likelihood of conflict where the donor will be the child's third legal parent.¹³⁸

[117] Where the donor will be the child's second parent and the donor intends to raise the child jointly with the birth mother, the Commission recommended a two-stage process. The first stage would require the woman and the sperm donor (prior to birth) to present a form and sworn statements to a registrar of the Family Court. The woman's sworn statement would state that the donor will be a genetic parent and that she wants him to be a legal parent. The donor's sworn statement would provide that he will be a genetic parent and wants to be a legal parent. The registrar would give interim approval. After birth, the registrar would approve the application after being given proof that the donor is the genetic parent of the child.¹³⁹

[118] Where the donor will be the child's third parent, a two-stage process would also be created. At the initial pre-birth stage, the donor and intended parents would provide sworn statements to the registrar of Family Court confirming their intentions. Evidence would also have to be provided that all three parties have received independent legal advice and counselling about the potential issues raised by their planned family, and to have entered into a written agreement setting out each party's role in parenting, and contact with, the child. The registrar would give interim approval, and after the birth would approve the application upon proof of the donor's genetic parentage of the child.¹⁴⁰

[119] The Victorian Law Reform Commission considered allowing donors to opt into legal parent status, and recommended against such a process, stating:

We agree with suggestions made in submissions and other consultations that Family Court parenting orders are a more flexible and appropriate way to recognize a donor's significant role

¹³⁶ New Zealand Report, *supra* note 97 at 65.

¹³⁷ *Ibid.*

¹³⁸ *Ibid* at 67.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

in a child's life. Parenting orders can be adapted to the particular circumstance of each case, and can be adjusted to reflect the evolution of the relationship between the donor and the child as the child matures. Many people, such as grandparents and aunts, make valuable contributions to children's upbringing and are responsible for significant levels of care, without being legally recognized as parents.¹⁴¹

[120] Some commentators have suggested an intermediate type of parental status - an "involved known donor" - be created for gamete donors wishing to be involved to some degree in the child's life. Fiona Kelly has suggested that any person should be able to apply to the court, within one year of the child's birth, to opt into the status of "non-parental adult caregiver" if both legal parents consent.¹⁴²

[121] Allowing a gamete donor to be an "involved known donor" serves two purposes. First, it allows a gamete donor to have some of the rights and responsibilities of a parent, without being considered the child's legal parent and thereby having the full range of rights and responsibilities attached to that status. Second, it provides security to single parents by choice and to same-sex couples that allowing their child's known donor to play a role in their child's life will not result in the future elevation of the donor to full legal parent status in the event of a dispute regarding the child's parentage. Fiona Kelly suggests:

Extending some form of legal recognition to involved known donors protects the donor's interests in maintaining an access relationship with the child, while also protecting the lesbian family, particularly the non-biological mother. When the "involved known donor" and non-biological mother need no longer compete for the status of second legal parent the likelihood, as well as the intensity, of a dispute may be lessened.¹⁴³

[122] New Zealand's *Care of Children Act, 2004*¹⁴⁴ allows a known donor to opt into an "involved known donor" type of role with the consent of the child's presumptive parents. Clause 41(1)(a) allows a party to an agreement between the parents of a child and the gamete donor(s) relating to contact with the child and/or their role in the child's life to have the agreement embodied in a court order. The section makes clear that the agreement itself cannot be enforced under the Act, but, if all parties consent, the court can make an order embodying all or some of the terms of the agreement.¹⁴⁵ The contact related provisions of the court order can then be enforced as if it were a parenting order relating to contact.¹⁴⁶ If the parties have a dispute relating to the role of the donor(s) in the upbringing of the child as set out in the court order embodying the terms

¹⁴¹ Victorian Report, *supra* note 103 at 138.

¹⁴² Fiona Kelly, "Multiple-Parent Families Under British Columbia's New *Family Law Act*: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting?" (2014) 47:2 UBC Law Review 565 at 587 [Kelly, "Multiple-Parent Families"].

¹⁴³ Kelly, "Equal Parents", *supra* note 14 at 262.

¹⁴⁴ *Care of Children Act 2004* (NZ) 2004/90.

¹⁴⁵ *Ibid* at s. 41(3).

¹⁴⁶ *Ibid* at s. 41(4).

of the agreement, any party may apply to the court for its direction and the court may make any order relating to the matter.¹⁴⁷

4.4.i Recommendations

[123] The Commission asked the following questions in the Consultation Paper:

- Should the Act state that gamete and embryo donors are not parents solely on the basis of their donation?
- Should the Act allow donors to opt into legal parenthood if certain conditions are met? If so, what conditions?
- Should there be an intermediate status for “involved known donors” to ensure that donors that play a role in the child’s life are not subsequently treated as parents by the courts? What rights and responsibilities should attach to that status? Under what circumstances should a donor be able to obtain this status?

[124] Consultees were unanimously of the opinion that donors should not be considered parents and that legislation should provide that donors are not, and cannot be declared to be, parents solely on the basis of the donation. This approach will provide certainty and reflect the intentions of the vast majority of donors and intended parents.

[125] There are, however, cases in which the donor and the intended parents will all intend to be the legal parents of the child. This point was echoed by the Canadian Bar Association (Saskatchewan Branch) in its response to the Consultation Paper:

If making the recommendation that a donor should not be a parent solely by virtue of their donation, a donor should not be precluded from legal parentage on that same basis. As a result, there may be families in which more than two parents should be legally recognized based on the intention and structure of the family.

[126] This was the scenario in the 2007 *AA v BB* decision from the Ontario Court of Appeal, discussed above.¹⁴⁸ In *AA v BB*, the sperm donor and the birth mother of the child were listed as parents on the birth certificate. The partner of the birth mother successfully applied for a declaration that she was a parent of the child, in addition to the biological parents. Had Ontario’s current legislative provisions regarding assisted reproduction and parentage been in place at the time of *AA v BB*, it may have been more difficult for the Court to reach the same result. Under the current provisions, the birth mother and her partner would be the parents of the child, and the donor would have to contend with s. 5 of Ontario’s *Children Law Reform Act (ON CLRA)* which states: “a person who provides reproductive material or an embryo for use in the conception of

¹⁴⁷ *Ibid* at ss. 41(5)-(6).

¹⁴⁸ *Supra* note 13.

a child through assisted reproduction is not, and shall not be recognized in law to be, a parent of the child unless he or she is a parent of the child under this Part.”

[127] A recent decision from Ontario’s Superior Court of Justice grapples with the effect of this provision. In *ML v JC*,¹⁴⁹ two individuals (Mark and Jane) agreed to assist each other to conceive two children. One child was to be raised by Mark, and one child would be raised for Jane and her spouse, Samantha. Mark’s sperm was used in attempts to artificially inseminate each woman, however only Jane successfully conceived. The Court applied s. 6(1) of the *ON CLRA* to declare that Jane, as the birth parent, was a parent of the child. Samantha was declared to be a parent of the child pursuant to s. 8(1) of the *ON CLRA*, which provides that a birth parent’s spouse at the time of conception shall be recognized as a parent of the child.

[128] The more complicated decision for the Court was whether Mark could be declared to be a parent of the child under the general declaration of parentage provision in s. 13 of the *ON CLRA*, as pursuant to s. 5(1), Mark could not be declared to be a parent of the child on the basis of the provision of his reproductive material, unless he was also a parent of the child under another section of the Act. Sections 13(1) and (3) of the *ON CLRA* allow any person having an interest to apply to the court for a declaration that a person is or is not a parent of the child (unless the child is adopted), and allows the court to make a declaration of parentage if it finds on the balance of probabilities that a person is or is not a parent of a child. If, however, the declaration of parentage will result in a child having more than two parents, or the declaration will result in the child having a parent who is not a parent under section 7 (presumption of parentage in cases not involving assisted reproduction), 8 (birth parent’s spouse is parent in cases of assisted reproduction), or 9 (parentage under pre-conception parentage agreements), sections 13(4) and (5) require the following conditions to be met in order for the court to make a declaration of parentage:

1. The application for the declaration is made on or before the first anniversary of the child’s birth, unless the court orders otherwise.
2. Every other person who is a parent of the child is a party to the application.
3. There is evidence that, before the child was conceived, every parent of the child and every person in respect of whom a declaration of parentage respecting that child is sought under the application intended to be, together, parents of the child.
4. The declaration is in the best interests of the child.

[129] The Court concluded it was unable to declare Mark a parent under s. 13 as the conditions in s. 13(5) were not all met since Mark, Jane, and Samantha had not intended to “be, together, parents of the child.” In the Court’s view, this result was “unsatisfactory” and not in the best interests of the child.¹⁵⁰ The Court was critical of the application of the assisted reproduction and parentage provisions in the *ON CLRA* to the case, stating:

¹⁴⁹ 2017 ONSC 7179.

¹⁵⁰ *Ibid* at para 86.

The application of the amendments to the facts of this case does not achieve the purposes [of the parentage related amendments to the *ON CLRA*] articulated by Mr. Naqvi. Rather, those amendments would deny parentage to Mark, who, while there was no valid surrogacy agreement, provided reproductive material to Jane always intending that he would parent the child to whom Jane gave birth. While I have found that the partial agreement reached by the parties did not constitute a valid surrogacy agreement, Mark has not wavered from his preconception intention to parent B.G. I have found that it was Jane who changed her mind about the original partial oral agreement when it became apparent that Samantha was not pregnant. Mark did not make a “donation” or “gift” of reproductive material to Jane. He thought he was providing material for his own reproductive use.¹⁵¹

[130] Similarly to the *AA v BB* decision, the Court exercised its *parens patriae* jurisdiction and declared Mark to be a parent of the child:

In my view, the amendments to the *CLRA* as they concern parentage, while they appear comprehensive, have left several “gaps”. In particular, the gaps include: circumstances such as this case where all of the significant “facts” preceded the entry into force of the legislation; and, where a party provided reproductive material, not as a “gift” or “donation” but for his own reproductive use, and has acted as a parent subsequent to the child’s birth.

Prior to the enactment of the amendments, it would have been possible to Mark to be declared a “father” of B.G. under the *CLRA*...

In my view, the fact that the parentage sections of the amended *CLRA* do not permit a recognition of parentage for Mark constitute a legislative gap. It is contrary to the best interests of B.G. that she be deprived the legal recognition of the parentage of Mark, who is biologically, emotionally, and functionally a parent to her, and a loving, devoted parent at that. Moreover, given that Jane included in her “Order Sought” that Mark be listed as the child’s father on the birth registration, Jane is consenting to Mark being declared to be a parent. I find that there is no other way to fill this gap than to exercise the Court’s *parens patriae* jurisdiction.

Further, as I have set out above, the purposes of the amendments to the *CLRA* as introduced were equality, inclusion, and to ensure that “parents ... are able to care and provide love for their children the way [they] have always, always done”.¹⁵²

[131] Consultation responses were varied as to whether a donor should be able to obtain legal parent status upon the birth of the child in certain circumstances. Those that supported the potential for a donor to be considered a legal parent of the child emphasized that the donor should only be able to obtain the status with the consent of the intended parent(s), and that the decision should be made prior to conception. Some suggested that a pre-conception written agreement and independent legal advice should be required.

[132] Concerns were expressed about the uncertainty, complexity, and potential for conflict that could arise if donors are able to obtain legal parent status in addition to the intended parents.

¹⁵¹ *Ibid* at para 90.

¹⁵² *Ibid* at paras 103 – 106.

On the other hand, some consultees were of the view that if all parties are in agreement as to who the legal parents of the child should be, then the child's parentage should reflect this decision. Several of these individuals mentioned that it may benefit the child to have multiple parents.

[133] Some consultees suggested that there may be other options for providing a donor with some types of parental rights without the need for the donor to obtain legal parent status. For instance, the parties could enter into parenting agreements, similar to those used in other third party parenting situations. Some suggested that the parenting agreements could be embodied in a court order.

[134] Another option raised by several consultees was the potential of the "person of sufficient interest" status to be used by donors seeking a degree of involvement in the child's life. Some consultees viewed the person of sufficient interest status as being similar to a degree to the "involved known donor" status available in New Zealand. A person of sufficient interest can seek custody or access to a child under the *CLA, 1997*.¹⁵³ Persons of sufficient interest are also included in *The Child and Family Services Act* in relation to child protection orders and hearings. If the person of sufficient interest is also determined to stand "in loco parentis" (in the place of a parent), the person may also incur financial responsibilities to the child under legislation such as *The Family Maintenance Act*.

[135] Persons of sufficient interest are not limited to those individuals with a biological connection to the child or those individuals in traditional relationships to the child.¹⁵⁴ Whether or not a person has a sufficient interest will be determined by the court considering a variety of factors, including:

- (a) the extent or degree of the applicant's involvement in the child's life, (b) the duration of that involvement, (c) the level of intimacy and the quality of the relationship between the applicant and the child, (d) how the relationship between the applicant and the child was represented to the world, and (e) whether the applicant provided financially for the child.¹⁵⁵

Where the applicant is not a parent, step parent or biological relative, "the courts have been extremely reluctant to grant access even where the applicant's relationship with the child has been significant. The existence of an emotional bond between the applicant and the child has not been seen as sufficient to warrant access."¹⁵⁶

¹⁵³ Section 6(1) of the *CLA, 1997* *supra* note 10 provides:

- 6(1) Notwithstanding sections 3 to 5, on the application of a parent or other person having, in the opinion of the court, a sufficient interest, the court may, by order:
 - (a) grant custody of or access to a child to one or more persons;
 - (b) determine any aspect of the incidents of the right to custody or access; and
 - (c) make any additional order that the court considers necessary and proper in the circumstances.

¹⁵⁴ *DLC v GES*, 2006 SKCA 79 at para 45.

¹⁵⁵ *Ibid.* at para 47.

¹⁵⁶ *Ibid* at para 56.

[136] Under s. 9(1) of the *CLA, 1997*, if an individual succeeds in establishing they are a person of sufficient interest, an order granting the individual access to the child will only be made if it would be in the best interests of the child. Section 9(1) provides as follows:

9(1) In making, varying or rescinding an order for access to a child, the court shall:

(a) have regard only for the best interests of the child and for that purpose shall take into account:

- (i) the quality of the relationship that the child has with the person who is seeking access;
- (ii) the personality, character and emotional needs of the child;
- (iii) the capacity of the person who is seeking access to care for the child during the times that the child is in his or her care; and
- (iv) the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child; and

(b) not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to care for the child during the times that the child is in his or her care.

[137] Several of the consultees who suggested that the donor could seek person of sufficient interest status indicated that the Commission may wish to consider whether the legislation should set out a modified set of factors to consider, or a set of conditions to be met, in relation to children born through assisted reproduction. For instance, it may be difficult to obtain this status prior to, or immediately following the birth, of the child, given that one of the factors the court will consider is the degree of the applicant's involvement in the child's life and the duration of that involvement. The presence of a pre-conception written agreement may be another factor to be specifically mentioned. There was also a suggestion that the Commission consider whether a specific process should be created to grant the donor this type of status without requiring a court application.

[138] The Commission recommends the *CLA, 1997* be amended to state that donors are not parents of a child conceived through assisted reproduction by reason only of the donation, in a manner similar to s. 5 of the *ON CLRA*, or s. 24(1) of the *BC FLA*.

[139] The Commission recognizes that there are circumstances in which a "donor" will be providing genetic material for use in assisted reproduction with the intention of being a parent of the child in addition to the intended parent(s). An example of this would be if a man provided sperm to one of the partners in a female same-sex relationship with the intention of being a parent of the child conceived together with the birth parent and her partner. Another example would be the provision of sperm by a friend of a woman to assist in her conceiving a child she

intends to raise on her own, but where the parties agree the man should be considered a legal parent to the child.

[140] In these circumstances, the Commission recommends a donor be able to be legal parent of the child in addition to the intended parent(s) if the donor and the intended parent(s) have entered into a pre-conception written agreement and received independent legal advice prior to executing the agreement. To add the donor to the birth certificate, a certificate of independent legal advice stating the parties had entered into a pre-conception written agreement would have to be filed by both the intended parent(s) and the donor with the Registrar of Vital Statistics.

[141] These provisions are not meant to apply where the “donor” is also one of the intended parents in a spousal relationship, as would be the case with *in vitro* fertilization using the sperm of the male partner. In these circumstances the presumptions of parentage discussed in the preceding section would apply: the birth mother and her partner would be the legal parents of the child.

[142] Given these recommendations, the Commission does not find it necessary to make any recommendations regarding the person of sufficient interest status and its potential application to donors.

4.5 Sperm Donation via Sexual Intercourse

[143] Sperm donation via sexual intercourse is a reasonably common occurrence for women desiring to be single mothers, and it is also occasionally used by female same-sex couples.¹⁵⁷ However, most Canadian jurisdictions limit their assisted reproduction parentage provisions to assisted reproduction by artificial insemination; in other words, sperm donation via sexual intercourse is not considered to be assisted reproduction. The reason for this is presumably a recognition of the fact that in the vast majority of cases, children conceived through sexual intercourse are not intended to be conceived via sperm donation, and to prevent claims by one parent that either they are not - or their ex-partner is not - actually a legal parent of the child in the event of a breakdown of the relationship.

[144] Alberta, British Columbia, and Ontario each define “assisted reproduction” as a method of conceiving other than by sexual intercourse.¹⁵⁸ The *Uniform Act* defines assisted reproduction similarly,¹⁵⁹ as does the *UPA, 2017*.¹⁶⁰ Nova Scotia’s *Birth Registration Regulations* defines “assisted conception” as “conception that occurs as a result of artificial reproductive technology using an anonymous sperm donor” which rules out sperm donation via sexual intercourse. In these jurisdictions, the assisted reproduction parentage provisions do not apply to sperm

¹⁵⁷ Kelly, “Equal Parents”, *supra* note 14 at 274.

¹⁵⁸ *AB FLA*, *supra* note 55 at s. 5.1(1)(a); *BC FLA*, *supra* note 50 at s. 20(1); *ON CLRA*, *supra* note 60 at s. 1(1).

¹⁵⁹ *Uniform Act*, *supra* note 91 at s. 1.

¹⁶⁰ Section 701 of the *UPA, 2017* *supra* note 120 provides that Article 7 [assisted reproduction] does not apply to the birth of a child conceived by sexual intercourse.

donation via sexual intercourse, and, excepting Ontario, the non-assisted reproduction parentage provisions would apply.

[145] Ontario has recently enacted a provision allowing sperm donation to occur via sexual intercourse if the intended birth parent and the sperm donor enter into a pre-conception written agreement that the sperm donor does not intend to be a parent of the child.¹⁶¹ If a pre-conception written agreement is in place, the sperm donor is not, and shall not be recognized to be, a parent of the child.¹⁶²

[146] Quebec also differs to some degree on this issue. The Code provides that sperm donation for a parental project may take place via sexual intercourse. Sperm donation via sexual intercourse is not, however, treated the same as sperm donation via assisted reproduction. In cases of sperm donation via sexual intercourse, the donor has the opportunity to establish filiation (parentage) within the first year of the child's life, whereas in cases of sperm donation via artificial insemination, the donor is not able to claim filiation.

[147] Fiona Kelly suggests that since sperm donation via sexual intercourse is reasonably common, assisted conception should include conception via intercourse, and legislation should encourage pre-conception written agreements.¹⁶³ She also suggests that legislation should also make clear that "where a pre-conception agreement exists, conception via intercourse does not negate the intention of the lesbian couple or single woman to parent independently of the donor."¹⁶⁴ Barbara Findlay & Zara Suleman have also suggested that "it is completely inconsistent with past practice, and it defies logic, that a child's rights, and the rights of her prospective parents, depend on whether the man donating sperm donated it into a vial, or directly to the woman."¹⁶⁵

[148] On the other hand, Wanda Wiegers suggests that there may be good reason to distinguish between conception via sexual intercourse and conception via artificial insemination:

[T]he "mechanics of conception" may be highly relevant to "relational realities." Holding men responsible in instances of casual sex, may, at least in theory, promote an equal sense of responsibility for the potential consequences of sexual intercourse. By contrast, assisted conception is typically highly planned and deliberate, especially when executed in a clinical setting, and usually indicative of a very high level of responsibility on the part of both donors and intended parents.¹⁶⁶

¹⁶¹ *ON CLRA*, *supra* note 60 at s. 7(4).

¹⁶² *Ibid* at s. 7(5).

¹⁶³ Kelly "Equal Parents" *supra* note 14 at 275.

¹⁶⁴ *Ibid* at 276.

¹⁶⁵ Barbara Findlay & Zara Suleman, "Baby Steps: Assisted Reproductive Technology and the BC Family Law Act, materials for BC CLE (2013) at 6.1.38.

¹⁶⁶ Wiegers, *supra* note 12 at 189-190.

[149] It is possible that allowing sperm donation via sexual intercourse if certain requirements are met may result in an increasing number of disputes over the parentage of a child conceived through sexual intercourse. In a recent interesting decision from Ontario,¹⁶⁷ a Court issued a declaration of non-parentage in a case where a child was conceived through sexual intercourse, and the existence of a verbal sperm donor agreement was disputed between the parties. The Court held that the provisions of the *CLRA* allowing sperm donation to occur via sexual intercourse were not applicable as the parties had not entered into a pre-conception written agreement. However, the Court relied on the general declaratory power in s. 13 of the amended *CLRA* to declare that someone is or is not a parent and issued a declaration that the male was not a parent of the child. The Court found that on the balance of probabilities, the parties had a pre-conception agreement that the male would act as a sperm donor and would not be a father to the child. In arriving at its decision, the Court stated:

[162] The amendments to the *CLRA* with respect to parentage move the focus away from biology toward the pre-conception intentions of the parties. The legislature, in enacting the amendments to the *CLRA*, has signalled its support for parties to determine a child's family unit regardless of the gender of the parents and, with some limitations, regardless of the number of parents. A family intentionally comprised of one parent is no less a child's family than one comprised of two or more parents.

[163] The legislation sets out a framework wherein, if followed, prospective parents can ensure that when the child is born they will be entitled to legal recognition of their parental status or non-status without costly and possibly public legal processes. However, as history tells us, the legislation cannot anticipate every parenting arrangement and not every parenting arrangement will meet the statutory presumptions. In those cases, like this one, parties seeking declaratory relief with respect to parentage must resort to s. 13 of the amended *CLRA*.

[164] This case should not stand for the proposition that parties are not required to reduce their agreements to writing. Rather the facts in this case highlight how crucial it is for parties to have a written agreement clearly defining their intentions before a child is conceived. Decisions as to whether or not to be a parent to a child are far better reached in a dispassionate setting rather than in the emotional place following the conception and birth of the child.

4.5.i *Recommendations*

[150] The Commission asked the following questions in the Consultation Paper:

- Should the assisted reproduction parentage provisions apply to situations of assisted reproduction using sperm donation through sexual intercourse? Why or why not?
- If so, should a pre-conception agreement be required in order for a sperm donor to not be determined to be a legal parent where sperm donation has occurred via sexual intercourse? Are there any other conditions that should be imposed on this arrangement?

¹⁶⁷ *MRR v JM*, 2017 ONSC 2655.

[151] Consultation responses on this question varied greatly. Those opposed to allowing a man to not be a parent to a child conceived using sperm donation through sexual intercourse argued that the potential for abuse of this type of provision was too great. Several people envisioned a scenario in which a man who does not want to be a legal parent forces or coerces a woman to sign a written agreement either prior to sexual intercourse, or after sexual intercourse (but dated pre-conception).

[152] Those that were in favour of including sperm donation via sexual intercourse in assisted reproduction parentage provisions were of the view that the legislation should provide for this of arrangement, as there may be situations where parties engage in sexual intercourse for the purposes of sperm donation without realizing that under the current legislation the donor would be considered the father of the child. In addition, those in favour noted that if there will be a provision stating that donors are not parents by virtue of the donation, then it would be unfair and illogical not to extend that provision to sperm donation via sexual intercourse, where it is clearly the intention of both parties. Many of those in favour acknowledged the potential for abuse, but were largely confident that conditions could be included to minimize the risks and that in the event of a dispute before the courts, the courts would likely be reluctant to find a man to not be a father of a child conceived via sexual intercourse unless satisfied both parties intended the sexual intercourse to be an act of sperm donation.

[153] Those in favour of including sperm donation via sexual intercourse in assisted reproduction parentage provisions suggested that a written pre-conception agreement with independent legal advice be required. One survey respondent suggested there should perhaps be a waiting period between entering the agreement and the act of intercourse to minimize concerns of men attempting to claim they are not parents on the basis that the intercourse was for sperm donation. There was also a suggestion that an attempt be made to limit this type of arrangement to individuals not in romantic relationships.

[154] The Commission was unable to arrive at a recommendation as to whether the *CLA, 1997* should include sperm donation via sexual intercourse in its assisted reproduction provisions. If, however, the Government decides it should be included, the Commission recommends that a written pre-conception agreement and independent legal advice prior to entering into the pre-conception written agreement both be requirements for such a provision to apply.

4.6 Surrogacy & Parentage

[155] Surrogacy presents a unique type of assisted reproduction where the birth mother of the child does not intend to be the legal mother of the child. Hetero-sexual couples, same-sex couples, and men and women who intend to parent as single parents may all use surrogates. The genetic contribution of the intended parents may vary. In addition, the genetic contribution of the birth mother differs between a gestational surrogate (no genetic contribution) and a traditional surrogate (contributes the ovum). Surrogates may be single or partnered. Gestational

surrogacy will always involve a medical clinic, however a traditional surrogacy does not necessarily require the services of a medical clinic.

[156] Each of the Canadian jurisdictions that have addressed surrogacy and parentage describe the surrogate as the birth mother or parent of the child.¹⁶⁸ The jurisdictions then set out procedures for transferring or relinquishing parentage to the intended parents (and provisions ensuring the partner of the surrogate is not deemed a parent of the child). None of the jurisdictions in Canada has prioritized intention over gestation by deeming the intended parents to be the only parents of the child upon the birth of the child and not requiring the consent of the surrogate to the transfer of parentage following the birth. The discussion in this section will follow this same model; whether this model should be followed will be discussed in more detail under part 4.3.iii (enforceability of surrogacy agreements).

[157] In Alberta, one of the intended parents must have a genetic link to the child in order for the surrogacy provisions of the *AB FLA* to apply. Clause 8.2(1)(b) specifies that an application can be made to the court for a declaration that a person whose human reproductive material was used in the assisted reproduction is a parent of the child. Subsection 8.2(6) requires the court to make the declaration if the court is satisfied that the child was born with the use of human reproductive material from the intended parent. The non-genetically related intended parent would then be deemed a parent under the general assisted reproduction presumptions of parentage provisions.¹⁶⁹ Both intended parents are then deemed to be the parents at and from the time of the birth of the child.¹⁷⁰

[158] In British Columbia, the intended parents are the parents of the child on the birth of the child if after the child's birth the surrogate gives written consent to surrender the child to the intended parents and the intended parents take the child into their care.¹⁷¹ There is no requirement that either of the intended parents be genetically related to the child. The *BC FLA* contemplates the death of the intended parents after conception, providing that the deceased intended parents are the child's parents if the surrogate gives written consent to surrender the

¹⁶⁸ *BC FLA*, *supra* note 50 at s. 29(2)(b); *AB FLA* *supra* note 55 at s. 8.1. Section 6(1) of Ontario's *CLRA*, *supra* note 60 states: "The birth parent of a child is, and shall be recognized in law to be, a parent of the child" and s. 6(2) provides that s. 6(1) is subject to the relinquishment of an entitlement to parentage by a surrogate under the Act or a court declaration to that effect. Section 4 of Nova Scotia's *Birth Registration Regulations*, *supra* note 71 requires the woman who gives birth to a child to be recorded as the mother of the child.

¹⁶⁹ Section 8.1(2)(b) of the *AB FLA*, *supra* note 55 applies if the birth mother is a surrogate, and the child was created with the male intended parent's gametes: the male intended parent's partner will be considered a parent of the child if they were married to or in a conjugal relationship of interdependence of some permanence with the male person at the time of the child's conception and if they consented to be a parent of the child born as a result of assisted reproduction and did not withdraw the consent prior to conception. Section 8.1(3)(b) is a similar provision in the event the child was created with the intended mother's gametes.

¹⁷⁰ *AB FLA*, *supra* note 55 at s. 8.2(7).

¹⁷¹ *BC FLA*, *supra* note 50 at s. 29(3).

child to the personal representative or other person acting in the place of the deceased intended parents.¹⁷²

[159] In Ontario, there can be up to four intended parents of a child born through a surrogacy agreement, without any need for a court declaration. If there are to be more than four intended parents, any party to the surrogacy agreement may apply to the court for a declaration of parentage within one year of the child's birth.¹⁷³ The intended parents will be the parents of the child (and the surrogate will cease to be a parent of the child) once the surrogate provides written consent to relinquish her entitlement to parentage after the birth (this consent cannot be given before the child is seven days old).¹⁷⁴ The *ON CLRA* requires there to have been a pre-conception written agreement and for each party to have received independent legal advice prior to entering into the agreement.¹⁷⁵ During the seven day period after the child is born, the surrogate and the intended parents share the rights and responsibilities of a parent.¹⁷⁶

[160] Nova Scotia's *Birth Registration Regulations*¹⁷⁷ allows the intended parents to apply to the court for a declaratory order with respect to the parentage of the child. The surrogacy arrangement must have been initiated by the intended parents and planned before conception, and one of the intended parents must have a genetic link to the child. The Court may order that the surrogate mother's name be removed from the birth registration, and that the names of the intended parents be added.

[161] The *Uniform Act* allows the intended parent(s) to apply for a declaratory order of parentage if at least one of the applicants provided the human reproductive material or embryo, the other applicant was married to or in a common-law partnership with the genetically related applicant, the applicants consented to be the parents of a child born as a result of assisted reproduction, and the surrogate consented to relinquish her entitlement to be a parent after the birth of the child.¹⁷⁸ The surrogate and the applicant jointly have the rights and responsibilities of a parent from the time the surrogate gives the required consent until an order is made, however once an order is made, it is deemed effective from birth.¹⁷⁹ The commentary to this provision explains that requiring the surrogate's consent after the birth is:

[c]onsistent with the principle that the birth mother is always the legal mother of the child at the time of the birth. It allows for legal certainty immediately following the birth so that there is a

¹⁷² *Ibid* at s. 19(5).

¹⁷³ *ON CLRA*, *supra* note 60 at s. 11(1). Section 11(2) stipulates that the application cannot be made until the child is born, and unless the court orders otherwise, after the child's first birthday.

¹⁷⁴ *Ibid* at s. 10(3)-(4). If the surrogate fails to consent (either because she refuses, is deceased, or cannot be located), any party to a surrogacy agreement may apply to the court for a declaration of parentage (s. 10(6)).

¹⁷⁵ *Ibid* at s. 10(2).

¹⁷⁶ *Ibid* at s. 10(5).

¹⁷⁷ NS Reg 290/2007.

¹⁷⁸ *Uniform Act*, *supra* note 91 at s. 8.

¹⁷⁹ *Ibid* at s. 8(8) and (10).

legal parent who can provide consent to medical treatment for the child before court declarations can issue with respect to the intended parents, and for the possibility that the surrogate may change her mind following the establishment of a gestational link to the child that has resulted in an emotional attachment between the birth mother and the child.¹⁸⁰

[162] The New Zealand Law Commission has suggested that the intended parents should be able to obtain a pre-birth interim order granting them legal parentage over the child. The order would become final 21 days after the child's birth upon the provision of evidence that at least one of the intended parents is genetically related to the child, and providing that the surrogate did not petition the court to overturn the interim order.¹⁸¹ The Commission also recommended that if a dispute as to the child's parentage arises within the 21 days after the child's birth, the court should determine the parentage of the child according to the best interests of the child.¹⁸² If the parties did not obtain a pre-birth interim order, the Commission recommended there be a 6 month window whereby parentage can be transferred to the intended parents other than by adoption. The Commission suggested that the court should make the order extinguishing the parental status of the surrogate and granting parentage to the intended parents if satisfied that: the surrogate is over 18 years old and already has one child, the child is a genetic child of at least one of the intending parties, the surrogacy was altruistic, the intended parents and the surrogate have had separate and joint counselling, the surrogate mother and her partner have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having had independent legal advice, and, making the order is in the best interests of the child.¹⁸³

[163] The Victorian Law Reform Commission considered whether the intended parents should be deemed the child's parents from birth, as opposed to requiring parentage to be transferred from the birth mother to the intended parents. The Commission recommended against such an approach on the basis that:

[t]here are sufficient complexities in surrogacy arrangements to justify a cautious approach when dealing with legal parentage. The welfare of the child must be the paramount consideration and the interests of both the commissioning parents and the surrogate must be protected. For this reason, the Commission has concluded that the transfer of legal parentage from the surrogate to the commissioning couple should not be automatic. Instead, it should involve a process which

¹⁸⁰ *Uniform Act, supra* note 91 at commentary to s. 8.

¹⁸¹ New Zealand Report, *supra* note 97 at 93.

¹⁸² *Ibid* at 94. The Commission suggests the court should take the following into consideration when determining the best interests of the child: the genetic relationships between child and adults, the gestational relationship between child and adult, the intentions of all parties, the sibling relationships of the child, the comparative potential ability of each of the parties to be fit and proper parents of the child, the ability of each of the parties to facilitate the child's relationships with the other parties, should that be considered by the court to be desirable, and whether issues could be resolved by guardianship and parenting orders, rather than declarations of legal parenthood in relation to each of the parties.

¹⁸³ New Zealand Report, *supra* note 97 at 94.

treats the surrogate as the parent of the child and requires all parties to meet certain specified criteria before legal parentage can be transferred.¹⁸⁴

4.6.i *Gestational vs Traditional Surrogacies*

[164] In a gestational surrogacy, the birth mother is not genetically related to the child; the link between the surrogate and the child is one of gestation only. In a traditional surrogacy, the birth mother has donated her own ova to conceive the child, and thus the surrogate is linked genetically and gestationally to the child.

[165] None of the surrogacy specific parentage statutory provisions in Canada distinguish between gestational and traditional surrogacies. Notably, most of the states in the United States that permit surrogacy only permit gestational surrogacy agreements.¹⁸⁵

[166] The *UPA (2017)* regulates gestational and traditional surrogacies differently. Under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child on the child's birth, and neither the surrogate nor the surrogate's spouse is considered to be parent of the child.¹⁸⁶ A party to a gestational surrogacy agreement may, before, on, or after the birth of a child conceived by assisted reproduction apply for a court order declaring that:

- each intended parent is a parent of the child and ordering that parental rights and duties vest immediately on the birth of the child exclusively in each intended parent;
- the gestational surrogate and the surrogate's spouse or former spouse, if any, are not the parents of the child;
- designating the content of the birth record in accordance with state law to designate each intended parent as a parent of the child;
- the court record be not open to inspection.¹⁸⁷

[167] Traditional surrogates are entitled to withdraw their consent to surrender the child to the intended parents up until 72 hours after birth. In cases of traditional surrogacy, the *UPA (2017)* provides that the court shall order that each intended parent is a parent of the child, and the surrogate and her partner are not parents of the child, provided the traditional surrogacy agreement was validated by a court and provided the surrogate does not withdraw her consent in the 72 hours following the birth of the child.¹⁸⁸ If the traditional surrogate withdraws her consent within 72 hours, the parentage of the child will be determined under the non-assisted reproduction parentage provisions of the *UPA (2017)*.

¹⁸⁴ Victorian Report, *supra* note 103 at 188.

¹⁸⁵ *UPA (2017)*, *supra* note 120 at commentary to Article 8.

¹⁸⁶ *Ibid* at s. 809(a) and (b).

¹⁸⁷ *Ibid* at s. 811(a).

¹⁸⁸ *Ibid* at s. 815(a).

[168] If the traditional surrogacy agreement was not validated by the court prior to conception, the court may validate the agreement before the birth of child provided all parties agree.¹⁸⁹ If the agreement was not validated prior to birth and the surrogate withdraws her consent within 72 hours of the birth, the child's parentage will be determined under the non-assisted reproduction parentage provisions of the *UPA (2017)*.¹⁹⁰ If the agreement was not validated prior to birth and the surrogate does not withdraw her consent within 72 hours, the traditional surrogate is not automatically a parent, and the court must determine parentage based on the best interests of the child the intent of the parties at the time of execution of the agreement.¹⁹¹

4.6.ii Genetic Link to Intended Parent(s)

[169] It is possible for a child being carried by a surrogate to be genetically related to one, both, or neither of the intended parents. There is variation between the jurisdictions that have considered this issue as to whether a genetic link is required to at least one of the intended parents for their surrogacy parentage provisions to be applicable. In jurisdictions where a genetic link to the child is required for the surrogacy provisions to be applicable, non-genetically related intended parents would have to adopt to be declared parents.

[170] As discussed above, in Alberta, one of the intended parents must have a genetic link to the child for the surrogacy provisions of the *AB FLA* to apply. The non-genetically related intended parent would then be deemed a parent under the general assisted reproduction presumptions of parentage provisions.¹⁹² Nova Scotia also requires that one of the intended parents have a genetic link to the child.¹⁹³

[171] In British Columbia there is no requirement that either of the intended parents be genetically related to the child. The *White Paper on Family Relations Act Reform* states that the majority of respondents did not think the requirements for intended parents to become parents should differ if neither of the intended parents are genetically related to the child.¹⁹⁴ Ontario also does not require that one of the intended parents be genetically related to the child.

¹⁸⁹ *Ibid* at s. 816(b).

¹⁹⁰ *Ibid* at s. 816(c).

¹⁹¹ *Ibid* at s. 816(d).

¹⁹² Section 8.1(2)(b) of the *AB FLA*, *supra* note 55 applies if the birth mother is a surrogate, and the child was created with the male intended parent's gametes: the male intended parent's partner will be considered a parent of the child if they were married to or in a conjugal relationship of interdependence of some permanence with the male person at the time of the child's conception and if they consented to be a parent of the child born as a result of assisted reproduction and did not withdraw the consent prior to conception. Section 8.1(3)(b) is a similar provision in the event the child was created with the intended mother's gametes.

¹⁹³ *Birth Registration Regulations*, *supra* note 177 at s. 5(2)(e).

¹⁹⁴ *BC White Paper*, *supra* note 123 at 30.

[172] The *Uniform Act* requires a genetic link to at least one of the intended parents in order for a court to make a declaration of parentage where a surrogate has been used.¹⁹⁵ The commentary to this provision states:

Where there is no possible genetic link between at least one of the intended parents and the child, adoption is the appropriate path to parenthood...Alternatively, a court may make a declaration of parentage....

An option considered and rejected would have expanded this section to cover surrogacy without a genetic link between either of the intended parents and the child. The concern is that this approach could circumvent public policy around adoption and create an inconsistent approach to protecting the best interests of the child. While it could be argued that this approach can be distinguished from an adoption based on the presence of the intent to parent prior to conception, this seems a narrow distinction.

[173] The New Zealand Law Commission recommended requiring there to be a genetic link to at least one intended parent, explaining:

Genetic connection is a value underlying legal parenthood laws, although the law has never created an exclusivity between parenthood and genetics. Rather it has formulated reallocation rules based on the degree of genetic connection between the child and the intending parents. Where neither intending parent will be the genetic parent of the child the state screens the parents to ensure their suitability. It is protective of the child's vulnerability in the absence of a genetic connection. Where there is a genetic connection between both parents and the child, the law allocates parenthood automatically.¹⁹⁶

[174] The Commission recommended that intended non-genetically related parents be required to undergo the same process and requirements as apply to an adoption, including screening for suitability.¹⁹⁷

[175] In contrast, the Victorian Law Reform Commission did not recommend that a genetic link be required. The Commission stated that a genetic link is preferred, but was of the view that people should not be excluded from using a surrogate if they are unable to contribute their own gametes.¹⁹⁸ The Commission did, however, recommend that there be mandatory counselling prior to the assisted conception procedure occurring at the clinic, and that the counselling include an assessment of the intended parents.¹⁹⁹ If the surrogacy was a traditional surrogacy done outside of a clinic setting, the Commission recommended that the intended parents be required to adopt the child.²⁰⁰

¹⁹⁵ *Uniform Act*, *supra* note 91 at s. 8(3)-(5).

¹⁹⁶ New Zealand Report, *supra* note 97 at para 3.18.

¹⁹⁷ *Ibid* at para 7.67.

¹⁹⁸ Victorian Report, *supra* note 103 at 15.

¹⁹⁹ *Ibid* at 179.

²⁰⁰ *Ibid* at 190.

[176] Arguments in favour of requiring a genetic link between the child and at least one of the intended parents reflects a concern that adoption processes may be circumvented. It is theoretically possible that individuals could claim they had a surrogacy agreement in place with a pregnant woman to allow them to claim the baby upon birth without going through the regular adoption procedures which require an extensive screening process. Arguments against requiring there to be a genetic link are based on the existence of a pre-conception intent to parent the child which differs from an adoption, a recognition that the (gestational) surrogate is also not genetically related to the child, and equality concerns raised by requiring intended parents who are unable to contribute genetic material at a disadvantage. As stated by the Manitoba Law Reform Commission:

In many ways, however, it seems incongruous to connect legal parentage solely to a genetic link, particularly when the surrogate mother will most often also have no genetic link to the child. All genetic parents may be unknown. Arguably, it also contravenes the principle that children should have equal status and protections regardless of the circumstances of their conception and certainty of status at the earliest reasonable time.²⁰¹

The Manitoba Law Reform Commission did not, however, reach a conclusion on this issue.²⁰²

4.6.iii *Recommendations*

[177] The Commission asked the following questions in the Consultation Paper:

- What presumptions of parentage should apply to a surrogacy?
- Should there be different presumptions of parentage and procedures for traditional and gestational surrogacies? If so, how should the presumptions differ?
- Should the presumptions of parentage for a surrogacy apply to a surrogacy where neither intended parent has a genetic link to the child, or should that situation be subject to adoption procedures?

[178] The majority of the survey responses on this question suggested Saskatchewan should adopt either the BC, ON or Uniform Act approach; the surrogate should be considered a parent of the child until she relinquishes the child to the intended parents. The need for Saskatchewan to follow a similar approach to other jurisdictions was emphasized by some consultees to ensure uniformity and discourage “birth place-forum shopping.” Consultees also mentioned the importance of ensuring the intended parents are recognized as parents upon the birth of the child.

[179] Several members of the Working Groups suggested that the surrogate and the intended parents should all be listed on the birth registration as parents of the child and share decision making for the child until the surrogate consents to relinquish her status as a parent. Other

²⁰¹ Manitoba Report, *supra* note 2 at 35.

²⁰² *Ibid* at 37.

members of the Working Groups were, however, of the view that only the intended parents should be parents of the child where a gestational surrogate carries the child, as this more accurately reflects the pre-conception intention of both the surrogate and the intended parents. Several members of the Working Groups were concerned about eliminating the possibility of intended parents not having any parental obligations to the child if they refused to take the child into their custody after the birth.

[180] Most consultees were of the view that there should not be a distinction between traditional and gestational surrogacies in the parentage provisions of the *CLA, 1997*. Several individuals mentioned that it would be illogical to treat the two differently and have increased procedural requirements in a traditional surrogacy situation merely on the basis that the surrogate donated her ovum and gestated the child, as donors should not be treated as parents. In other words, the combination of gestation and donation should not supersede the pre-conception intent of the traditional surrogate to donate her egg, and also to gestate the fetus, to assist intended parents in creating their family.

[181] Survey responses were nearly split on whether there should be a genetic link to at least one of the intended parents in order for a surrogacy parentage provision to be relied on. During consultations with various law firms, there was more support for not requiring a genetic link to either of the intended parents in a surrogacy parentage provision. Several individuals recognized that while the absence of a genetic link to the child is similar in a sense to an adoption, they distinguished a surrogacy from a traditional adoption on the basis of the pre-conception intent of the intended parents and the surrogate. Several individuals also expressed an opinion that it would be unfair to distinguish between intended parents who can and who cannot provide their own genetic material, with the latter being required to go through an adoption process.

[182] The Commission recommends there be no distinction in the *CLA, 1997* between traditional and gestational surrogacies, in order to ensure harmonization with other Canadian jurisdictions.

[183] The Commission recommends the *CLA, 1997* include surrogacy-specific parentage provisions similar to those found in Ontario's *CLRA*. The intended parent(s) should be the parent(s) of the child (and the surrogate will cease to be a parent of the child) once the surrogate provides written consent to relinquish her entitlement to parentage after the birth. The Commission does not, however, recommend that Saskatchewan prohibit the surrogate from giving her consent until 7 days after the birth, similar to Ontario. The provision should require a pre-conception written agreement and for each party to have received independent legal advice prior to entering into the agreement.

[184] The Commission recommends there be no requirement for there to be a genetic link between the child and one of the intended parents in order for the surrogacy parentage provisions to apply, in order to ensure harmonization with other Canadian jurisdictions and to ensure intended parents are treated equitably.

4.7 Procedure for Determining Parental Status

4.7.i Timing of Procedure: Pre or Postnatal

[185] The timing of the procedure for determining parentage is connected in a sense to the enforceability of surrogacy agreements. In jurisdictions that render surrogacy agreements unenforceable, the procedure for determining parentage must happen after the birth of the child.

[186] In Alberta, the application for a declaration of parentage must be made to the court within 30 days of the birth of the child.²⁰³ In British Columbia, the surrogate must provide written consent after the child's birth to surrender the child, and thus the procedure is postnatal. This provision reflects the *White Paper on Family Relations Act Reform*, which states that the majority of commenters were of the view that the process should occur after the child's birth.²⁰⁴

[187] In Ontario, the procedure is postnatal, and the surrogate is, notably, not able to consent to relinquishing their entitlement to parentage of the child before the child is seven days old.²⁰⁵ This seven day window reflects the adoption requirements in Ontario.

[188] The *Uniform Act* requires the consent of the surrogate to relinquish her parentage after the birth of the child. The application for a declaration of parentage must be made within 30 days of the birth of the child.²⁰⁶

[189] Nova Scotia's provision is unique in that it does not specifically provide that the application must be brought postnatally, and the section does not appear to require the child to have been born prior to the intended parents bringing the application for a declaratory order regarding parentage. Subsection 5(2) of the *Birth Registration Regulations* provides as follows:

On application by the intended parents in a surrogacy arrangement, the court may make a declaratory order with respect to the parentage of the child if all of the following apply:

- a) The surrogacy arrangement was initiated by the intended parents;
- b) The surrogacy arrangement was planned before conception;
- c) The woman who is to carry and give birth to the child does not intend to be the child's parent;
- d) The intended parents intend to be the child's parents;
- e) One of the intended parents has a genetic link to the child.

[190] The New Zealand Law Commission recommended that the parties should be able to obtain a pre-birth interim court order determining legal parentage that would become final 21 days after birth, so long as the surrogate does not petition the court to overturn the interim order and proof

²⁰³ *AB FLA*, *supra* note 55 at s. 8.2(4).

²⁰⁴ *BC White Paper*, *supra* note 123 at 30.

²⁰⁵ *ON CLRA*, *supra* note 60 at s. 10(4).

²⁰⁶ *Uniform Act*, *supra* note 91 at s. 8.

of the genetic link to one of the intended parents has been provided to the court.²⁰⁷ At this point, the legal parenthood of the surrogate and her partner would be extinguished. If the parties failed to obtain a pre-birth order, the Commission recommended there be a six-month window during which the intended parents could obtain legal parentage without going through the adoption process.²⁰⁸

[191] The Victorian Law Reform Commission recommended a 28-day waiting period before applications for declarations of parentage could be made.²⁰⁹

[192] The *UPA (2017)* allows any party to a gestational surrogacy agreement to apply for a court order declaring parentage of the child in cases of gestational surrogacies. As the *UPA (2017)* deems the intended parents and not the gestational surrogate and her partner to be the parents of the child, this order can be sought before, on, or after the birth of the child.²¹⁰ The court can issue an order or judgment under this section before the birth of the child, however the order cannot be enforced until the birth of the child.²¹¹

[193] In cases of traditional surrogacy, the *UPA (2017)* provides that each intended parent is a parent of the child provided the traditional surrogacy agreement was validated by a court and provided the surrogate does not withdraw her consent in the 72 hours following the birth of the child.²¹² This procedure would occur after the birth of the child.

4.7.ii *Type of Procedure: Administrative or Judicial*

[194] One argument for requiring a degree of oversight for the transfer of parentage from a surrogate to the intended parents is that having a court involved reduces the potential for surrogates to be exploited. On the other hand, others have argued that requiring a court process to transfer parentage imposes needless costs on intended parents and renders the process overly complex.

[195] In Alberta, the procedure to transfer parentage of the child from the birth mother to the intended parents is a judicial procedure. Subsection 8.2(1) of the *AB FLA* allows an application to be made to the court for a declaration that the surrogate is not a parent to the child and that a person whose human reproductive material was used is a parent of the child. Nova Scotia's and Newfoundland and Labrador's surrogacy provisions also require a court application.²¹³

²⁰⁷ New Zealand Report, *supra* note 97 at 93.

²⁰⁸ *Ibid* at 94.

²⁰⁹ Victorian Report, *supra* note 103 at 188.

²¹⁰ *UPA (2017)*, *supra* note 120 at s. 811(a).

²¹¹ *Ibid* at s. 811(b).

²¹² *Ibid* at s. 815(a).

²¹³ Section 5 of the *Birth Registration Regulations*, *supra* note 71; *Vital Statistics Act*, 2009, SNL 2009, c V-6.01at s. 5(6).

[196] The *Uniform Act* also requires a court order of a declaration of parentage when surrogacy is used. The commentary on this point provides:

While it was initially contemplated that jurisdictions could decide whether court oversight or an administrative process was needed for parentage of intended parents, the Uniform Act requires a court declaration to ensure certainty of process. However, jurisdictions may wish to choose to allow the transfer of parentage to occur administratively through a registration process rather than require a court application.²¹⁴

[197] Neither British Columbia nor Ontario require the intended parents of a child born through surrogacy to apply to a court for an order or declaration of parentage. In British Columbia, provided the requirements of s. 29 are met, the intended parents can file a statutory declaration with the British Columbia Vital Statistics Agency to have the child's birth certificate amended. The British Columbia White Paper notes that most respondents preferred an out-of-court option as opposed to a court proceeding for allowing the intended parents to become legal parents.²¹⁵

[198] Ontario also allows intended parents to register a child born to a surrogate by filling out certain forms. Both the intended parents²¹⁶ and the surrogate²¹⁷ are required to fill out statutory declarations, in addition to completing the statement of live birth. The statutory declaration by intended parents form requires the intended parent(s) (note that there can be up to four intended parents) to declare that:

- They entered into a surrogacy agreement prior to the conception of the child;
- They received independent legal advice before entering into the surrogacy agreement;
- The child was conceived through assisted reproduction;
- They have complied with all relevant surrogacy requirements in the *CLRA* and the *Vital Statistics Act*;
- They agree that each intended parent is recognized in law to be a parent of the child; and
- They agree that the surrogate's consent to relinquish any entitlement to parentage of the child was not provided until at least seven days after the birth of the child.

Ontario's statutory declaration for surrogates requires the surrogate to declare that:

- She entered into a surrogacy agreement prior to the conception of the child;
- She received independent legal advice before entering into the surrogacy agreement
- The child was conceived through assisted reproduction;
- She has complied with all relevant surrogacy requirements in the *CLRA* and the *Vital Statistics Act*;

²¹⁴ *Uniform Act*, *supra* note 91 at commentary to s. 8.

²¹⁵ *BC White Paper*, *supra* note 123 at 30.

²¹⁶ The statutory declaration for the intended parents can be found online at: Ontario Central Forms Repository, <<http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&SRCH=1&ENV=WWE&TIT=11333&NO=007-11333E>>.

²¹⁷ The statutory declaration for a surrogate can be found online at: Ontario Central Forms Repository <<http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&SRCH=&ENV=WWE&TIT=11334&NO=007-11334E>>.

- She consents to relinquish any and all entitlement to parentage of the child; and
- Her consent to relinquish any and all entitlement to parentage of the child was not provided until at least seven days after the birth of the child.

[199] This aspect of Ontario’s surrogacy provisions has been questioned by some commentators, who argue that removing judicial oversight for surrogacy leaves room for coercion and fraud.²¹⁸ Sara Cohen, a lawyer specializing in fertility law, suggests that judicial oversight is preferable and necessary for both traditional and gestational surrogacies, stating:

I have had potential clients come in for a meeting requesting that I assist them with a declaration of parentage for an alleged traditional surrogacy where the “surrogate” is about to give birth. When I advise that DNA testing will be required and that a court process will be involved, the potential clients admit that this is not in fact a surrogacy arrangement but that they found a pregnant woman who supposedly wants to relinquish her child and they would like to become the child’s parents without going through Ontario’s adoption process...Although the vast majority of intended parents conduct themselves ethically and appropriately, it is naïve and unrealistic to fail to recognize how desperate some people are to have children, and that some women are in fact vulnerable.²¹⁹

Cohen suggests that if there is to be no judicial oversight, then a middle ground option, such as the procedure followed in Illinois, would be preferable to a purely administrative procedure. In Illinois, the intended parents register the child’s birth as the child’s legal parents with the consent of the surrogate. Each party must have counsel that certifies they received independent legal advice and a written agreement was required. The medical clinic that performed the *in vitro* fertilization must also certify that the child is not related to the surrogate and was conceived through assisted reproduction. Illinois does not have a process in place to transfer parentage without an adoption in the case of traditional surrogacy.²²⁰

[200] The Manitoba Law Reform Commission stated it favoured “provisions for establishing parentage that do not depend on court processes in the context of surrogacy arrangements.”²²¹ Both the New Zealand Law Commission and the Victorian Law Reform Commission recommended there be judicial oversight over the transfer of parentage.

[201] The Quebec Advisory Committee on Family Law recommended there be two methods for intended parents to be deemed parents of a child born through surrogacy: an administrative process provided certain requirements are met, and a judicial route where the formalities were not fulfilled.²²² The requirements for the administrative route would include: recording the

²¹⁸ Sara R. Cohen, “The All Families are Equal Act is Problematic for Surrogacy in Ontario. Here’s Why” 95 October 2016), online: Fertility Law Canada, < <http://www.fertilitylawcanada.com/fertility-law-canada-blog/the-all-families-are-equal-act-is-problematic-for-surrogacy-in-ontario-heres-why>>.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ Manitoba Report, *supra* note 2 at 36.

²²² Stefanie Carsley, “Reconceiving Quebec’s Laws on Surrogate Motherhood” (2018) Can Bar Rev 121 at 146.

parental project in a notarial act *en minute* prior to conception;²²³a requirement that the surrogate and intended parents meet with a professional from a *centre jeunesse* to discuss the psychosocial consequences and ethical issues involved with the surrogacy arrangement (each party would have to attest to attending these sessions to the notary); and the consent of the surrogate following the birth to relinquish the child.²²⁴ After the birth of the child, the birth mother would be required to consent to giving up the child in writing before two witnesses or in a notarized document. The intended parents would then sign a joint declaration of birth which would be given, in addition to the notarial act, to the registrar or civil status within 30 days of the birth. After 30 days, and provided the surrogate does not withdraw her consent, the registrar would issue the child's birth certificate listing only the intended parents as parents.²²⁵ If these requirements were not met, the Committee recommended there be a judicial route where the parties would be required to demonstrate that their parental project existed prior to conception in order to show they parties are not attempting to circumvent Quebec's adoption laws.²²⁶

[202] Stefanie Carsley states that while these recommendations are an improvement over article 541, some problems remain:

The *Comite's* recommendations would continue to prevent intended mothers and some intended fathers from obtaining parental status if the surrogate changes her mind during pregnancy or revokes her consent within 30 days of the birth. An intended father who used his sperm to conceive could be recognized as a parent. However, an intended mother still could not, even if she has a genetic link to the child. An intended father's same-sex spouse would also be unable to obtain legal status.

The proposed 30-day window in which a surrogate can revoke her consent following the birth also does not accord with the report's recommendation to move away from the adoption model in surrogacy cases. This period for revocation mirrors the approach taken in Quebec towards child adoption, and does not account for differences between adoption and surrogacy with respect to the birth mother's intentions and decision-making, which might warrant distinct legal responses. A surrogate mother – unlike a birth mother who places a child for adoption – becomes pregnant with the intention of carrying a child for another individual or couple. It is questionable whether a surrogate ought to be able to revoke her consent in the same manner as a birth mother and for the same period, given this difference.²²⁷

[203] The *UPA (2017)* requires judicial oversight in the case of traditional surrogacies (both when the agreement is entered into, and to declare the intended parents as parents of the child), but not in the case of gestational surrogacies (although the parties to a gestational surrogacy agreement) may apply to the court for an order declaring parentage over the child.

²²³ *Ibid* at 146. An act *en minute* is defined in the *Notaries Act*, CQLR c N-3 as “an act that a notary must deposit or preserve in his or her notarial records, and from which authentic copies or extracts may be issued.”

²²⁴ *Ibid* at 146.

²²⁵ *Ibid* at 147.

²²⁶ *Ibid*.

²²⁷ *Ibid*. at 150.

4.7.iii *Procedural Requirements*

[204] Currently in Saskatchewan, a court order is required to remove the surrogate from the birth certificate, and to add one or both of the intended parents on to the birth certificate. As discussed above, if the intended father's genetic material was used to create the embryo, the intended father can be listed on the registration of live birth and he will then be on the birth certificate as the child's father. The intended father's partner could also be listed on the registration of life birth as "other parent". Once the birth certificate has been acquired by the intended parents, a declaration can then be sought to remove the surrogate from the birth certificate. This process typically takes months and costs several thousand dollars.

[205] Alberta requires the consent of the surrogate, in a form provided for in the regulations, in order for a court to make a declaration that the surrogate is not the mother and that the intended parent is a parent to the child carried by the surrogate.²²⁸ Clause 8.2(8)(b) states that surrogacy agreements may not be used as evidence of consent of the surrogate to the application for a declaration that she is not the birth mother. A written pre-conception surrogacy agreement is not required.

[206] For British Columbia's surrogacy parentage provision (s. 29 of the *BC FLA*) to apply, there must be a written agreement entered into pre-conception between the intended parents and the surrogate. The agreement must provide that the surrogate will be the birth mother and on the child's birth, the surrogate will not be a parent of the child, the surrogate will surrender the child to the intended parents, and the intended parents will be the child's parents. Once the child is born the intended parent is the child's parent if the following conditions are met:

- a) before the child is conceived, no party to the agreement withdraws from the agreement;
- b) after the child's birth,
 - i. the surrogate gives written consent to surrender the child to an intended parent or the intended parents,²²⁹ and
 - ii. an intended parent or the intended parents take the child into his or her, or their, care.²³⁰

[207] Ontario's surrogacy parentage provision applies if there is a written pre-conception surrogacy agreement in which the surrogate agrees not to be a parent of the child and each other party to the agreement (the section allows for up to four intended parents) agrees to be a parent

²²⁸ *AB FLA*, *supra* note 55 at s. 8.2(6)(b). This consent requirement may be waived if the surrogate is deceased or cannot be located after reasonable efforts have been made to locate her (s. 8.2(9)).

²²⁹ Section 29(4) of the *BC FLA*, *supra* note 50 allows the British Columbia Supreme Court to waive the consent required if the surrogate is deceased or incapable of giving consent, or cannot be located after reasonable efforts to locate her have been made.

²³⁰ *BC FLA*, *supra* note 50 at s. 29(3).

of the child.²³¹ In addition, each of the parties to the agreement must have received independent legal advice before entering into the agreement, and the child must be conceived through assisted reproduction (i.e. not through sexual intercourse).²³² The intended parents become the legal parents of the child, and the surrogate ceases to be a parent of the child, once the surrogate has given consent in writing relinquishing her entitlement to parentage.²³³

[208] Nova Scotia's provision refers to a pre-conception surrogacy arrangement as opposed to a surrogacy agreement, and there is no specific requirement that the "arrangement" be in writing. Section 5 of the *Birth Registration Regulations* provides that the Court can make the declaratory order sought by the intended parents if:

- a) the surrogacy arrangement was initiated by the intended parents;
- b) the surrogacy arrangement was planned before conception;
- c) the woman who is to carry and give birth to the child does not intend to be the child's parent;
- d) the intended parents intend to be the child's parents;
- e) one of the intended parents has a genetic link to the child.

This provision is somewhat unique in that the written consent of the surrogate to surrender the child after the birth is not specifically required. Further, it is possible that the surrogacy agreement could be used as evidence that the surrogate does not intend to be the child's parent. Finally, it appears possible that the application could be made prior to the birth of the child.

[209] Newfoundland and Labrador's *Vital Statistics Act, 2009* allows the registrar to register the intended parents of a child born through a surrogacy arrangement if an adoption order or a declaratory order regarding parentage has been made by the court under sections 6 or 7 of the *Children's Law Act* (which generally allow the court to make declarations of parentage and non-parentage for mothers and fathers). These sections do not deal specifically with surrogacy, and thus there is no legislative requirement for a written agreement, or even the consent of the surrogate mother to the application.

[210] For a court to grant the declaratory order provided for in the *Uniform Act*, the court must be satisfied that:

- the child was born as a result of assisted reproduction;
- at least one of the applicants provided the human reproductive material or embryo used in the assisted reproduction;
- the other applicant (if there is more than one) was married to or in a common-law partnership with the person who provided the human reproductive material or embryo

²³¹ *ON CLRA*, *supra* note 60 at s. 10(2).

²³² *Ibid* at s. 10(2).

²³³ *Ibid* at s. 10(3). Section 10(4) sets out that this consent cannot be provided before the child is seven days old.

- the applicant(s) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent prior to the child's conception; and
- after the birth of the child, the surrogate consented, in the prescribed form, to relinquish her entitlement to be a parent of the child, and to the application.²³⁴

The *Uniform Act* does not explicitly require a written surrogacy agreement, however, a written surrogacy agreement would be useful in demonstrating that the applicants consented to be parents to a child born from a surrogate.

[211] The British Columbia Supreme Court has commented as follows on the importance of having a written surrogacy agreement in place:

The requirement of a written agreement has the salutary effect of clearly setting out the expectations and intentions of the parties before the conception of a child which, together with a child's birth, is definitely an emotional and life-changing event...A lack of a written agreement raises the risk that a surrogate mother will have a change of heart and that there will be a contest concerning parentage once the child is born. The provisions in s. 29 [of the *BC FLA*] are intended to provide a clear path for all persons concerned as to what will happen upon the child's birth and what rights will arise on the part of the respective parties.²³⁵

[212] Angela Campbell states that it is not unequivocally established that surrogacy is benign to surrogates, given the potential risks to a woman's physical and psychological well-being. She also notes that there are also risks for the intended parents, and that they may be the more vulnerable party in a surrogacy arrangement in some cases. Given these risks, she suggests that:

Care must be taken to equalize, to the extent possible, the bargaining power of the parties even when the surrogate is providing services out of apparent generosity or when her co-contractor is a family member. This can be achieved through various measures such as the provision of skilled and independent legal advice as well as psychosocial counselling.²³⁶

²³⁴ *Uniform Act*, *supra* note 91 at s. 8. Section 8(12) provides that the court can waive the consent required if the surrogate is deceased, incapable of giving consent, or cannot be found after reasonable efforts have been made to locate her.

²³⁵ *Family Law Act (Re)*, 2016 BCSC 598 at para 46. In this case, the parties had a verbal traditional surrogacy agreement in place, and following the child's birth, the surrogate had surrendered custody of the child to the intended parents who then remained in their care. The surrogate recognized the intended parents as the parents of the child. At issue was whether the surrogacy parentage provision in s. 29 of the *BC FLA* could apply given that the parties had not entered into a written agreement prior to the child's conception. The Court noted that had the agreement been in writing, the conditions in s. 29 would have been fulfilled, and no court application would have been required. The Court granted a declaration of parentage declaring the intended parents to be the child's parents, and a declaration of non-parentage for the surrogate, and ordered the amendment of the child's birth registration.

²³⁶ Campbell, "Law's Suppositions", *supra* note 11 at 55.

[213] Karen Busby states that it is arguable that the surrogate's post-birth consent and judicial oversight are important safeguards against exploitation.²³⁷ Busby suggests that the absence of any indicators of surrogacy related problems in Canada explains why provincial governments that have created procedures for surrogacy related parentage determinations have not required more than consent and judicial review.²³⁸

[214] The *UPA (2017)* places several conditions on both gestational and traditional surrogacy agreements. In order to be eligible to enter into a gestational (or genetic) surrogacy agreement, the surrogate must be at least 21 years old, have previously given birth, must complete a medical evaluation and a mental-health consultation, and have independent legal representation through the surrogacy arrangement.²³⁹ Each intended parent must be at least 21 years old, complete a medical evaluation and mental-health consultation, and have independent legal representation through the surrogacy arrangement.²⁴⁰ Each intended parent, the surrogate, and the surrogate's spouse all must be parties to the agreement,²⁴¹ the surrogate and intended parents must have independent legal representation through the arrangement,²⁴² and the intended parents must pay for the surrogate's independent legal representation.²⁴³ The surrogacy agreement must be executed before any medical procedure related to the surrogacy agreement occurs.²⁴⁴ Section 804 of the *UPA (2017)* sets out the required content of a gestational or surrogacy agreement.

[215] The New Zealand Law Commission recommended that the pre-birth interim order determining legal parental status be issued if: the surrogate is over 18 years old and has already had one child, the child would be the genetic child of at least one of the intended parents, the surrogacy is altruistic, all parties have had separate and joint counselling, the surrogate mother and her partner have entered into the arrangement voluntarily and consent to the interim order after receiving independent legal advice.²⁴⁵

[216] The Victorian Law Reform Commission suggested that the courts should be able to make parentage orders in favour of the intended parents if the court is satisfied that the order would be in the best interests of the child, the application was made no earlier than 28 days after the birth and no later than 6 months after the birth of the child, the child is living with the intended parents, the parties were eligible to enter into a surrogacy arrangement, the surrogacy has been altruistic, and the surrogate consents to the order.²⁴⁶

²³⁷ Busby, *supra* note 116 at 303.

²³⁸ *Ibid.*

²³⁹ *Ibid* at s. 802(a).

²⁴⁰ *Ibid* at s. 802(b).

²⁴¹ *Ibid* at s. 803(3).

²⁴² *Ibid* at s. 803 (7).

²⁴³ *Ibid* at s. 803(8).

²⁴⁴ *Ibid* at s. 803(9).

²⁴⁵ New Zealand Report, *supra* note 97 at 93.

²⁴⁶ Victorian Report, *supra* note 103 at 188.

[217] This discussion illustrates that there are several possible procedural requirements that could be imposed on any procedure to transfer parental status to the intended parents:

- Written agreement entered into pre-conception
- Independent legal advice for both parties
- Counselling for both parties
- Consent of the surrogate post delivery
- Counselling for both parties prior to entering into the written agreement
- A finding that the transfer of parentage would be in the best interests of the child

4.7.iv *Recommendations*

[218] The Commission asked the following questions in the Consultation Paper:

- Should relinquishing/transferring parental status be possible prior to birth?
- Should relinquishing/transferring of parental status be an administrative or judicial procedure?
- What conditions or requirements should be imposed on a procedure to relinquish/transfer parental status?

[219] The majority of survey respondents stated that the surrogate should be considered a parent of the child until the child is born, and that any relinquishing or transferring of her parental status should only happen after birth. Reasons for this response included ensuring that the surrogate mother be responsible for all decisions regarding the child while in utero as these decisions will inevitably impact the surrogate and a reluctance to assign parentage (and arguably by extension, personhood) to a fetus. Uniformity with other Canadian jurisdictions was also mentioned.

[220] Most survey respondents supported an administrative procedure to reduce unnecessary burdens and lower costs for intended parents, and to ensure the parentage of the child is quickly established. Those that supported an administrative procedure would also require several safeguards be required such as a pre-conception written agreement with independent legal advice on both the agreement and the relinquishment of parentage. There was also, however, support for a streamlined judicial procedure similar to Alberta's to ensure some level oversight of the surrogacy arrangement and to ensure children are protected.

[221] Regarding potential requirements of a procedure for relinquishing or transferring parental status away from the birth parent and to the intended parents, several consultees suggested BC and Ontario's requirements would be sufficient.

[222] The Commission recommends the *CLA, 1997* incorporate an administrative type of procedure to determine the parentage following the birth of a child, similar to Ontario and British Columbia, provided certain conditions are satisfied. The intended parents and the surrogate

should each be required to complete a declaration, similar to Ontario's, indicating that they entered into a pre-conception written agreement and received independent legal advice. The surrogate will also need to indicate she consents to relinquishing her entitlement to parentage on the form. The Commission further recommends that the surrogate be required to submit a certificate of independent legal advice along with the form to vital statistics in order to add an additional measure of oversight to the administrative process. If these conditions are not met, parentage will need to be determined by a court application.

4.8 Enforceability of Surrogacy Agreements

[223] Intended parents and gestational surrogates are typically required by the assisted reproduction clinic to have entered into surrogacy agreements prior to implantation of an embryo. Traditional surrogates can conceive outside of assisted reproduction clinics, and as a result, there may or may not be a surrogacy agreement in place in cases of traditional surrogacy.²⁴⁷

[224] In addition to setting out the intentions of the parties with regards to the parentage of the child to be gestated by the surrogate, a surrogacy agreement will typically contain a variety of other provisions related to the surrogacy arrangement. For instance, surrogacy agreements may contain the following types of provisions:

- a representation from the surrogate that they are healthy, capable of carrying a child, and will not form or attempt to form a parent-child relationship;
- a representation from the surrogate's spouse that he will not make a claim of parentage;
- a provision that all parties be reasonably informed of material changes in circumstances, such as illness, change in insurance coverage etc;
- a requirement that the surrogate undergo a medical and psychological evaluation;
- an undertaking from the surrogate that she will:
 - undergo implantation of a maximum number of fertilized ova or ovum per implantation attempt;
 - deliver at a hospital;
 - renounce any presumptive rights to the child;
 - follow medical advice throughout the pregnancy;
 - give her doctor written consent to keep the intended parents informed during the pregnancy;
 - contact the intended parents at the first signs of labour;
 - instruct the hospital that the child is to be treated as the child of the intended parents;
 - allow the intended parents to make all decisions (e.g. name, medical care, discharge date from hospital) respecting the baby after delivery;

²⁴⁷ Given the potentially complex legal issues relating to the parentage of a child conceived through traditional surrogacy, most reproductive clinics in Canada will not provide *in vitro* fertilization services to a traditional surrogate (<http://www.fertilitylawcanada.com/surrogacy-law-in-canada.html>).

- cooperate with the parentage declaration court application as soon as practicable after birth;
- a provision setting out the parties' intentions as to whether the intended parents will be invited to prenatal appointments and tests, and whether the intended parents will be present at the delivery;
- a provision setting out whether travel is permitted during pregnancy, and where travel is permitted;
- provisions regarding selective reduction, early termination, miscarriages and stillbirths;
- provisions setting out which expenses will be reimbursed and to what extent (e.g., medical expenses, travel expenses, child care, maternity clothing, housekeeping, legal expenses, after birth recuperation expenses)
- a provision specifying that if the surrogate is awarded custody of the child, the surrogate will reimburse the intended parents all monies paid to her under the agreement;
- provisions dealing with the custody of the child should both or one of the intended parents die prior to delivery;
- a provision requiring everyone to update their wills;
- a provision specifying that if the intended parents separate or divorce prior to delivery, the parentage application will proceed and the intended parents will determine custody in the usual forum;
- confidentiality clauses for all parties.

[225] Even though surrogacy agreements are typically required by assisted reproduction clinics when gestational surrogates are used, Ontario, Alberta, and Quebec have each enacted provisions rendering surrogacy agreements unenforceable. Ontario's *CLRA*²⁴⁸ provides as follows in s. 10(9):

A surrogacy agreement is unenforceable in law, but may be used as evidence of,

- (a) an intended parent's intention to be a parent of a child contemplated by the agreement; and
- (b) a surrogate's intention to not be a parent of a child contemplated by the agreement.

[226] Alberta's *FLA*²⁴⁹ provides as follows in s. 8.2(8):

Any agreement under which a surrogate agrees to give birth to a child for the purpose of relinquishing that child to a person

- (a) is not enforceable,
- (b) may not be used as evidence of consent of the surrogate under subsection (6)(b) [postnatal declaration of parentage to the intended parents], and
- (c) may be used as evidence of consent for the purposes of section 8.1(2)(b)(ii) or (3)(b)(ii) [presumptions of parentage for the intended parents].

²⁴⁸*Supra* note 60.

²⁴⁹ *Supra* note 55.

[227] In Quebec, surrogacy agreements are explicitly stated to be absolutely null in Article 541 of the *Civil Code*.²⁵⁰

[228] The *BC FLA* requires a written contract between the intended parents and the surrogate in order to transfer parentage to the intended parents after the child is born.²⁵¹ The surrogate's consent is also required to transfer parentage to the intended parents.²⁵² However, the *BC FLA* provides that the agreement cannot be used as evidence of the surrogate's consent to transfer legal parentage, but instead can be used as evidence of the intentions of the intended parents with respect to the child's parentage if a dispute arises after the child's birth.²⁵³

[229] The *Uniform Act* also states that surrogacy agreements are unenforceable,²⁵⁴ and may not be used as evidence of consent for the purposes of establishing the surrogate's consent to relinquish her entitlement to parentage.²⁵⁵ The surrogacy agreement can, however, be used as evidence of the intended parent's consent to be parents of a child born as a result of assisted reproduction (for the purposes of a declaration of parentage in a surrogacy situation).²⁵⁶ The commentary to this provision states succinctly: "It is not consistent with public policy or with the court's overarching *parens patriae* responsibilities to allow surrogacy contracts to be enforceable."²⁵⁷

[230] The *UPA (2017)*, in contrast, specifically provides that gestational surrogacy agreements meeting certain requirements are enforceable.²⁵⁸ Section 812 sets out the ways in which a gestational surrogacy agreement may or may not be enforced:

- if the gestational surrogacy agreement does not comply with the requirements for enforceability (ie the conditions for entering into an agreement, and the content of the agreement), the court shall determine the rights and duties of the parties consistent with the intent of the parties at the time of execution;

²⁵⁰ *Civil Code*, *supra* note 64 at art 541.

²⁵¹ Section 29 of the *BC FLA*, *supra* note 50 sets out the rules for determining parentage if there is a surrogacy arrangement. Pursuant to s. 29(2), the section applies if:

- (a) Before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and
- (b) The agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth,
 - i. The surrogate will not be a parent of the child,
 - ii. The surrogate will surrender the child to the intended parent or intended parents, and
 - iii. The intended parent or intended parents will be the child's parent or parents.

²⁵² *BC FLA*, *supra* note 50 at s. 29(6).

²⁵³ *Ibid* at s. 29(6).

²⁵⁴ *Uniform Act*, *supra* note 91 at s. 11(a).

²⁵⁵ *Ibid* at s. 11(b).

²⁵⁶ *Ibid* at s. 11(c).

²⁵⁷ *Ibid* at commentary to s. 8.

²⁵⁸ *UPA (2017)*, *supra* note 120 at s. 812.

- specific performance is not a remedy available for breach of a gestational surrogate of a provision in the agreement that the gestational surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures;
- if an intended parent is determined to be a parent of the child, specific performance is available for:
 - a breach by the gestational surrogate which prevents the intended parent from exercising immediately on birth of the child the full rights of parentage; or
 - a breach by the intended parent which prevents the intended parent's acceptance, immediately on birth of the child conceived by assisted reproduction under the agreement, of the duties of parentage.

[231] In order for traditional surrogacy agreements to be enforceable under the *UPA (2017)*, the agreement must be validated by the court prior to conception.²⁵⁹ Courts are required to issue an order validating the agreement if the requirements for a surrogacy agreement are met and the court is satisfied that all parties entered into the agreement voluntarily and understand its terms.²⁶⁰ Intended parents may terminate the agreement at any time before a gamete or embryo is transferred.²⁶¹ A traditional surrogate may withdraw consent to the agreement at any time before 72 hours after the birth of the child.²⁶² Once the agreement is terminated by either party, the parties are released from all obligations under the agreement except that the intended parents remain responsible for all expenses incurred by the surrogate until the date of termination, which are reimbursable under the agreement.²⁶³ Unless there has been fraud, the traditional surrogate and their spouse are not liable to the intended parents for any penalty or liquidated damages.²⁶⁴

[232] Section 819 of the *UPA (2017)* sets out the ways in which a traditional surrogacy agreement may or may not be enforced:

- if a traditional surrogacy agreement is breached by the surrogate or the intended parents the non-breaching party is entitled to the remedies at law or in equity;
- specific performance is not available for breach by a surrogate of a requirement of a validated or non-validated traditional surrogacy agreement that the surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures;
- specific performance is available for a breach by the surrogate of a requirement which prevents an intended parent from exercising the full rights of parentage 72 hours after the birth;
- specific performance is available for breach by an intended parent which prevents the intended parent's acceptance of duties of parentage 72 hours after the birth.

²⁵⁹ *Ibid* at s. 813(a).

²⁶⁰ *Ibid* at s. 813(b).

²⁶¹ *Ibid* at s. 814(a)(1).

²⁶² *Ibid* at s. 814(a)(2).

²⁶³ *Ibid* at s. 814(b).

²⁶⁴ *Ibid* at s. 814(c).

4.8.i *Enforceability of Provisions Related to Parentage*

[233] The majority of surrogacy arrangements proceed exactly as they were intended to: the surrogate delivers the infant, and the infant is then taken and raised by the intended parents as their child.²⁶⁵ Therefore, whether provisions relating to parentage of a child carried by a surrogate should be enforceable by a court is only relevant to the small number of potential cases where a dispute over the child's parentage could arise. It is important to note at the outset that disputes over the child's parentage could conceivably go both ways; a surrogate could refuse to handover the infant, and the intended parents could change their mind at some point during the pregnancy and refuse to take the infant.

[234] The arguments for rendering surrogacy agreements unenforceable relate to concerns surrounding the potential vulnerabilities of both the women acting as surrogates and the children gestated by surrogates. There is a concern that women may be exploited in a surrogacy arrangement, and that children may become objects of exchange, both of which are some of the reasons why some countries ban commercial surrogacy. In addition, allowing a surrogate to change her mind post-birth recognizes the gestational relationship that can be formed between the surrogate and the child. As Wanda Wiegiers states:

Busby and Vun note that most of the empirical evidence to date suggests that gestational mothers are generally satisfied with their role in the process and detach early in the pregnancy. Nonetheless, there are cases where gestational mothers have bonded or attached during pregnancy, experienced distress and refused to relinquish the child, contrary to the expectations of all parties. Special provision for gestational mothers responds to gender equity by recognizing the significant role played by them in the life of the newborn child, the efforts and risks of gestation and the inability to predict accurately the consequences of conception, including the occurrence of pre-natal bonding.²⁶⁶

[235] Further, as pointed out by the Manitoba Law Reform Commission: "Allowing surrogacy contracts to be enforceable is consistently argued to be inconsistent with public policy, women's personal autonomy rights and the principle that no agreement can displace the court's inherent *parens patriae* jurisdiction to act in the best interests of the child."²⁶⁷

²⁶⁵ Susan G. Drummond, "Fruitful Diversity: Revisiting the Enforcement of Gestational Carriage Contracts" in *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) 275 states at 308: "the risk of intended parents failing to honour their part of the bargain and assume parental responsibility for the child carried by the surrogate is extremely minimal, to the point of being effectively non-existent in practice. The evidence also reveals that the incidence of carriers failing to honour their intentions entrenched in gestational contracts has been extremely low in Canada, the United States, and the United Kingdom since the Baby M case in 1988."

²⁶⁶ Wiegiers, *supra* note 12 at 198-199.

²⁶⁷ Manitoba Report, *supra* note 2 at 33.

[236] However, some have argued that surrogacy agreements should be enforceable because there is evidence to suggest that the policy concerns that initially led to decisions to render surrogacy agreements unenforceable are misplaced: “the empirical research indicates that those vulnerabilities [of surrogates and the children they gestate] may not be sufficiently acute, where they exist at all, to override the policy concerns (including the best interests of children) that might be furthered by enforcing regulated carriage contracts.”²⁶⁸

[237] Susan Drummond argues that allowing surrogacy agreements to be enforceable (provided there is no unconscionability, fraud, error, or duress) would put surrogates “on notice from their outset of their undertaking that the children they give birth to will not be their legal children.”²⁶⁹ In Drummond’s view, a rule that the surrogacy agreement will be enforced would mean:

A woman who enters a gestational carriage contract would be doing so knowing that the law speaks clearly on the implications of her decision – a result that would eliminate the harsh consequences for intended parents, who are currently beholden to the carrier’s potential ambivalence and exposed to considerable risks of emotional and financial loss and, in the current legal context, ongoing parental responsibilities if they are genetically related to the child (and quite possibly if they are not). The intended parents in gestational carriage contracts are after all not complete strangers to the child: they are the parties but for whom the pregnancy would not have been initiated, and they intend from the outset to be actively involved in the child’s care, whereas the gestational carrier does not.²⁷⁰

Drummond suggests that given the increasing evidence that gestational carriage results in “little tangible harm”, it would be “regrettable...to follow a model, such as the one proposed in the Uniform Child Status Act, that hinges on an outdated understanding of the realities on the ground.”²⁷¹

[238] Stefanie Carsley has criticized article 541 of the *Quebec Civil Code* – which states that surrogacy agreements are null and unenforceable – for failing to protect surrogates and thus doing the opposite of what the article was specifically intended to do.²⁷² She explains:

While article 541 CCQ was intended to protect surrogate mothers, in practice it leaves surrogates in a precarious position. Quebec’s current regime fails to offer surrogates any protection should one or more intended parents change their minds and refuse to honour their agreement to take the child...The surrogate may be left to care for and pay for the costs of raising a child that she did not intend to keep, while the intended parents might not experience any financial or legal repercussions for their actions...

²⁶⁸ Drummond, *supra* note 265 at 313.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid* at 313-314.

²⁷¹ *Ibid* at 314.

²⁷² Stefanie Carsley, *supra* note 222 at 138.

Although a surrogate in this position might decide to place the child for adoption, surrogates who carefully choose and screen intended parents might feel uncomfortable giving up the child to another couple...

Article 541 CCQ also enables intended parents to renege on promises to reimburse a surrogate's expenses with impunity...Parties may set out in written surrogacy contracts what expenses the intended parents agree to cover; however, a surrogate in Quebec will be unable to enforce any terms of her agreement with respect to reimbursement of expenses...These situations are not merely hypothetical. Media reports and empirical research indicate that some intended parents have reneged on their agreement with Canadian surrogates.²⁷³

[239] Carlsey also points out that article 541 fails to take into account the intended parents' financial commitments to the surrogacy process:

Surrogacy is prohibitively expensive for most Canadians and reflects a substantial financial investment on the part of intended parents. IVF costs, on average, between \$10,000 to \$15,000 per *in vitro* cycle...Intended parents may also pay for lawyers and counsellors for themselves and for the surrogate, and cover the surrogates' expenses related to the surrogacy. Should a surrogate change her mind and wish to keep the child, she is not legally required to reimburse the intended parents for any expenses paid in relation to her pregnancy – including the costs of IVF and gamete donation. Given the costs associated with this process, in such a situation many intended parents will be unable to initiate new surrogacy arrangements and may not have other opportunities to build their families.²⁷⁴

[240] Whether provisions relating to parentage should be enforceable by a court could differ between gestational and traditional surrogacy agreements. In a gestational surrogacy, the child is not genetically related to the surrogate, and thus the gestational surrogate's relationship to the child is solely through gestation. In a traditional surrogacy, the child is genetically related to the surrogate, and thus the traditional surrogate's relationships to the child is both genetic and gestational. Traditional and genetic surrogates are similar, however, in that neither intends to be the mother of the child. Additionally, whether provisions relating to parentage are enforceable may depend on which party is disputing the surrogacy agreement.

[241] The *UPA (2017)* treats gestational and traditional surrogacies differently on this point. When a gestational surrogate is used, the intended parents are, on birth of the child, the parents of the child, and neither the surrogate nor her partner are the parents.²⁷⁵ The *UPA (2017)* also provides that gestational surrogacy agreements are enforceable if certain requirements are met.²⁷⁶ In contrast, in order for a traditional surrogacy agreement to be enforceable, the

²⁷³ *Ibid* at 138-139.

²⁷⁴ *Ibid* at 145.

²⁷⁵ *UPA (2017)*, *supra* note 120 at s. 809.

²⁷⁶ *Ibid* at s. 812.

agreement must be validated by the court.²⁷⁷ Traditional surrogates can withdraw their consent to the agreement up to 72 hours after the birth of the child.²⁷⁸

[242] The Victorian Law Reform Commission considered whether the parentage provisions of surrogacy agreements should be enforceable and received mixed responses during its public consultations.²⁷⁹ Some respondents suggested they should be enforceable on the basis that certainty with regards to the outcome would help the surrogate cope with the pregnancy and relinquish the child after birth.²⁸⁰ Those not in favour of enforcing the parentage provisions made several arguments, including: the genetic connection of the intended parents should not necessarily displace the gestational connection the surrogate has to the child; the intention or capacity of a person to parent can change over time and intentions should not be viewed as “fixed determinants” of what is in the child’s best interests; and when there is a dispute as to parentage, the court should make a determination in accordance with the best interests of the child.²⁸¹ The Commission concluded that surrogacy agreements should not be enforceable, stating:

The Commission has concluded that the law should not compel the surrogate to hand over the baby to the commissioning couple if she decides that she cannot bring herself to do so...The surrogate mother should be recognized as the parent of the child unless she consents to the making of a court order transferring parentage to the commissioning parent(s) after the child is born. Before an order can be made, the child must have lived with the commissioning parents for a specified period. This principle should apply whether or not the surrogate is genetically related to the child.²⁸²

[243] An alternative option to allowing surrogacy agreements to be enforceable with regards to parentage, would be to enact a legislative provision stating that in the event of a conflict between the intended parents and the surrogate the parentage provisions of surrogacy agreements are presumed to be in the best interests of the child.

4.8.ii *Enforceability of Provisions Not Related to Parentage*

[244] While the focus of this consultation project is on the parentage of children conceived through assisted reproduction, it is possible that a legislative provision could be drafted to provide that while the surrogacy agreement is not determinative of the child’s parentage, all or some of the other provisions in the surrogacy agreement are nevertheless enforceable. These agreements are typically drafted by legal counsel, and both parties presumably dedicate time and resources into determining the content of these agreements. An argument could certainly

²⁷⁷ *Ibid* at s. 813.

²⁷⁸ *Ibid* at s. 814(a)(2).

²⁷⁹ Victorian Report, *supra* note 103 at 188.

²⁸⁰ *Ibid*.

²⁸¹ *Ibid*.

²⁸² *Ibid* at 189.

be made that allowing the courts to enforce some of the provisions in a surrogacy agreement would best protect the interests of both the intended parents and the surrogate.

4.8.iii *Conditions for Enforceability of a Surrogacy Agreement*

[245] Conditions for enforceability of all or some of a surrogacy agreement could be prescribed in legislation. For instance, in order for a surrogacy agreement (or certain provisions of a surrogacy agreement) to be enforceable by a court, legislation could require that both parties had to have obtained independent legal advice regarding the agreement, that the agreement be in writing, and that the surrogacy agreement be entered into prior to conception. These conditions may differ for traditional and gestational surrogacies. The *UPA (2017)* imposes the same requirements on gestational and traditional surrogacy agreements with respect to eligibility to enter into the agreement, and the content of the agreement.

4.8.iv *Recommendations*

[246] The Commission asked the following questions in the Consultation Paper:

- Should surrogacy agreements, including provisions related to parentage, be enforceable? Should there be a distinction between traditional and gestational surrogacy agreements?
- If parentage related provisions in surrogacy agreements should not be enforceable, should other types of provisions in surrogacy agreements be enforceable? Should legislation specify which types of provisions are and are not enforceable?
- Should there be conditions on whether the surrogacy agreement, or a certain type of provision in the agreement, is enforceable?

[247] Most consultees were of the view that surrogacy agreements should generally be enforceable. One survey respondent offered the following as an explanation for their opinion:

A friend of mine was a surrogate, and there was supposed to be regular visitation with the child, and once the child was born, all contact was cut. This seems especially cruel to a woman who bore for someone and even provided half the DNA to the child.

[248] Opinions were, however, divided as to whether the parentage aspects of surrogacy agreements should be enforceable. Some suggested that parentage provisions should be enforceable if traditional surrogacies are distinguished from gestational surrogacies and that the *UPA* approach to this issue should be followed. Others suggested that the parentage provisions in a surrogacy agreement should only be used as evidence of the pre-conception intent of all parties to the agreement. One consultee suggested that independent legal advice on the agreement should be a condition for future enforceability of the contract.

[249] The Commission would not recommend that the *CLA, 1997* state that surrogacy agreements are unenforceable. Instead, the Commission recommends that the *CLA, 1997* specify

that any provision in a surrogacy agreement that purports to determine parentage is not enforceable, but may be employed by a court as evidence of the intention of the parties to the agreement.

4.9 Multiple Parents

[250] Conceiving a child through assisted reproduction differs in one fundamental respect from conceiving a child through sexual intercourse: there are often more than two parties involved in the conception and gestation of the child. Given this difference, it is possible for more than two people to claim to be, or to be claimed to be, parents of the child.

[251] Multiple-parent families already exist in Canada. According to Fiona Kelly, there is a small but significant number of female same-sex couples parenting in a multiple-parent framework who support the legal recognition of other parties – typically known sperm donors and their partners - in the multiple-parent framework.²⁸³

[252] In the case of *AA v BB*, discussed above, the Ontario Court of Appeal issued a declaration resulting in the child having three legal parents: his same-sex mothers and his sperm donor. More recently in April 2018, multiple parents in a polyamorous family were recognized. In *Re C.C.*²⁸⁴ two males, along with the mother of a child, sought a declaratory order that the two males be declared parents of the child. The parties were in a polyamorous relationship, and the biological father was unknown (the men refused to undergo DNA testing). The Court determined that the possibility of multiple parents was not contemplated in both the *Children’s Law Act* and the *Vital Statistics Act, 2009*, and relied on its *parens patriae* jurisdiction to fill the gap in the legislation and to declare both men to be fathers of the child, in addition to the mother. In reaching its decision, the Court stated:

I am of the opinion that when the *CLA* was enacted in this Province it was never the intention of the legislature to discriminate against any child but clearly to bring about equal status for all children notwithstanding their parentage.

In the present case, the child, A., has been born into what is believed to be a stable and loving family relationship which, although outside the traditional family model, provides a safe and nurturing environment. The fact that the biological certainty of parentage is unknown seems to be the adhesive force which blends the paternal identity of both men as the fathers of A. I can find nothing to disparage that relationship from the best interests of the child’s point of view.

As to the best interests of the child in this case, all of the factors under section 31(2) of the *CLA* come into play with the exception of the views of the child. IO have no reason to believe that this

²⁸³ Kelly, “Multiple-Parent Families”, *supra* note 142 at 569.

²⁸⁴ 2018 NLSC 71. The decision can be accessed at: <
[https://court.nl.ca/supreme/family/pdf/C.C.%20\(Re\),%202018%20NLSC%2071,%20April%204,%202018%20-%20Fowler,%20J..pdf](https://court.nl.ca/supreme/family/pdf/C.C.%20(Re),%202018%20NLSC%2071,%20April%204,%202018%20-%20Fowler,%20J..pdf)>.

relationship detracts from the best interests of the child. On the contrary, to deny the recognition of fatherhood (parentage) by the Applicants would deprive the child of having a legal paternal heritage with all the rights and privileges associated with that designation. Society is continuously changing and family structures are changing along with it. This must be recognized as a reality and not as a detriment to the best interests of the child.²⁸⁵

[253] Alberta's legislation does not allow for more than two legal parents. The *AB FLA* provides that the court cannot make a declaration of parentage in regard to a surrogacy if the declaration would result in the child having more than two parents.²⁸⁶ Clause (7)(b) of the *AB FLA* similarly prohibits the court from making a declaration of parentage where surrogacy has not been used if the declaration would result in the child having more than two parents. Prince Edward Island also stipulates a maximum of two legal parents.²⁸⁷

[254] Both British Columbia and Ontario, however, allow for more than two parents in certain circumstances. British Columbia's multiple parent provision is s. 30 of the *BC FLA*. The provision applies in two circumstances:

- where there is a written pre-conception agreement between the intended parent(s) and a potential birth mother who agrees to be a parent together with the intended parent(s), or
- where there is a written pre-conception agreement between the potential birth mother, a person who is married to or in a marriage-like relationship with the potential birth mother, and a donor who agrees to be a parent together with the potential birth mother and a person married to or in a marriage-like relationship with the potential birth mother.

The written pre-conception agreement must provide that the potential birth mother will be the birth mother of a child conceived through assisted reproduction and that on the child's birth, the parties to the agreement will be the parents of the child.

[255] Fiona Kelly has described s. 30 as being fairly radical and one of the first three-parent provisions in the world.²⁸⁸ Interestingly, s. 30 did not receive any opposition during British Columbia's public consultation on the new *Family Law Act*, and was not subject to much debate in the legislature.²⁸⁹ Kelly comments:

It is difficult to know why the reforms garnered such little attention and why the three-parent provision, one of only a few of its kind in the world, received virtually no comment at all. One can only presume that the provisions were considered uncontroversial – simply a reflection of the

²⁸⁵ *Ibid* at paras 33 – 35.

²⁸⁶ *AB FLA*, *supra* note 55 at s. 8.2(12).

²⁸⁷ *PEI CSA*, *supra* note 82 at s. 9(8).

²⁸⁸ Kelly, "Multiple-Parent Families", *supra* note 142 at 580.

²⁸⁹ *Ibid*.

“changing reality” of Canadian families – though it is also possible that they were overshadowed by the other substantial changes to BC family law that the FLA introduced.²⁹⁰

Kelly criticizes s. 30 for not reflecting how some same-sex mothers engage in multiple-parenting. Section 30 requires the third parent to have a gestational or genetic link to the child, and it does not include that person’s spouse or partner. However, Kelly suggests that this may not reflect the reality of multiple-parenting, stating:

[e]mpirical research indicates that, where a lesbian couple have a parenting arrangement with a gay couple, the mothers typically consider both the child’s biological father and his male partner to be the child’s parents...their children also do not distinguish between the two men based in biological relatedness.²⁹¹

Kelly also states that while the majority of lesbian women who engage in multiple parenting do so with their conjugal partner, this is not necessarily always the case. In her view, limiting s. 30 to the non-biological parent in a conjugal relationship with the biological parent is contrary to the purpose of the new parentage provisions as it does not protect these children’s best interests or promote stable family relationships.²⁹²

[256] Ontario also has multiple parent provisions for assisted reproduction. In situations not involving a surrogacy, s. 9(4) of the *CLRA* allows up to four people to be recognized as parents. For the section to apply, there must be a written pre-conception parentage agreement in which two or more parties, including the birth parent, agree to be, together, the parents of a child yet to be conceived.²⁹³ If the child is to be conceived through sexual intercourse with a sperm donor, the person whose sperm is to be used must also be a party to the agreement.²⁹⁴ If the child is to be conceived through assisted reproduction, the spouse of the person who intends to be the birth parent must also be a party to the agreement, unless they intend to not be a parent.²⁹⁵ If the birth parent’s spouse does not intend to parent, they must, prior to conception, provide a written confirmation that he or she does not consent to be a parent of the child.²⁹⁶

[257] Ontario’s legislation also provides for multiple parents where a surrogate is used. There can be up to four intended parents without the need for a court order pursuant to s. 10. In order for the section to apply, there must be a surrogacy agreement with independent legal advice, there can be no more than four intended parents, and the child must be conceived through assisted reproduction.²⁹⁷ Once the child is born and the surrogate consents to relinquishing her entitlement to parentage, the child becomes and the child of each intended parent and the

²⁹⁰ *Ibid.*

²⁹¹ *Ibid* at 583.

²⁹² *Ibid* at 585.

²⁹³ *ON CLRA, supra* note 60 at s. 9(1).

²⁹⁴ *Ibid* at s. 9(2)(c).

²⁹⁵ *Ibid* at s. 9(2)(d).

²⁹⁶ *Ibid* at s. 9(3).

²⁹⁷ *Ibid* at s. 10(2).

surrogate ceases to be a parent.²⁹⁸ If there are more than four intended parents in the case of a surrogacy, any party to the surrogacy agreement may apply to the court for a declaration of parentage, within the first year of the child's life.²⁹⁹ In making its decision, the best interests of the child is to be the paramount consideration by the court.³⁰⁰

[258] The general declaration of parentage provision in s. 13 of the *CLRA* also contemplates a situation where there could be multiple parents of a child. Section 13(1) allows any person having an interest to apply for a declaration that they are or are not a parent of the child (this section does not apply if the child is adopted). If, however, the declaration of parentage would result in the child having more than two parents, or if the declaration of parentage would result in the child having a parent in addition to their birth parent that is not a parent of the child under section 7 (other biological parent, if sexual intercourse), 8 (birth parent's spouse if assisted reproduction or insemination by sperm donor) or 9 (pre-conception parentage agreements), the court may not make the declaration unless the following conditions are met:³⁰¹

1. The application for the declaration is made on or before the first anniversary of the child's birth, unless the court orders otherwise.
2. Every other person who is a parent of the child is a party to the application.
3. There is evidence that, before the child was conceived, every parent of the child and every person in respect of whom a declaration of parentage respecting that child is sought under the application intended to be, together, parents of the child.
4. The declaration is in the best interests of the child.³⁰²

Section 13 could thus be relied on if the parties had failed to enter into a written pre-conception agreement, provided there was evidence that the parties intended to parent the child post-conception.

[259] The *Uniform Act* also allows for a child born through assisted reproduction to have up to six parents in certain circumstances. Subsection 9(5) allows an individual who provided the human reproductive material or the embryo used in the assisted reproduction or who was married or in a common-law partnership with the person who provided the human reproductive material or embryo at the time of the child's conception to apply for a declaratory order that they are an additional parent of the child. The application must be brought within 30 days of the birth of the child, and there must have been an agreement to parent to be declared an additional parent prior to conception in place between the applicant(s), the child's birth mother, and the

²⁹⁸ *Ibid* at s. 10(3). Pursuant to s. 10(4) the surrogate may not consent to relinquish her entitlement to parentage before the child is seven days old.

²⁹⁹ *Ibid* at s. 11(2).

³⁰⁰ *Ibid* at s. 11(4).

³⁰¹ *ON CLRA, supra* note 60 at s. 13(4).

³⁰² *Ibid* at s. 13(5).

person presumed to be a legal parent of the child under the presumptions of parentage. The commentary to this provision explains:

Again, the cornerstone here is the intention to be a parent. The principle concern in these cases is to provide certainty and clarity (1) in the best interests of the child, (2) for the potential parents, (3) for the donor in terms of parentage, and (4) regarding legal responsibilities and status in dealing with estates, benefits, support, etc.

The proposed approach is similar to recommendations by both the New Zealand Law Commission and the Victorian Law Reform Commission, and to the decision in the Ontario case of *AA v BB*, 2007 ONCA 2.

In theory, under this provision, a child could have a maximum of six parents – the birth mother, her spouse or common-law partner, the two donors who agreed prior to conception to be parents of the child (where the resulting embryo is carried by the birth mother), and the spouses or common-law partners of the donors. However, in most instances, it will result in a maximum of three parents – the birth mother, her spouse or common-law partner, and the donor who all agreed prior to conception to be the child’s parents.³⁰³

[260] The *Uniform Act* differs from the *BC FLA* and the *ON CLRA* (in cases of assisted reproduction without surrogacy) in its requirement that a court order be sought to recognize additional parents.

[261] The *UPA (2017)* provides two alternative provisions dealing with multiple parents. The first is simply: “The court may not adjudicate a child to have more than two parents under this Act.”³⁰⁴ The second alternative provision provides a more nuanced position:

The court may adjudicate a child to have more than two parents under this Act if the court finds that failure to recognize more than two parents would be detrimental to the child. A finding of detriment to the child does not require a finding of unfitness of any parent or individual seeking an adjudication of parentage. In determining detriment to the child, the court shall consider all relevant factors, including the harm if the child is removed from a stable placement with an individual who has fulfilled the child’s physical needs and psychological needs for care and affection and has assumed the role for a substantial period.³⁰⁵

[262] Some commentators suggest there is a risk that the recognition of multiple parent families will result in the courts “finding fathers” for female same-sex families.³⁰⁶ On the other hand, allowing for recognition of a multiple parents only when the parties have agreed to such an arrangement may encourage female same-sex couples who would prefer to use known sperm

³⁰³ *Uniform Act*, *supra* note 91 at commentary to s. 9.

³⁰⁴ *UPA (2017)*, *supra* note 120 at s. 613(a).

³⁰⁵ *Ibid* at s. 613(b).

³⁰⁶ 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.

donors to do so, as they would have a higher degree of certainty that the rights of the non-biological parent would not be trumped by the donor.³⁰⁷

[263] The Manitoba Law Reform Commission has suggested that multiple parenting arrangements be contained in written agreements:

[I]f the recognition of more than two legal parents in appropriate situations accurately reflects the considered choice of the parties and the reality of the intended family at the time of conception, it may provide more stability for the child, and perhaps reduce the potential for uncertainty and conflict in the event of relationship breakdown. The corollary is that the intention of the parties will be clear if they choose not to enter into a multiple parent agreement when that option is expressly available in legislation. This will also help to ensure that the parties' intentions are carefully considered in advance and expressed in writing.³⁰⁸

[264] The BC Branch of the Canadian Bar Association also suggested in its response to the new *Family Law Act* that third or fourth parties only be made parents by contractual agreement, making "plain the financial responsibilities for the parenting involved in a surrogate or donor relationship."³⁰⁹

[265] The New Zealand Law Commission recommended there not be a two-parent restriction in the legislation, and stated as follows regarding whether the potential for conflict was reason to limit the number of legal parents to two:

We have considered whether valid policy reasons exist to exclude the possibility of more than two parents at law. There may be a heightened potential for conflict; however, that in itself is not a reason to limit the number of parents. There is no restriction on how many guardians may be appointed in relation to one child, although the potential for conflict will be a significant factor in the court's decision whether or not to appoint an additional guardian...

We also note that these children, and arrangements as to their creation, care and development, have usually been the subject of significant deliberation before conception and birth. While conflict can never be avoided, it is hoped that the greater deliberation and thought required before the parents enter this sort of arrangement will result in less potential conflict...Should the relationships break down, a potential for difficulty is how the court will deal with issues of custody and access between the three parents. However, the courts encounter the same issues when stepfamilies separate and there are two genetic parents and another "social" parent who may play a significant role in the child's life and with whom ongoing contact may be in the child's best interests. We have also taken note of the fact that it is not uncommon for children to have

³⁰⁷ Kelly, "Multiple-Parent Families", *supra* note 142 at 570-71.

³⁰⁸ Manitoba Report, *supra* note 2 at 29.

³⁰⁹ Canadian Bar Association, British Columbia Branch, Family Relations Act Working Group, *Submission to Ministry of Attorney General: White Paper on Family Relations Act Reform, Proposals for a New Family Law Act* (October 2010) at 36, online: Canadian Bar Association < <https://www.cbabc.org/CMSPages/GetFile.aspx?guid=9e8ea20f-46a9-4958-bc3a-c30a6321efac>>.

multiple “de facto” parent figures in their lives through step-parenting or customary practices in Maori, Pacific Island and other cultures where extended families exist.³¹⁰

[266] The Commission recommended that a donor be allowed to be the child’s legal parent in addition to the intended parents provided there was a court approved agreement between the parties regarding the role of the donor in the child’s upbringing in place prior to conception, and evidence that all parties had received independent legal advice and counselling. These recommendations were not adopted, however New Zealand does have an “involved known donor” type of parental status, as discussed above.

[267] The Victorian Law Reform Commission reached a different conclusion on this issue in 2007. The Commission recommended that there be a two-parent limit remain in place, stating:

This will not prevent people from forming families where several people act as parents. It remains possible, therefore, that in time, a process similar to that of opting...may emerge as a necessity for a greater number of families where the donor is regarded as a parent of the child. Legal recognition of non-birth mothers may be the first step towards developing a sense of confidence in and acceptance of diverse family types necessary for further reform.³¹¹

[268] Prior to arriving at this conclusion, the Commission had, however, suggested that a donor be able to opt into the status of legal parent through adoption with the consent of the birth mother and her partner. The adoption would have to be made within the first year of the child’s life and after counselling and legal advice. The results of public consultation on this suggestion led to the Commission deciding against recommending this approach. The main criticism was that allowing for multiple-parents would be “messy” from a practical point of view.³¹² This practicality concern can be described as follows:

The concern that multiple-parent families might pose practical challenges particularly in situations of conflict, is the primary criticism raised by those who oppose multiple-parent recognition. It is argued that dealing with the interests of multiple parties may increase the complexity and uncertainty of family law disputes about custody, access, or financial support, an outcome that is unlikely to be in the interests of children. Practical matters that require parental consent, such as medical decision making, travel and schooling, could also become more complicated even in the absence of conflict.³¹³

[269] Fiona Kelly has addressed the practical challenges argument by asserting that in practice, in most instances of multiple-parent families, parenting rights are allocated proportionately to parenting responsibilities. Kelly notes that allocating “rights and responsibilities between parents is not, in light of divorce and separation, a new concept. Parenting rights and responsibilities are

³¹⁰ New Zealand Report, *supra* note 97 at 70-71.

³¹¹ Victorian Report, *supra* note 103 at 139.

³¹² Kelly, “Multiple-Parent Families” *supra* note 142 at 574. The author also notes that concerns were raised about potential conflicts between federal and state law.

³¹³ *Ibid* at 574-575.

frequently divided unequally between parties. Multiple-parent families therefore need not be as complex or uncertain as critics often suggest.”³¹⁴ Kelly advocates permitting any person to apply to the court to opt into the status of legal parent within one year of the birth of the child, if the child’s legal parents consent.³¹⁵

[270] The Manitoba Law Reform Commission was of the view that setting out a statutory process for multiple parent arrangements would provide greater certainty to all parties, and the children, involved in assisted reproduction. However, the Commission was ultimately unable to recommend a preferred approach to the issue of multiple parents.³¹⁶

4.9.i *Recommendations*

[271] The Commission asked the following questions in the Consultation Paper:

- Should the legislation allow for more than two parents?
- If the legislation allows for more than two parents, what requirements or conditions should be imposed on such an arrangement?

[272] Responses to these questions were mixed. Some survey participants supported the idea of multiple parents, if it would be in the best interests of the child to have multiple parents and if all potential parents are in agreement. Others were opposed on the basis that it may be difficult for the child to have multiple parents, and that having multiple parents may lead to conflict over child rearing decisions.

[273] The Saskatoon Working Group suggested that the legislation allow for the possibility of up to four parents, provided there is a written pre-conception agreement between all of the intended parents, with a potential requirement of independent legal advice for all parties. The Group also suggested that it may be preferable to require the additional intended parents to seek

³¹⁴ *Ibid* at 575.

³¹⁵ *Ibid* at 587.

³¹⁶ Manitoba Report, *supra* note 2 at 31-32:

Given the novelty of a statutory provision for the presumption of more than two legal parents, the Commission recommends caution when legislating in this area. The British Columbia provision has been in force for just over one year. There is little evidence available about what effect such provisions may have on the interests of the children born as a result of multi-parent arrangements.

At present, the Commission is not in a position to formulate a preferred approach to this question. Manitoba’s existing legislation does not appear to preclude a court order declaring an additional parent in circumstances the court considers appropriate, using its *parens patriae* jurisdiction. Before making any recommendations about statutory amendments in this area, the Commission considers that additional research, consultation and deliberation is required on questions about who should be eligible to be an additional parent, what conditions should be met, and whether additional parents should be presumed in the law without judicial intervention.

declarations of parentage within one year of the birth of the child. The Regina Working Group also agreed the legislation should allow for multiple parents, and that a pre-conception written agreement should be required. The Group discussed allowing for a certain number of multiple parents (potentially four) without the need for a court order, and then allowing any additional intended parents to seek a declaration under a general declaration of parentage provision.

[274] The Commission recommends the *CLA, 1997* allow for up to four parents without the need for an application to the court for a declaration of parentage.

4.10 Posthumous Conception

[275] There are various ways assisted reproduction could be used to conceive a child using the gametes of a deceased individual. For instance, a woman could use her deceased partner's frozen sperm to artificially inseminate herself, or a man could use his deceased partner's frozen ovum and his own reproductive material to create an embryo to be carried by a surrogate. In addition, the deceased's genetic material may have been used to create embryos in storage at the time of the deceased's death.

[276] The *AHRA* specifically prohibits using a person's human reproductive material to create an embryo without that person's written consent,³¹⁷ and removing human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor has given written consent to its removal for that purpose.³¹⁸ The *AHRA* does not prohibit the posthumous use of frozen embryos or gametes if the deceased provided written consent.

[277] Alberta's *FLA* does not contain a specific provision dealing with posthumous assisted conception.

[278] British Columbia's *FLA* contains a specific provision dealing with parentage if assisted reproduction occurs after death. Subsection 28(1) applies if the deceased gave written consent to the use of the human reproductive material or embryo after their death, gave written consent to be the parent of a child conceived after their death, and did not withdraw their consent before death. Once the child is born, the child's parents are deemed to be the deceased person and the person who was married to, or in a marriage-like relationship with, the deceased person when that person died, regardless of whether he or she also provided human reproductive material used for the assisted reproduction.³¹⁹

[279] Ontario's *CLRA* also contains a specific provision dealing with posthumous conception using assisted reproduction. Subsection 12(1) allows the spouse of a deceased person to apply to the court for a declaration that the deceased person is a parent of a child conceived after his or her

³¹⁷ *AHRA*, *supra* note 7 at s. 8(1).

³¹⁸ *Ibid* at s. 8(2).

³¹⁹ *BC FLA*, *supra* note 50 at s. 28(2).

death through assisted reproduction. The application can only be made after the child is born, and it must be made within 90 days of the child's birth.³²⁰ The Court can grant a declaration of parentage if the deceased consented in writing to be a parent of a child conceived posthumously through assisted reproduction and did not withdraw their consent before his or her death.³²¹

[280] The *Uniform Act* also contains a provision on posthumous conception, requiring the deceased individual to have consented in writing to be recognized as a parent of a child conceived posthumously, and for the consent to have not been withdrawn.³²² The application for a declaration of parentage can only be made by the spouse or common-law partner of the deceased, or the person who is claiming to be the posthumously conceived child of the deceased.³²³ If, however, the child was born to a surrogate, only the person who was married to or in a common-law relationship with the deceased can apply for a declaratory order.³²⁴

4.10.i *Recommendations*

[281] The Commission asked the following questions in the consultation paper:

- Should Saskatchewan's legislation contain a provision dealing with posthumous conception and parentage?
- How should the parentage of children conceived posthumously be determined?

[282] There was a general consensus that the *CLRA, 1997* should contain a provision dealing with posthumous conception, and that the provision should require the deceased to have consented to the posthumous use of their genetic material.

[283] The Commission recommends a spouse of a deceased person to be able to apply to the court for a declaration that the deceased person is a parent of a child conceived after his or her death through assisted reproduction. The application should only be made after the child is born, and it should be made within 90 days of the child's birth. The deceased must have consented in writing to be a parent of a child conceived posthumously through assisted reproduction and must not have withdrawn their consent before his or her death.

³²⁰ *ON CLRA, supra* note 60 at s. 12(2).

³²¹ *Ibid.*

³²² *Uniform Act, supra* note 91 at s. 7(3).

³²³ *Ibid* at s. 7(1),

³²⁴ *Ibid* at s. 7(2).

[284] If the government implements this recommendation, consideration will need to be given as to how this recommendation may affect *The Intestate Succession Act, 1996*,³²⁵ *The Dependants' Relief Act, 1996*,³²⁶ and *The Wills Act, 1996*.³²⁷

4.11 Children Born Outside of Saskatchewan

4.11.i Extraprovincial Orders

[285] Saskatchewan's *CLA, 1997* currently provides that extraprovincial declaratory orders made in Canada must be recognized and have the same effect as if they were made in Saskatchewan.³²⁸ International extraprovincial declaratory orders must be recognized provided the conflict of laws requirements in the section are met.³²⁹ Section 52 provides that courts may decline to recognize an extraprovincial order where there is new evidence or the court is satisfied that the extraprovincial declaratory order was obtained by fraud or duress.

[286] In British Columbia, the courts must recognize an extraprovincial (but Canadian) declaratory parentage order, and upon recognition, the order has the same effect as if it were made under the *BC FLA*.³³⁰ The court can decline to recognize an extraprovincial declaratory order if new evidence is available or the court is satisfied that the extraprovincial declaratory order was obtained by fraud or duress. International declaratory orders must be recognized if at the time of the order the child or at least one of the child's parents was resident in the foreign jurisdiction or had a real and substantial connection with the foreign jurisdiction. British Columbia courts may decline to recognize the international declaratory order if there is new evidence available, if the court is satisfied that the order was obtained by fraud or duress, or if the order is contrary to public policy.³³¹

³²⁵ SS 1996, c I-13.1.

³²⁶ SS 1996, c D-25.01.

³²⁷ SS 1996, c W-14.1.

³²⁸ *CLA, 1997*, *supra* note 10 at s. 50.

³²⁹ Section 51 provides as follows: An extraprovincial declaratory order that was made outside Canada is to be recognized and have the same effect as if made in Saskatchewan if:

- (a) At the time the proceeding was commenced or the order was made, either parent was domiciled:
 - i. In the territorial jurisdiction of the court making the order; or
 - ii. In a territorial jurisdiction in which the order is recognized;
- (b) The court that made the order would have had jurisdiction to do so under the conflict of laws rules that are applicable in Saskatchewan;
- (c) The child was habitually resident in the territorial jurisdiction of the court making the order at the time the proceeding was commenced or the order was made; or
- (d) The child or either parent had a real and substantial connection with the territorial jurisdiction in which the order was made at the time the proceeding was commenced or the order was made.

³³⁰ *BC FLA*, *supra* note 50 at s. 35.

³³¹ *Ibid* at s. 36.

[287] Ontario's provisions are similar to British Columbia's.³³² The *Uniform Act* also contains similar provisions in sections 13 – 17:³³³

- 13 An extra-provincial declaratory order that was made in Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*).
- 14 A court may decline to recognize an extra-provincial declaratory order that was made in Canada and may make a declaratory order under this Act if
 - (a) new evidence becomes available that was not available at the proceeding at which the extra-provincial declaratory order was made, or
 - (b) the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress.
- 15 Sections 16 to 18 apply with respect only to children who were born outside Canada.
- 16 An extra-provincial declaratory order that was made outside Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*) if
 - (a) the child or at least one parent was habitually resident in the jurisdiction of the court making the order at the time the proceeding was commenced or the order was made, or
 - (b) the child or at least one parent had a real and substantial connection with the jurisdiction of the court making the order at the time the proceeding was commenced or the order was made.
- 17 A court may decline to recognize an extra-provincial declaratory order that was made outside Canada and may make a declaratory order under this Act if
 - (a) new evidence becomes available that was not available at the proceeding at which the extra-provincial declaratory order was made,
 - (b) the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress, or
 - (c) the extra-provincial declaratory order is contrary to public policy.

[288] The Manitoba Law Reform Commission recommended that Manitoba's legislation be made consistent with sections 13 – 17 of the *Uniform Act*.³³⁴

[289] Saskatchewan's current provisions do not include a public policy exception to the requirement to recognize international extraprovincial declaratory orders. The Uniform Law Conference of Canada explained their addition of a public policy exception for orders made outside Canada as follows:

³³² *ON CLRA*, *supra* note 60 at s. 16(3) – (5).

³³³ *Uniform Act*, *supra* note 91 at ss. 13 – 17.

³³⁴ Manitoba Report, *supra* note 2 at 38.

[The exception] is intended as a safeguard to allow a court to refuse to recognize a foreign order that might go so far beyond the rules proposed in this Act as to be contrary to public policy in the enacting jurisdiction. One example might be where an order is granted that makes a person a parent who has no genetic or gestational relationship to the child, and there was no evidence of intent to parent prior to the child's conception or birth.³³⁵

[290] The Commission recommends sections 13 – 17 of the *Uniform Act* be adopted in Saskatchewan.

4.11.ii *Birth Certificates Issued Outside of Canada*

[291] It is possible that birth certificates may be issued to children born outside of Canada with individuals listed as their parents who may not be considered parents under Saskatchewan law. This issue may arise, for instance, if there are differences between the jurisdictions as to whether a genetic link with the child is required to establish parentage where a surrogate is used. Section 18 of the *Uniform Act* addresses this situation as follows:

18(1) The persons listed as the parents of a child on a birth certificate issued by a jurisdiction outside Canada who would not be presumed to be the parents of that child under this Act may apply to the court for a declaratory order that they are the parents of that child.

(2) The court may make an order sought under subsection (1) if the child would otherwise have no parents.

(3) The court may consider a birth certificate issued by a jurisdiction outside Canada as evidence for the purpose of making an order under this section.

[292] The Manitoba Law Reform Commission recommended that such a provision be incorporated into Manitoba's parentage laws.³³⁶

[293] The Commission recommends that s. 18 of the *Uniform Act* be adopted in Saskatchewan.

4.12 Recommendations for Reform

[294] The Commission's recommendations are as follows:

12. The Commission recommends that the terms "parent" and "birth parent" be used in the *CLA, 1997* to replace "mother" and "father" to the extent possible. If it remains necessary to use the terms "father" and "mother" in some instances, the Commission recommends the *CLA, 1997* refer to "a father/mother" as opposed to "the father/mother."

³³⁵ *Uniform Act, 2010*, *supra* note 91 at commentary to s. 16.

³³⁶ Manitoba Report, *supra* note 2 at 38.

13. The Commission recommends a donor be able to be legal parent of the child in addition to the intended parent(s) if the donor and the intended parent(s) have entered into a pre-conception written agreement and received independent legal advice prior to executing the agreement.
14. The Commission recommends there be no distinction in the *CLA, 1997* between traditional and gestational surrogacies.
15. The Commission recommends the *CLA, 1997* include surrogacy-specific parentage provisions. The intended parent(s) should be the parent(s) of the child (and the surrogate will cease to be a parent of the child) once the surrogate provides written consent to relinquish her entitlement to parentage after the birth. The provision should require a pre-conception written agreement and for each party to have received independent legal advice prior to entering into the agreement.
16. The Commission recommends there be no requirement for there to be a genetic link between the child and one of the intended parents in order for the surrogacy parentage provisions to apply.
17. The Commission recommends the *CLA, 1997* incorporate an administrative type of procedure following the birth of a child from a surrogate, provided certain conditions are satisfied. The intended parents and the surrogate should each be required to complete a declaration indicating that they entered into a pre-conception written agreement and received independent legal advice. The surrogate will also need to indicate she consents to relinquishing her entitlement to parentage on the form. The Commission further recommends that the surrogate be required to submit a certificate of independent legal advice along with the declaration to vital statistics in order to add an additional measure of oversight to the administrative process.
18. The Commission recommends that the *CLA, 1997* specify that any provision in a surrogacy agreement that purports to determine parentage is not enforceable, but may be employed by a court as evidence of the intention of the parties to the agreement.
19. The Commission recommends the *CLA, 1997* allow for up to four parents without the need for an application to the court for a declaration of parentage.
20. The Commission recommends a spouse of a deceased person to be able to apply to the court for a declaration that the deceased person is a parent of a child conceived after his or her death through assisted reproduction. The application should only be made after the child is born, and it should be made within 90 days of the child's birth. The deceased must have consented in writing to be a parent of a child conceived posthumously through assisted reproduction and must not have withdrawn their consent before his or her death.
21. The Commission recommends the recognition of extra-provincial declaratory order sections of the *Uniform Act* (sections 13 – 17) be adopted in Saskatchewan.

22. The Commission recommends that s. 18 of the *Uniform Act* – which addresses birth certificates issued to children born outside of Canada recognizing individuals as parents that would not be recognized as parents under Saskatchewan’s parentage legislation - be adopted in Saskatchewan.