

# The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family

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## Abstract

This article contends that the 'functional family' model falters in the context of lesbian and gay intra-family disputes. Functional family arguments have frequently been misused in disputes between separated lesbian mothers who are contesting issues around children and in disputes between lesbian mothers and known sperm donors/biological fathers. I argue that the rise of fathers' rights movements and increasing emphasis on biological family gives both discursive and legal authority to essentialised, gendered and symbolic status claims made by biological parents, valorising distant biological fathers over mother-led family units, and separated biological mothers over non-biological mothers.

Finding that the functional family approach cannot usefully resist the current ideological climate, the article concludes with an exploration of an alternative: framing a form of status claim for lesbian co-parents based on intentionality.

## Introduction

In recent years, in particular since the 1990s, lesbians and gay men have achieved major reforms granting some form of legal recognition to their couple and parenting relationships in most Western nations. Many of these recognition claims have drawn upon and integrated the sociological concept of 'functional family'.<sup>1</sup> The kernel of functional family claims in law is that rights should attach to, or flow from, the way a relationship functions rather than being limited by its legal form.

The key claim of this article is that however successful functional family claims have been in gaining rights from the State for lesbian and gay families,<sup>2</sup> this model falters

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<sup>1</sup> In particular see: *Mossop v Department of Secretary of State, Treasury Board of Canada*, Canadian Union of Professional and Technical Employees TD 6/89, April 13 1989 (unreported) and the influential dissent of L'Heureux Dubé J in *Canada (Attorney General) v Mossop* [1993] 1 SCR 554 as well the dissent of Ward LJ in *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304 and the judgments of the majority at the House of Lords level: *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27. These developments are discussed in Jenni Millbank, 'The Role of Functional Family in Same-Sex Family Recognition Trends' 20 *Child and Family Law Quarterly* 155-182.

<sup>2</sup> *Ibid.*

in the context of lesbian and gay intra-family disputes. I argue that the functional family model has been of limited utility, and indeed has been frequently misused, in disputes between separated lesbian mothers who are contesting issues around children.<sup>3</sup> I also contend that in the current climate the functional family model is utterly vitiated in disputes between lesbian mothers and known sperm donors/biological fathers. These disputes take place at a time of unprecedented formal equality for, and social acceptance of, same-sex family forms. Yet they coincide with other pervasive shifts in family law and policy – most notably the ‘fathers’ rights’ movement and the rise of (the norm of) the ‘eternal biological family’.<sup>4</sup> These two powerful trends enhance each other, as Susan Boyd has noted, because much of the fathers’ rights movement ‘seeks ways to enhance the legal status of fathers based on bio-genetic ties alone.’<sup>5</sup> These trends run counter to, and indeed may render redundant, the focus on the caring work of family that is the core of the functional family model. I argue that the rise of fathers’ rights movements and increasing emphasis on biological family gives both discursive and legal authority to essentialised, gendered and symbolic status claims made by biological parents, valorising distant biological fathers over mother-led family units, and separated biological mothers over non-biological mothers.

I conclude that the functional family approach cannot usefully resist the current ideological climate and so, without wishing to utterly succumb to it, I explore the alternative of framing a form of status claim for lesbian co-parents based on intentionality. Functional family and intentionality are inter-related: shared intention and shared enterprise in planning a child and trying to conceive is the platform on which the caring work of functional family is later built. Ultimately I hope that the centring of intentionality in defining an enduring parental status for

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<sup>3</sup> Many of these observations also apply to the far less common cases in which gay men who have been jointly raising a child separate and fall into dispute: see eg *DWH v DJR* [2007] AJ No 187; *Davis v Kania* 836 A2d 480 (2003).

<sup>4</sup> This term was first coined by Selma Sevenhuijsen, see ‘Fatherhood and the Political Theory of Rights: Theoretical Perspectives of Feminism’ (1986) 14 *International Journal of the Sociology of Law* 329 at 335. See generally, Carol Smart and Bren Neale, *Family Fragments* (1999); Alison Diduck, *Law’s Families* (2004); Reg Graycar, ‘Law Reform by Frozen Chook: Family Law Reform for the New Millenium?’ (2000) 24 *Melbourne University Law Review* 737. Janet Dolgin argues the ‘genetic family’ ‘further fragments the ideology within which families are understood, and challenges the presumption that society can safeguard traditional families or modern families – so-called families-of-choice – as units of love grounded in loyalty and solidarity commitment’: Dolgin, ‘Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of the Family’ (2000) 32 *Connecticut Law Review* 523 at 543.

<sup>5</sup> Susan Boyd, ‘Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility’ (2007) 25 *Windsor Yearbook of Access to Justice* 55.

lesbian mothers does not lead us into the privatised domain of contract law based on parties' bargains. Rather, this model is based on an acknowledgement of the unique truth that for lesbian families the genesis of children is always conceiving of children; it is the intention to have children together that is the essence of family formation. The centring of intentionality is of course not without its own difficulties, but an attempt is made to explore the pragmatic operation and parameters of an intentionality model.

## I. FUNCTIONAL FAMILY MEETS ITS LIMITS

Functional family claims rest on a performative aspect, that is, the parties are granted rights because of what they do in relation to one another, not because of the status of who they are or what manner of legal formality they have undertaken. This model falters in intra-family disputes because at the most basic level, there is simply no longer a united - functioning - functional family. Rather the court is confronted with conflicted - dysfunctional – individuals with contradictory accounts of who their family is, and was.

This exposes the weakness of the fundamentally performative aspect of functional family: how does one address roles that, by the time of hearing, months or years after relationship breakdown, are no longer being performed, or no longer performed in the same way, or are being performed by others? These issues arise in numerous mother versus mother cases that usually concern disputes about co-mother contact with the child or children, who reside after relationship breakdown with the birth mother (more on this pattern later). In an alarming number of cases the birth mother has taken the position of absolutely denying the parental role of the co-mother.<sup>6</sup> So we see birth mothers in court claiming that the co-mother, with whom they jointly planned, conceived and raised a child, is an 'aunty' or 'extended family member',<sup>7</sup> 'family friend'<sup>8</sup> or 'significant other'<sup>9</sup> in relation to the child, or that she is a helpful

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<sup>6</sup> Shelley Gavigan has neatly paraphrased this as the 'she was just being a good sport' argument: see Gavigan in 'A Parent(ly) Knot: Can Heather have two Mommies?' in Didi Herman and Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (1995). It is important to acknowledge that co-mothers also use homophobic arguments denying the validity of lesbian relationships, for example through seeking to avoid child support obligations by denying their own parental status (characterised by Gavigan in the same piece as the 'I was just being a good sport' approach). Such cases appear from this research to be far fewer in number.

<sup>7</sup> Re G [2005] EWCA Civ 462 at para 11.

<sup>8</sup> See *JAL v EPH*, 682 A2d 1314 (1996).

source of former support to herself<sup>10</sup> akin to a ‘roommate’, ‘best friend’<sup>11</sup>, ‘nanny’<sup>12</sup> or ‘baby sitter’;<sup>13</sup> but not in any way the child’s other parent or other mother.<sup>14</sup> ‘Real’, ‘natural’, ‘biological’, ‘the’ and ‘only’ are words that often preface the birth mother’s self description in these cases.<sup>15</sup>

Birth mothers frequently oppose the claim of a co-mother in a way that attacks the rights of all lesbian co-mothers rather than just her former partner. Literally dozens of the cases feature broad-based claims of birth mothers that parental status or parental responsibility can never vest in two women, or never in a non-biological mother, that parentage statutes apply exclusively to mothers and fathers, or that pre-existing legal mechanisms for the recognition of lesbian families such as consent orders through the courts are invalid.<sup>16</sup> So for example, DEW (unsuccessfully) argued in 2004 in Maine that the co-mother with whom she had jointly parented for five years during the relationship and another five years post-separation was ‘an individual who is not related to [the] child biologically or by adoption’ who should therefore ‘never be eligible for an award of parental rights and responsibilities’ when there is a fit legal parent in existence.<sup>17</sup>

Family law is state-based in the United States (US) and numerous jurisdictions do not permit claims to be brought by ‘non-parents’. This has led to a steady stream of cases over the past 20 years on the issue of standing of co-mothers, who have had to

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<sup>9</sup> See eg *KGT v PD* [2005] BCJ No 2935 in which the birth mother claims that she is the child’s ‘only mother and parent’, while the co-mother is a ‘significant other’ at para 19.

<sup>10</sup> The co-mother was characterised as a ‘mere helper’ in *VC v MJB*, 748 A2d 539 (2000) at 543.

<sup>11</sup> See eg *TB v LRM*, 753 A2d 873 (2000) at 886.

<sup>12</sup> See *VC v MJB*, 748 A2d 539 (2000) at 546.

<sup>13</sup> See eg *In Re Cheyenne Jones*, Ohio App LEXIS 2296 (2002) at para 3; *AF v DLP*, 771 A2d 692 (2001); *KAM v MJR* (1999) FLC 92-847. Such characterisations have led a number of judges to deny contact rights to co-mothers on the basis that to do so would open the floodgates to contact claims by nannies, babysitters and others: see eg *Nancy S v Michele G*, 228 Cal App 3d 831 (1991) at 841; dissent in *VC v MJB* 725 A2d 13 (1999) at 39; dissent in *ENO v LMM*, 711 NE2d 886 (1999) at 898.

<sup>14</sup> Indeed ‘nonparent’ and ‘stranger’ are terms in frequent use in the US cases: see eg *White v Thompson* (1999) 11 SW3d 913; *Wakeman v Dixon* (2006) 921 So2d 669; *Jones v Barlow* (2007) 154 P3d 808.

<sup>15</sup> See eg *TB v LRM* (2000) 753 A2d 873 (natural mother); *Re G* [2005] EWCA Civ 462; *DEW, H and J* [2006] FMCA fam 514. See also the consent agreement in *Rubano v DiCenzo* (2000) 759 A2d 959 where the birth mother agreed to contact between the child and co-mother in exchange for a waiver to any claim to parental recognition: at 962.

<sup>16</sup> See *Kristine H v Lisa R* (2004) 120 Cal App 4th 143; *In re ELMC* (2004) 100 P3d 546; *Valore v Bronicki* (2005) Pa Dist & Cnty Dec LEXIS 433; *Rubano v DiCenzo* (2000) 759 A2d 959; *LaChapelle v Mitten* (2000) 607 NW2d 151. See also *Davis v Kania* (2003) 836 A2d 480 involving a gay male couple.

<sup>17</sup> *CEW v DEW* (2004) 845 A2d 1146 at 1148 (emphasis added).

litigate for years even to have their claims heard.<sup>18</sup> In recent years at least 17 US states have broadened their approach to standing in children's cases to include psychological or de facto parents in lesbian families, yet threshold cases on standing (rather than merits) still dominate litigation in that country.<sup>19</sup> In Australia, Canada and (in somewhat more limited circumstances) Britain, claims regarding children can be heard regardless of the parents' formal legal status, and so more commonly we see cases argued on the merits in which birth mothers contend that contact should be at their discretion. It is also common for birth mothers to vehemently oppose any grant of parental responsibility (also known as guardianship) to applicant co-mother.<sup>20</sup> Where is functional family here? Sometimes these are the very same mothers who have previously petitioned the court for orders of joint parental responsibility,<sup>21</sup> or for second parent adoption,<sup>22</sup> regarding the same child or an older child born into the same relationship.

At this juncture I pause to acknowledge that - as my family law students gently remind me when I rail against the use of homophobic arguments by lesbian litigants - no one behaves at their best in family court litigation. Parents frequently lay recriminations and abusive characterisations at each other's door, with varying degrees of relevance,<sup>23</sup> and will always be tempted (or pushed by their lawyers) to draw on self-interested arguments that are socially regressive. However, I believe

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<sup>18</sup> Julie Shapiro notes that in 2005 intra-lesbian cases actually exceeded other parenting and family law matters in which the National Center for Lesbian Rights was acting: Julie Shapiro, 'A Lesbian Centered Critique of "Genetic Parenthood"' (2006) 9 *Journal of Gender, Race and Justice* 591 at 601. Shapiro also notes that anti-lesbian organisations have intervened in some of this litigation in support of the biological mother.

<sup>19</sup> See National Centre for Lesbian Rights website for a list of cases by jurisdiction: <[http://nclrights.org/publications/states\\_custodycases.htm](http://nclrights.org/publications/states_custodycases.htm)> accessed 1 June 2007 (last updated June 2006).

<sup>20</sup> Co-mothers are eligible for parental responsibility in the UK: in *G v F* [1998] 3 FCR 1 the court granted leave to apply; in *Re G* [2005] EWCA Civ 462 the co-mother was granted shared parental responsibility. In Canada: *Buist v Greaves* [1997] OJ No 2646 the application was denied; in *KGT v PD* [2005] BCJ No 2935 the court denied an adoption but did grant joint guardianship. Of the 25 US jurisdictions that have accepted de facto parental status for lesbian co-mothers, a much smaller number permit the possibility of shared parental responsibility and only a handful of the cases discussed here actually granted it: see eg *LSK v HAN* (2002) 813 A2d 872; *LaChapelle v Mitten* (2000) 607 NW2d 151 (shared with both mothers and the sperm donor); *Jacob v Shultz-Jacob* (2007) WL 1240885 (Pa Super) (shared with both mothers and the sperm donor); *Smith v Smith* (2006) 893 A2d 934; *In re ELMC* (2004) 100 P3d 546.

<sup>21</sup> See eg: *In re ELMC* (2004) 100 P3d 546; *Valore v Bronicki* (2005) Pa Dist & Cnty Dec LEXIS 433; *Kristine H v Lisa R* (2004) 120 Cal App 4th 143; *Kristine H v Lisa R* (2005) 37 Cal 4th 156; *Jones v Barlow* (2007) 154 P3d 808.

<sup>22</sup> See eg *Annette F v Sharon S* (2006) Cal App Unpub LEXIS 1099; *Sharon S v Annette F* (2003) 31 Cal4th 417; *In re Parentage of AB* (2005) 837 NE 2d 965; *In re Parentage of AB* (2004) 818 NE2d 126; *Lynda H v Diane TO* (1998) 243 AD2d 24; *LaChapelle v Mitten* (2000) 607 NW2d 151; *CM v CH* (2004) 789 NYS2d 393.

<sup>23</sup> For example, past evidence of familial violence or neglect of child's needs is highly relevant to a child's best interests inquiry.

there is a world of difference between seeking to establish that the other parent is a bad or irresponsible parent whose care or company will be harmful to the child and actually claiming that the other parent is not a parent at all.<sup>24</sup>

There are two possibilities here that I want to explore. First, there are a range of cases where functional family appears in a contorted or misused fashion, argued by the birth mother and/or received by the court in a way that invalidates lesbian-led family forms. Secondly there are those cases in which biology is so dominant that, even if functional family is argued by the co-mother, or by mothers together in dispute with a donor, it is never viable as a frame of reference.

#### (i) Functional Family misused and abused

A common misuse of the idea of functional family is that because it rests on the functions or roles that members play in relationship to each other, it therefore grants only a temporary status to non-biological parents. So, birth mothers claim that although the co-mother may have functioned as a parent in the past, now that the co-mother is no longer part of the household (and no longer has regular contact if the birth mother has opposed it) she has ceased to be a parent.<sup>25</sup> This kind of argument seems particularly likely to be made, and to succeed, when children are very young at the time of separation. So, for example in the Australian case of H and J in 2006<sup>26</sup> the mothers had separated when the child was 12 months old and the birth mother then refused any contact for the five months prior to the interim hearing, at which she argued:

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<sup>24</sup> Moreover, birth mothers in the cases on standing are not just arguing that the co-mother should have no contact or no parental responsibility regarding their child: they are arguing that neither should co-mothers in all other lesbian families. See eg *TB v LRM* 786 A2d 913 (2001) in which the birth mother argues that the court should completely abandon the doctrine of *loco parentis* (at 917), and that exclusion of lesbian parents from adoption and marriage statutes precludes the co-mother from any parental rights (at 918). In *Matter of Parentage of LB 122* P3d 161 (2005) the birth mother argued against any standing for psychological parents: at 16.

<sup>25</sup> This argument was accepted in *Guardianship of ZCW*, 71 Cal App4th 524 (1999); *Jones v Barlow* 154 P3d 808 (2007) and the first instance judgment in *VC v MJB* cited in *VC v MJB* 725 A2d 13 (1999) at 17. At first instance in VC because the co-mother had lived apart from the children for the first 2 of the 3 1/2 years of their lives she was held not to be a psychological parent: this was reversed on appeal. Note however that the passage of four years until judgment was the reason the Supreme Court of New Jersey would not grant co-mother parental responsibility, although she was ultimately granted contact: *VC v MJB* 748 A2d 539 (2000).

<sup>26</sup> *H and J* [2006] FMCA fam 514.

whatever significance lay in the relationships between [the child] and the [co-mother] (she asserts it was at best slight), now, given [the child's] age and level of intellectual and cognitive development, that relationship no longer exists.<sup>27</sup>

Another version of this argument is the position that the co-mother's familial relationship with the child is not a stand-alone relationship, but was rather a relationship mediated by and contingent on a relationship with the birth mother herself.<sup>28</sup> It is therefore worth noting that in many cases co-mothers are described by the court principally as the mother's former partner, not as the child's other parent.<sup>29</sup> While this may be explained as a consequence of the lack of language available, or as the court not wanting to use a term without accepted legal meaning, it nonetheless suggest that the co-mother's claim is viewed as contingent on a relationship with the birth mother,<sup>30</sup> who is centred as the 'real' mother. So for example, contrast the introduction to the English Court of Appeal decision in *Re G No 2* (granting residence with the co-mother):

**'The parties to this appeal are CG, CW and their children'**<sup>31</sup>

with that in the House of Lords (reversing the decision):

**'The present unhappy dispute is between the children's mother and her former partner Ms CW'**.<sup>32</sup>

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<sup>27</sup> H and J [2006] FMCA fam 514 at para 12 (emphasis added). See also the birth mother's argument at para 69 that, 'whatever significance' the relationship between co-mother and child in the past it is now 'entirely evaporated'.

<sup>28</sup> This was explicitly argued in the same case, 'It is the mother's position that, from [the child's perspective], given the absence of a genetic connection and the now concluded relationship between [the women], the applicant can not be regarded as being a person of significance to [the child]': H and J [2006] FMCA fam 514 para 12 (emphasis added). See also: *TB v LRM*, 753 A2d 873 (2000) at 890 arguing that contact cannot be in the child's best interests because she objects to it, and characterising the co-mother in all of her grounds of appeal as 'a former lesbian lover' of the 'natural mother' at 880-881 and *Kristine H v Lisa R*, 120 Cal App 4th 143 (2004) in which the birth mother argued that the court could not declare parentage for a 'homosexual partner not biologically related to their partner's child' at 160. As with many of the other arguments discussed in this paper, this is not always accepted by the court, although it is not often singled out for criticism by the court. For a few exceptions see: *KGT v PD* [2005] BCJ No 2935 at paras 42-3; *In re Parentage of AB 818 NE2d 126* (2004) at 133, and *Kristine H v Lisa R 120 Cal App 4th 143* (2004) at 145-6.

<sup>29</sup> See eg *Buist v Greaves* [1997] OJ No 2646 at para 7. In *TB* the headnotes rather than the judgments use the terms 'the girlfriend' and 'the appellants former lesbian lover' at the Supreme and Superior Court levels respectively: *TB v LRM*, 786 A2d 913(2001); *TB v LRM*, 753 A2d 873 (2000).

<sup>30</sup> At an extreme end is *Buist v Greaves* where the court appears to suggest that the co-mother ought not have left the mother if she really cared about stability for child: *Buist v Greaves* [1997] OJ No 2646. See also dissent in *Rubano v DiCenzo*, 759 A2d 959 (2000) characterising the co-mother's claim as 'a petition for visitation by a person who neither has an adoptive nor biological relationship to the child...based solely upon a prior homosexual relationship with the biological mother' at 990.

<sup>31</sup> *Re G (No 2)* [2006] EWCA Civ 372 at para 1 (emphasis added). CG is the birth mother, CW the co-mother.

<sup>32</sup> *Re G* [2006] 4 All ER 241 Lord Nicholls at para 2 (emphasis added).

Parental intention and functionality can blur easily in intra-lesbian disputes. So, while the birth mother of two children in *VC v MJB* acknowledged ‘having thought of the four of them as a family while the relationship was intact’, at trial ‘said she, the children and her new partner were a family now’.<sup>33</sup> The birth mother, although in one sense framing a claim that the child’s other parent is whoever she says they are, for as long as she says they are, draws on functional family to argue that the co-mother is no longer being a parent, and she is not seen by the child as a parent.<sup>34</sup> Moreover she may claim that the co-mother has been replaced in her role by a new partner who is similarly biologically unrelated to the child but who trumps her because she is now doing the caring work previously undertaken by the co-mother.<sup>35</sup> If the court construes the co-mother as a step-parent from the outset then it is not a huge leap to see her role as fundamentally temporary<sup>36</sup> and inter-changeable with a new adult (who may indeed perform it better).

Why, exactly, should the co-mother not be equated with the ‘new’ step-parent?<sup>37</sup> Addressing this question makes it clear that intention and functionality are likewise blurred in the claims of co-mothers: she is a parent not just because she acts as a parent but because she and the birth mother both intended her to be one and because they chose to conceive a family together. Yet in the context of a family law dispute, where the child’s best interests test is paramount and child-centred discourse ubiquitous, claiming a novel parental status based on past intention is extremely difficult, if not impossible.<sup>38</sup> Thus intention is de-emphasised, often leading to an exclusive focus on past caring patterns.<sup>39</sup> Co-mothers, forced to rely on

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<sup>33</sup> *VC v MJB*, 725 A2d 13 (1999) quoting trial judgment at 16.

<sup>34</sup> In *VC v MJB*, 748 A2d 539 (2000) the birth mother’s expert ‘noted that the children viewed MJB’s new partner as a current member of their family’ at 545.

<sup>35</sup> See eg *Re G* [2005] EWCA Civ 462; *KGT v PD* [2005] BCJ No 2935.

<sup>36</sup> See the argument of the birth mother in *AB*, rejected by the court, that the co-mother is akin to a temporary foster parent seeking to prevent the return of a child to natural parents: *In re Parentage of AB* 818 NE2d 126 (2004) at 133.

<sup>37</sup> See *SF v MD*, 751 A2d 9 (2000) where the functional family claim of co-mothers is equated with stepparent visitation: at 15. Note that in some claims, co-mothers have been explicitly held to have fewer rights than step-parents: see eg *White v Thompson* 11 SW3d 913 (1999).

<sup>38</sup> ‘In my view, in terms of the applicable legislation, the applicant cannot claim to be significant to [the child] merely because the applicant and the mother were involved in a significant relationship, at the time of [the child]’s conception and afterwards’: *H and J* [2006] FMCA fam 514 at para 62.

<sup>39</sup> ‘In my view, her claim to be of significance to [the child] can only be based on what [has been] described as ‘past performance’’: *H and J* [2006] FMCA fam 514 at para 61 and see references to past provision of care, previous welfare and past significance in para 63.



a history of shared care to ground their claims, must somehow convince the court that this relationship of past care is not past in the sense of being at an end; they must translate it into a claim of future significance.<sup>40</sup> This is often extremely difficult to do in the absence of any general social validation of the co-mother's role.<sup>41</sup>

In the US many jurisdictions have adopted a bifurcated hearing in intra-lesbian disputes: firstly to determine whether the co-mother meets the standard of de facto or psychological parent to establish standing, and then, if so, to undertake a child's best interests inquiry on the issues. While judges in such cases have adopted the language of functional family and endorsed the role of law as reflecting rather than dictating family reality;<sup>42</sup> this is quite simply a very heavy evidentiary (and economic) burden for co-mothers to bear.<sup>43</sup> Co-mothers have failed to satisfy the standard of functional parent, for example, in cases where they lived with the baby for only four months prior to relationship breakdown,<sup>44</sup> and where the couple were closeted and so had not presented to the world at large (or on any official documentation) as a family.<sup>45</sup> While some courts have stressed that it is the quality

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<sup>40</sup> See eg TB where after five years of litigation the co-mother had conclusively established standing based on past care but the matter was remanded for rehearing on the basis that there had been insufficient investigation into whether continued contact would be in the child's best interests into the future: TB v LRM (2001) 786 A2d 913; TB v LRM, 786 A2d 913(2001). In Re G [2005] EWCA Civ 462 it is interesting that the reframing of intention was undertaken by the court welfare officer, who characterised the importance of the co-mother to the children in terms of ensuring that they 'grow up with a better understanding of the complexity of their own identity' at para 9. However even in this quite positive decision there are a number of references to the co-mother's role 'historically' (although she is given importance as trustee of the family history that the birth mother is now seeking to deny).

<sup>41</sup> Indeed one birth mother's expert testified that 'the loss of VC [the co-mother] was not comparable to the loss of a parent in a heterosexual divorce because, in a heterosexual relationship, society would reinforce the expectation for a relationship to continue between a child and parent post-divorce, whereas no similar expectation would exist for the relationship between VC and the children': VC v MJB 725 A2d 13 (1999) at 17 quoting trial judgment.

<sup>42</sup> See eg the Supreme Court of New Jersey: 'Once the parent child bond is forged, the rights and duties of the parties should be crafted to reflect that reality' VC v MJB 748 A2d 539 (2000) at 555, and concurring judgment 'it is reality and not mere legality that should dictate who can be denominated as a psychological parent' at 558.

<sup>43</sup> In VC v MJB 748 A2d 539 (2000) the Supreme Court of New Jersey acknowledged that the first phase would almost always require expert testimony to establish the existence of a psychological parent-child relationship: at 553. The Maryland Court of Appeals has held that the person claiming de facto parental status must bear the burden of pleading, production of evidence and persuasion: Marks v Kahlor Md App LEXIS 252 (2006) at 15. Some jurisdictions hold that de facto parents do not attain an equal footing with a biological or legal parent, for instance there is a presumption of custody to the biological or adoptive parent or the de facto parent is limited to contact and cannot claim residence or shared parental responsibility, or they must demonstrate compelling interest such as actual or threatened emotional harm to the child to gain standing.

<sup>44</sup> AF v DLP 771 A2d 692 (2001).

<sup>45</sup> AF v DLP 771 A2d 692 (2001) at 699. She was not allowed to introduce expert evidence as to the parent-child bond as she had failed the threshold standing question.

and not the length of the relationship between co-mother and child that is crucial,<sup>46</sup> the American Law Institute Principles, which have been very influential in supporting the ‘de facto parent’ standard,<sup>47</sup> actually reintroduced a quantitative focus by defining a de facto parent as someone who has lived with the child for ‘not less than two years’ and who has ‘regularly performed a share of the caretaking functions at least as great as that of the parent with whom the child primarily lived’.<sup>48</sup>

In the case of AH in 2006 the Supreme Court of Massachusetts affirmed a decision that a co-mother who had lived with the child for the first 18 months of his life, but who was a career-oriented primary breadwinner (who had not proceeded with a second parent adoption available in that state), did not meet the de facto parent standard.<sup>49</sup> As a result the co-mother was denied standing to seek contact with her child after three years of litigation. It is very striking that the Chief Justice of the same Court which had first granted same-sex marriage in Goodridge, a judgment replete with references to gay and lesbian parenting and family forms,<sup>50</sup> two years later in AH should so vigorously refuse:

‘the plaintiff’s invitation to erase the distinctions between biological and adoptive parents, on the one hand, and de facto parents on the other, and to ... intrude into the private realm of an autonomous, if nonintact, family’.<sup>51</sup>

It is also apparent that mothers whose relationships break down during the pregnancy have no chance of meeting the functional family standard because it focuses on the post-birth period, yet the baby was still intended to be the child of

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<sup>46</sup> In JAL the Superior Court of Pennsylvania rejected the birth mother’s argument that the co-mother could not qualify because she had only lived with the child for first 10 months of the child’s life: JAL v EPH 682 A2d 1314 (1996). See also VC v MJB 748 A2d 539 (2000) (where the co-mother had lived with the children for two years and apart from them for the next four years), the Supreme Court of New Jersey stressed that in assessing the parent-child bond the crucial aspect is the nature of the relationship not the quantity of time: at 553.

<sup>47</sup> Cited with approval in Rubano v DiCenzo 759 A2d 959 (2000) at 974-5, and an earlier draft in ENO v LMM 711 NE2d 886 (1999) at 891. See critique by Richard Storrow, ‘Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parenthood’ (2002) 53 Hastings Law Journal 597 at 664-677.

<sup>48</sup> American Law Institute, Principles of the Law of Family Dissolution (2002) 2.03(1)(c), emphasis added, cited in AH v MP 857 NE2d 1061 (2006). Not all jurisdictions have used this standard: see eg Vermont, which took into account the ‘expectation and intent’ of both parties that the co-mother would be a parent and the joint decision as to the manner of conception in addition to shared parenting after birth in Miller-Jenkins v Miller-Jenkins, 912 A2d 951 (2006) at para 56.

<sup>49</sup> AH v MP 857 NE2d 1061 (2006). Massachusetts was one of the earliest states to grant de facto parental status: see ENO v LMM 711 NE2d 886 (1999).

<sup>50</sup> Goodridge v Dept of Health 798 NE2d 941 (2003); Opinion of the Justices to the Senate 802 NE2d 565 (2004): the majority judgments in both were authored by Marshall CJ.

<sup>51</sup> AH v MP 857 NE2d 1061 (2006) at 1065. In Goodridge v Dept of Health 798 NE2d 941 (2003) Marshall CJ noted that, ‘While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children... same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage’ at 963.

each.<sup>52</sup> I acknowledge here that such a co-mothers' claim to parental status in such circumstances may lead to some uncomfortable resonances with 'fathers' rights' claims (where, for example distant or uninvolved biological fathers assert a permanent irreplaceable status because they are 'the father'). Carol Smart long ago identified the marked disjuncture between mothers caring for and fathers caring about children and many feminists have argued that the legal system has erred in placing an equal value on these kinds of care.<sup>53</sup> In order to value women's caring work in heterosexual families, 'mothers' rights' have principally been framed through a primary caregiver presumption by feminist family law scholars since the 1980s.<sup>54</sup>

The primary caregiver presumption connects to functional family in the sense that it promotes a model of dispute resolution for family claims that centres the unequal way in which (heterosexual) families functioned prior to separation over the claims to formal equality by the legal/biological parents. The primary caregiver presumption was adopted in a very limited number of jurisdictions and has now been completely overtaken in most jurisdictions by reforms vigorously promoting (indeed, some would say, compelling) the norm of on-going shared post-separation parenting in heterosexual families.<sup>55</sup> It is ironic then to note the currency of primary caregiver arguments in intra-lesbian cases.<sup>56</sup> In stark contrast to the cases of lesbian parents claiming familial recognition from the state, where references to the egalitarian ideal of shared and equal parenting are ubiquitous, the intra-lesbian cases burst with birth mothers claiming (with varying degrees of effect) that they alone bore the lion's share

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<sup>52</sup>See *TF v BL* 813 NE2d 1244 (2004) where the birth mother sought child support which was denied by the Supreme Court of Massachusetts on the basis that although there was an agreement to jointly parent the child this amounted to a contract in breach of public policy as 'parenthood by contract' is not recognised in that state.

<sup>53</sup> See eg Carol Smart, 'Losing the Struggle for Another Voice: The Case of Family Law' (1995) 18 *Dalhousie Law Journal* 173 and 'The Legal and Moral Ordering of Child Custody' (1991) 18 *Journal of Law and Society* 485.

<sup>54</sup> See for example, Susan Boyd, Helen Rhoades & Kate Burns, 'The Politics of the Primary Caregiver Presumption: A Conversation' (1999) 13 *Australian Journal of Family Law* 233.

<sup>55</sup> See Susan Boyd & Helen Rhoades, 'Reforming Custody Laws: A Comparative Study' (2004) 18 *International Journal of Law, Policy and the Family* 119 and Boyd, Rhoades & Burns, *ibid*.

<sup>56</sup> While the ALI principles including 'a share of caretaking functions as least as great as that of the parent' have had some influence, they are in fact cited in only a minority of the US cases where primary caregiver is argued by the birth mother. Note also that Kentucky has a statutory definition of de facto parent requiring them to be 'the primary caregiver': a lesbian co-parent and primary financial supporter of an adopted child for six years was held not to meet this standard in *BF v TD*, Ky App LEXIS 95 (2005), and so was denied standing to seek contact.

of domestic labour and repeated reference to the birth mother as primary caregiver.<sup>57</sup>

So for example in KGT the birth mother argued that:

she as [the child's] birth mother and the person who has been primarily responsible for her care, is [the child's] only mother and parent'<sup>58</sup>

The use of primary caregiver arguments and rhetoric in intra-lesbian disputes is, in the vast majority of cases, completely inappropriate for two reasons. First it uses a model based on vast disparities in care in heterosexual families and applies it to lesbian families in which there are, generally speaking, quite minor disparities in care. The sociological literature on lesbian-led families formed through assisted conception shows a common ideal of shared care, which although not always completely achieved,<sup>59</sup> is far greater in fact than that generally found in heterosexual families.<sup>60</sup> The research demonstrates that co-mothers are far more likely to take significant periods of time off work following the birth of a child, to engage in part-time work thereafter, and to undertake an equitable share of household and child care labour throughout the child's life than fathers are.<sup>61</sup> Where inequality in the provision of child care occurs it is also likely to be identified by lesbian parents as an issue in the parties' division of labour, and may be 'compensated' for at other times or in other ways.<sup>62</sup> In this sense, L'Heureux Dubé's remark in Mossop that it is 'possible that a functional model may be used to subject non-traditional families to a higher level of scrutiny than families who appear to conform more to the traditional

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<sup>57</sup> See eg Buist v Greaves [1997] OJ No 2646.

<sup>58</sup> KGT v PD [2005] BCJ No 2935 at para 19.

<sup>59</sup> For example, Gillian Dunne found that co-mothers are more likely to undertake full-time work than birth mothers in lesbian parenting couples: Gillian Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 Gender and Society 11.

<sup>60</sup> Patterson and Chan give an overview of several US and UK studies through the 1990s of families where lesbian couples had planned and borne children together and conclude that: 'Lesbian couples, by and large, reported being able to negotiate their division of labor equitably. In addition, lesbian non-biological mothers were consistently described as more involved than heterosexual fathers with their children': Charlotte Patterson and Raymond Chan, 'Gay Fathers' in Michael Lamb (ed), *The Role of the Father in Child Development* (3<sup>rd</sup> ed, 1997) at 203.

<sup>61</sup> For example in Golombok and Tasker's study, birth mothers reported that over 90% of the co-mothers were at least as involved as themselves in parenting, compared with 47% of fathers in DI families and 37% of fathers in non-DI families: see, Susan Golombok and Fiona Tasker, 'The Role of Co-Mothers in Planned Lesbian-Led Families' in Gillian Dunne (ed), *Living Difference: Lesbian Perspective on Work and Family Life* (1998) at 59. See also Nanette Gartrell, Amy Banks, Jean Hamilton, Nancy Reed, Holly Bishop and Carla Rodas, 'The National Lesbian Family Study: 2. Interviews with Mothers of Toddlers' (1999) 69 *American Journal of Orthopsychiatry* 362; Maureen Sullivan, 'Rozzie and Harriet: Gender and Family Patterns of Lesbian Coparents' (1996) 10 *Gender and Society* 747 – these and many other studies are discussed in Jenni Millbank, 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38 *Australian Journal of Social Issues* 541.

<sup>62</sup> See for example, Sullivan, *ibid*.

norm<sup>63</sup> appears prophetic.<sup>64</sup> (It is also notable that in cases where the co-mother has undertaken the majority of the child's early care, the term rarely appears.<sup>65</sup>) Secondly, in the intra-lesbian cases, primary caregiver arguments have been made not, as was intended, as the basis for claims to residence with the child (where it is - in my view rightly - a way of arguing for stability of attachment and routine for the child post-separation).<sup>66</sup> Rather, birth mothers have raised primary caregiver claims in order to deny parental responsibility, parental status, or even regular weekend contact to the co-mother.

While these arguments are not always given great credence by decision-makers,<sup>67</sup> I find it troubling that they are made at all. Such claims reaffirm the idea that the co-mother's parental status must be earned, and that it is fundamentally temporary. They also suggest that the co-mother's contribution is only ever quantitative, that she cannot offer anything qualitatively different to the child in addition to that offered by the (primary caregiver) birth mother:<sup>68</sup> in essence, that only one woman needs to perform the function of mother.<sup>69</sup> This aspect of the argument appears to have had more purchase in the cases: there is a marked reluctance in the available judgments to use the gendered term 'mother' for both women.<sup>70</sup> So while the birth mother will frequently be referred to as 'the' mother, the co-mother is often referred to as the applicant or by name (or initials), or if characterised by reference to her role then as

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<sup>63</sup> Canada (Attorney General) v Mossop [1993] 1 SCR 554 at 638.

<sup>64</sup> For a rare acknowledgement that co-mothers are being held to a far higher standard of care than fathers through the invocation of primary caregiver arguments: see the dissent in Jones v Barlow 154 P3d 808 (2007).

<sup>65</sup> See G v F [1998] 3 FCR 1 where primary care of the child for two years was not called that and the adult was titled a 'quasi parent'. There is a single reference to fact that co-mother was primary caretaker for child until school age in Matter of Parentage of LB 89 P3d 271 (2004) at 275. In Laspina Williams v Laspina Williams 742 A2d 840 (1999) the co-mother quit her job when the child was a baby to provide full-time care but the judgment contains no reference to primary caregiver.

<sup>66</sup> It is also notable that primary caregiver concerns have never been used as the basis for granting residence to the co-mother.

<sup>67</sup> See eg JAL where the court held that the fact that birth mother was the primary caregiver did not diminish child's bond with the co-mother: JAL v EPH 682 A2d 1314 (1996) and KGT v PD [2005] BCJ No 2935 in which the court refers numerous times to 'heavier load' of care borne by the birth mother and calls her the primary caregiver, but qualifies this by adding 'That is not, in itself, unusual; it is usual for one parent to take a greater role in the parenting duties. That does not mean the other is any less a parent': at para 35.

<sup>68</sup> See eg claims by the birth mother of undertaking 'ninety percent' and '99%' of the parenting, respectively, in Re Cheyenne Jones Ohio App LEXIS 2296 (2002) and Valore v Bronicki Pa Dist & Cnty Dec LEXIS 433 (2005).

<sup>69</sup> See Buist v Greaves [1997] OJ No 2646: 'There is no doubt that the relationship between Simon and Ms Buist is very close; however, Simon does not consider her his mother. Ms Greaves is his mother. He calls her 'mamma' while he calls Ms Buist 'gaga' which is short for Peggy': at 34.

<sup>70</sup> Note a recent exception, 'AB has grown up knowing Dawn as her mother in the same manner that she knows Stephanie as her mother' In re Parentage of AB 818 NE2d 126 (2004) at 132.

a parent or co-parent (such terms also, although decreasingly, appear within disclaiming quotation marks.)<sup>71</sup> A claim to being a mother by the co-mother is seen not as complementing the relationship of the birth mother and child, but as competing with it (hence quantity of caregiving is relevant) or as attempting to usurp it altogether.<sup>72</sup> This point connects to the ways in which gendered expectations of parenting are mapped onto parents' and judges' understanding of the importance of biological relationships in both the mother v mother and the donor v mothers cases, discussed below.

## (ii) Functional Family trumped by biology

While the above section has explored some of the ways in which functional family arguments have been misused by birth mothers, this section examines ways in which biology is centred or essentialised such that claims to functional family by co-mothers are marginalised or entirely silenced. Julie Shapiro reminds us that defying 'the primacy of the biological link as the defining factor in parenthood' is a necessary prerequisite for lesbian family formation,<sup>73</sup> yet in the intra-lesbian cases we frequently see biology raised to a rarefied level as birth mothers claim that the co-mother is a 'biological stranger' to the child.<sup>74</sup>

To begin with what perhaps seems a small point, I can't recall reading a single heterosexual family law case in which it was noted that the mother had (or had not)

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<sup>71</sup> That the appearance of quotation marks is about a lot more than grammar is demonstrated in numerous cases. For example in the first instance decision in *Alison D*, the dissenting judge who would have granted co-mother standing places quote marks around 'biological stranger', while the majority, and majority on appeal, does not do so: *Alison D v Virginia M* (1990) 155 AD2d 11; *Alison D v Virginia M* 77 NY2d 651 (1991). See also the use of the parent with and without quote marks in *White v Thompson* (1999) 11 SW3d 913. A notable contrast is *MDR*, one of the most openly affirming judgments of lesbian families, which never puts quote marks around the terms mother or parent: *MDR v Ontario* (Deputy Registrar General) [2006] OJ No 2268.

<sup>72</sup> See eg expert evidence in *SF v MD* where the child called both women 'mother' led to a 'risk of confounding the roles when they are both contenders for the same role': *SF v MD* 751 A2d 9 (2000) at 18, emphasis added. See also the evidence of the birth mother in *JAL* that she cut contact between the child and co-mother 'because she felt that *JAL* was trying to establish a parental relationship and to undermine *EPH* as a parent' *JAL v EPH* 682 A2d 1314 (1996) at 1318. See also birth mother's claim that co-mother seeing herself as a mother was 'manipulating and confusing' the child: In *Re Cheyenne Jones* Ohio App LEXIS 2296 (2002) at para 9.

<sup>73</sup> Julie Shapiro, above note 18 at 598-599.

<sup>74</sup> *Alison D*, despite being called 'mommy' by the child, was characterised by the New York Court of Appeal majority as 'a biological stranger to the child' *Alison D v Virginia M* 77 NY2d 651 (1991) at 655. The 'stranger' characterisation, was extended into a 'stranger danger' analogy by the birth mother in *Miller-Jenkins* when she claimed in the press that contact between the child and co-mother 'would be like somebody off the streets coming and taking my daughter... They have no ties to my daughter': *New York Times*, 8 September 2005.

breast-fed the children as babies. Yet this is a constant refrain in the intra-lesbian cases: strike one for biology.<sup>75</sup>

The triumph of biology is probably best demonstrated by the simple observation that in 65 cases reviewed for this analysis (comprising 76 available judgments), primary residence was awarded to the co-mother at any level of the claim only twice.<sup>76</sup> In both cases this only occurred after the birth mother acted in contempt of court, through preventing earlier court-ordered contact and evincing a determined plan to sever the relationship with the co-mother through a variety of means including relocation.<sup>77</sup> The decision to change residence was therefore based in both cases on the ground that it was the only option available to preserve a relationship with both parents. In one of these two cases, *Re G (No 2)*, the decision was nonetheless reversed by the House of Lords in a judgment that emphatically propounds the continuing importance of biology in motherhood.<sup>78</sup>

The contrast between the Court of Appeal and House of Lords decisions in *Re G (No 2)* is stark. At Court of Appeal a host of legal authorities was presented by the birth mother on the preference for biological parents when there is ‘some other contender for care’ who is a ‘non-parent’.<sup>79</sup> Yet Thorpe LJ refused to ‘extend’ any general principle from those authorities on the basis that the case at hand was simply not about a non-parent:

The question is: who is a natural parent? In the [case law] all the judges spoke of the biological parent as the natural parent, but in the eyes of the child the natural parent may be a non-biological parent who, by virtue of long settled care, has become the child’s psychological parent. That consideration is obviously pertinent to any resolution of the competing claims of same sex parents. As in the present case the family may be created by mutual agreement and careful planning. Where, as here, the care of the newborn, and then the

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<sup>75</sup> See eg *Re G (No 2)* [2006] 4 All ER 241 at para 9 (a fact not mentioned in either of the two Court of Appeal judgments in the case); *KGT v PD* [2005] BCJ No 2935 at para 11 and 30; *AH v MP* 857 NE2d 1061 (2006) at 1067.

<sup>76</sup> In one case one of the four children lived with the co-mother, but this was at the request of the birth mother. The co-mother failed to gain custody of the other three children due to the court’s preference for a biological parent: *Jacob v Shultz-Jacob* WL 1240885 (Pa Super) (2007).

<sup>77</sup> See *Jones v Boring Jones* 884 A2d 915 (2005), applying a child’s best interests test ‘weighted in favour of the biological parent’ at para 12. See paras 14-15 on the birth mother’s ‘sabotage’ of the co-mother’s relationship with the children.

<sup>78</sup> *Re G (No 2)* [2006] EWCA Civ 372; *Re G* [2006] 4 All ER 241.

<sup>79</sup> *Re G (No 2)* [2006] EWCA Civ 372 at para 39

developing baby, is broadly shared the children will not distinguish between one woman and the other on the grounds of biological relationship.<sup>80</sup>

Thorpe LJ made two other key points rejecting the primacy of biology. Firstly he noted other kinds of lesbian and gay family forms, such as gay male couples having a child through surrogacy, or lesbian couples in which one mother was genetic and the other the birth mother in order to highlight the arbitrariness of considering a biological link in such families.<sup>81</sup> Secondly, Thorpe LJ argued that no distinction between a biological and non-biological parent would be made by the court in a family law case concerning a heterosexual family formed with the use of donated gametes.<sup>82</sup> This is a very simple but absolutely fundamental point; which is completely missed by Baroness Hale's majority judgment in the Lords which she commences by stating that the issues and legal principles in the case are 'just the same' as those that arise in heterosexual couples.<sup>83</sup> Quite apart from the fact that heterosexual couples are generally able to have children genetically connected to both parties, in cases when they must use donor gametes heterosexual couples do obtain both legal and social status in relation to unrelated children. Beyond the legal recognition of heterosexual non-genetic parents, a heterosexual non-biological father is seen as separate from the genetic mother; his role is viewed as unique and irreplaceable even if non-genetic because it is gendered. A heterosexual non-biological mother using donated eggs is still the gestational mother, again a unique and irreplaceable connection. The co-mother in a lesbian family by contrast is viewed as just an extra mother and only through her care giving, she is a not-really-real or not-complete mother.

The Lords judgment in *Re G (No 2)* established a clear 'parent versus non-parent' standard for intra-lesbian family disputes. While all of the Lords concurred with the judgment of Baroness Hale, Lord Nicholls and Scott each added an emphatic paragraph, stating respectively:

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<sup>80</sup> *Re G (No 2)* [2006] EWCA Civ 372 at para 44.

<sup>81</sup> *Re G (No 2)* [2006] EWCA Civ 372 at para 42.

<sup>82</sup> The example he gives is of donated eggs: *Re G (No 2)* [2006] EWCA Civ 372 at para 41.

<sup>83</sup> *Re G* [2006] 4 All ER 241 at para 6. Alison Diduck critiques Baroness Hale's judgment on the grounds of misplaced universalism and argues there is an increasing assumption that biology is welfare in the application of the best interests principle: "If Only We Can Find the Appropriate Terms to use the Issue Will be Solved": *Law, Identity and Parenthood* (19) *Child and Family Law Quarterly* 458.



I wish to emphasise one point. In this case the dispute is not between two biological parents...In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parent without compelling reason.<sup>84</sup>

and

Thorpe LJ failed to give the gestational, biological and psychological relationship between [the birth mother] and the girls the weight that the relationship deserved. Mothers are special...<sup>85</sup>

Baroness Hale did acknowledge Thorpe LJ's argument about the diversity of parenting practices by noting that a 'natural parent' may indeed be a genetic, gestational or social and psychological parent. This didn't help the co-mother, however, because Baroness Hale found that the birth mother 'is the natural mother of these children in every sense of that term'.<sup>86</sup> While the co-mother, like an adoptive parent, is a psychological parent,<sup>87</sup> the birth mother is 'both their biological and their psychological parent'.<sup>88</sup> The birth mother has all of the dimensions of parenthood, while the co-mother only has one aspect— hence the birth mother, when in contest, will always be more of a parent.<sup>89</sup>

### (iii) Biology and father absence collide

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<sup>84</sup> Re G [2006] 4 All ER 241 per Lord Nicholls at para 2.

<sup>85</sup> Re G [2006] 4 All ER 241 at para 3 (emphasis added). The weight of biology may be lessened where it is not the mother's biological connectedness being asserted. See for example the case of a co-mother versus grandparent dispute over custody of the child where the birth mother had died, in which a concurring judge stated, 'we should never say that mere blood relations should trump a relationship based on love and trust': Clifford K and Tina B v Paul S 619 SE2d 138 (2005) at 163. Although note Maynard J in dissent in the same case began, 'I am dismayed that this Court has written an opinion that is so anti-family. The majority's decision in this case places a child in a single-parent home with a person who is not a biological relative even though a two-parent home consisting of the child's biological relatives – his grandparents – is available. I am simply at a loss to understand the majority's reasoning...' at 164.

<sup>86</sup> Re G [2006] 4 All ER 241 at para 44 (emphasis added).

<sup>87</sup> The use of the expression 'quasi parent' in a number of the UK cases also betrays a sense that being a social parent is only even performing a small portion of parenthood, indeed literally a quarter, it is not being a whole parent. See eg also the co-mother who had been the child's primary caregiver for the first two years described as a 'quasi' parent in G v F [1998] 3 FCR 1. See also the adoption case: Re M [2004] NIFam 3.

<sup>88</sup> Re G [2006] 4 All ER 241 at para 37, emphasis added.

<sup>89</sup> This was explicitly stated as a principle in VC v MJB, 748 A2d 539 (2000) which held that a psychological parent stands in parity with legal parent but then continued, 'The legal parent's status is a significant weight in the best interests balance because eventually, in the search for self-knowledge, the child's interest in his or her roots will emerge. Thus, under ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and a psychological parent) is in equipoise, custody will be awarded to the legal parent': at 554.

Many of the intra-lesbian cases involve children conceived with the use of an anonymous donor. Yet in instances where the donor is a known man, it is remarkable how frequently the birth mother, not content to assert her own biological supremacy, also claims it for the sperm donor in asserting that he, rather than the co-mother, is (now) the child's other parent. These cases include instances where the donor has no financial responsibility for the child, has had no contact with the child,<sup>90</sup> and where the express agreement with the donor was that the mothers would be the sole parents of the child. Birth mothers have gone so far as to marry gay donors,<sup>91</sup> amend birth certificates to list donors as parents, and seek court declarations of paternity in order to defeat co-mothers' claims for contact with children.<sup>92</sup> As with other challenges to the legal recognition of lesbian families made by lesbian mothers, the retrograde effect of these arguments on the community generally has not prevented them from being made.<sup>93</sup>

Cases in which co-mother are opposed by birth both biological parents bring biology glaringly to the forefront. In one such case, H and J,<sup>94</sup> the birth mother denied that the co-mother was either a legal parent or a psychological parent under the Australian Family Law Act.<sup>95</sup> While the co-mother referred to herself as the 'non-biological co-parent', the Court noted that she 'provided no genetic material, personal to her, to assist in the conception' and so decided that for the sake of 'neutrality' it would refer to her as 'the applicant'.<sup>96</sup> In contrast, the birth mother and the completely uninvolved sperm donor were labelled 'the mother' and 'the father' in

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<sup>90</sup> See eg H and J [2006] FMCA fam 514.

<sup>91</sup> See also BL v Ba (Li) [2006] ACWSJ LEXIS 4967; in *Matter of Parentage of LB 89 P3d* (2004) the birth mother responded to the co-mother's application for parentage by changing the child's birth certificate and school records to add the donor as father and even went so far as to marry him in order to assert paternity: at 275.

<sup>92</sup> See eg *White v Thompson* 11 SW3d 913 (1999).

<sup>93</sup> There are many contenders for the most homophobic argument in the intra-lesbian cases, but for my money the award goes to *AL v YR, WL 393521 (Mo Cir)* (1996) where the birth mother argues that the co-mother, her former lesbian partner, is not an 'appropriate caretaker for the minor child because she is a lesbian' at para 18.

<sup>94</sup> H and J [2006] FMCA fam 514.

<sup>95</sup> The co-mother's claim to be a legal parent was based on the automatic ascription of status under Northern Territory law, in a provision not picked up by prescription in the Family Law Act 1975 (Cth) s 60H; her claim to be a psychological parent was based on Family Law Act 1975 (Cth) s 65C.

<sup>96</sup> H and J [2006] FMCA fam 514 para 5.

the judgment.<sup>97</sup> The prevalence of biology in this choice of terminology is underscored by the fact that the donor was not legally a father,<sup>98</sup> and the absence of 'genetic material' or a genetic or biological 'connection' between the co-mother and child - an uncontested matter - was referred to seven times.

The co-mother was held in H and J not to be a legal parent. In deciding whether she could be a psychological parent (under the broad person 'concerned with the care, welfare and development' category) the Magistrate held that while an unknown father or sperm donor would automatically qualify, the co-mother would have to bring evidence to prove the child was, and remained, attached to her.<sup>99</sup>

Obviously, a biological parent can be significant to a child, in the sense of being important to that child, notwithstanding he or she has no involvement at all in the care of that particular child. In that case, the importance arises as a result of the particular child having a shared genetic inheritance with the parent. The applicant in this case cannot claim such a genetic significance to [the child]. In my view, her claim to be of significance to [the child] can only be based on [what has been described] as past performance.<sup>100</sup>

This passage is fascinating in that a genetic relationship, even one with no social dimension and no legal status, is understood to be of both present and future relevance, while a functional parent is framed as someone only from the past. Being a parent endures, doing parenting ceases. This decision is all the more striking because it takes place in one of the few jurisdictions, Australia, which has always recognised psychological parents.<sup>101</sup>

H and J highlights how little biological fathers need to do to be seen as enduring and significant figures in children's lives. This is borne out in the donor versus mother

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<sup>97</sup> H and J [2006] FMCA fam 514, 'as there is no controversy regarding their biological connection with [the child], in the sense they provided respectively the ovum and sperm, which resulted in [her] conception': at para 6.

<sup>98</sup> See Jenni Millbank, 'Recognition of Lesbian and Gay Families in Australian Law - Part Two: Children' (2006) 34 Federal Law Review 205.

<sup>99</sup> The Court determined only that the co-mother had the potential to satisfy 65C: H and J [2006] FMCA fam 514 at para 76.

<sup>100</sup> H and J [2006] FMCA fam 514 at para 61.

<sup>101</sup> The original Family Law Act 1975 (Cth) s 64(1) permitted the Family Court of Australia to grant custody to 'a person other than a party to the marriage' if it was 'satisfied that it is desirable to do so'. Until 1987 the jurisdiction of the court was by reference to marriage due to constitutional limitations, but in 1987 it was extended to all children through a reference of powers from the states. Reforms in 1987 introduced section 63C which provided in subsection (c) that proceedings could be instituted by 'any other person who has an interest in the welfare of the child'. In 1995 that section was replaced with the current section 65C which provides orders may be sought and made in favour of 'any person concerned with the care, welfare and development' of the child.

cases where a valorised biological status in combination with the social expectation that parenting for men simply requires doing much less caring work than women,<sup>102</sup> and that men's gendered parenting is necessary for children's development (particularly for boys) has meant that donors are received by courts as if they are in fact the other parent. A functional family model should protect the autonomy of the mothers in these circumstances, because it is they who are the functioning family unit. But while the co-mother has to meet a very high standard to prove herself a functional parent, the donor through friendly or recreational contact relationship with the child, or even the sincere wish to have such relationship which has not in fact occurred to date,<sup>103</sup> is seen as a real and immutable father.

Mothers' claims to functional family in such circumstances are rarely acknowledged as valid descriptions of their (and their child's) experience, much less accepted by courts as the basis for denying parental status to men or preventing a 'normal father-child' contact relationship. This clash of ideas regarding lived versus biological family was manifest in the first instance (and appellate dissent) versus appellate majority judgments in the much discussed New York case of *Thomas S v Robin Y*.<sup>104</sup> The case involved a child who was nine years old by the time of hearing. The biological father had six years of friendly holiday contact with the child, her sister (not his biological child) and the mothers, but a dispute erupted when he sought contact with the child alone in order to introduce the child to his family (whom he thought would not be comfortable with her two mothers). In order to pursue contact, Thomas claimed full parental status; an action which the mothers felt profoundly threatened their family structure. Part of the difficulty of that case was the all or nothing claim to parental status, which led to a highly polarised debate in gay and lesbian legal scholarship.<sup>105</sup> A functional family analysis was applied at first instance to deny paternity (and therefore, under New York law on standing, contact), but this was overturned on appeal. Fred Bernstein has argued, compellingly in my view, that a proper

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<sup>102</sup> See eg Smart and Neale above note 4 at 47-48; Diduck above note 4 at 85-98. Julie Shapiro draws attention to the different meanings inherent in the verbs 'to mother' and 'to father' a child: above note 18 at 598.

<sup>103</sup> Carol Smart notes this in the context of family law more generally: 'Care talk is...often based on a rights claim: that is to say, many fathers are claiming a right to start caring or to care in the future. But the assertion of the desire to become a responsible, caring parent is treated as a natural urge that springs from instinctual love; it is therefore almost unassailable': Carol Smart, 'The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood' in Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (2006).

<sup>104</sup> *Thomas S v Robin Y* 618 NYS2d 356 (1994); 599 NYS2d 377 (1995).

<sup>105</sup> See Katherine Arnup and Susan Boyd, 'Familial Disputes? Sperm Donors, Lesbian Mothers, and Legal Parenthood' in Herman and Stychin above note 6.

application of functional family in such a situation would have protected the lesbian-led family by denying paternity, but could also act to maintain an established contact-relationship if it was beneficial to the child (although it would not expand or alter the relationship as Thomas S had sought to do).<sup>106</sup>

By contrast to the situation in Thomas S, which could have been (but was not) resolved by reference to the pre-existing pattern of relationships which incorporated a functional family approach, many of the more recent disputes between known donors/biological fathers and lesbian mothers involve toddlers or babies, with litigation commenced in some cases only weeks after the child's birth.<sup>107</sup> In these cases there is no pre-existing pattern of contact with the donors whose claim rests solely on their biological connection. A striking example is the New Zealand dispute, *P v K and M*, in which there are (so far) six judgments.<sup>108</sup> M and K, a lesbian couple approached a gay male couple, P and F, to form a family. Unlike many other lesbian and gay families which are based on loose oral arrangements, the parties here executed a written agreement which stated that the mothers would be the primary parents and caregivers, while the biological father and his partner would be 'God parents'. The men were to have no less than 14 days of contact per year, they would be consulted about major decisions concerning the child's upbringing, although the mothers would have the final say, and guardianship would only pass to the men in the event that both women died or were incapacitated.<sup>109</sup> The mothers characterised this as an avuncular role, while the men saw the biological father's role as an 'interested, active and committed parent'<sup>110</sup>: a father in the 'traditional sense of the word'.<sup>111</sup> Although no aspect of the agreement envisaged that the men would have prime or shared decision-making about the child, or responsibility over the child, this agreement was regarded by the court as being similar to the meaning of legal guardianship for the biological father.<sup>112</sup> (It is also notable that although the

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<sup>106</sup> See Fred Bernstein, 'This Child Does have Two Mothers...And a Sperm Donor with Visitation' (1996) 22 New York University Review of Law and Social Change 1.

<sup>107</sup> See also *Re Patrick* (2002) FLC 93-096; *X v Y* (2002) SLT (Sh Ct) 161. In *H and J & D* [2006] FamCA 1398 it is unclear exactly when litigation commenced but by the time of judgment the child was just over one year old.

<sup>108</sup> *K v M* (2002) 22 FRNZ 360; *P v K & M* (Family Court, Auckland, Unreported, Doogue J, 8 August 2002); *P v K* [2003] 2 NZLR 787; *P v K & M* [2004] NZFLR 752; *P v K* [2004] 2 NZLR 421; *P v K* [2006] NZFLR 22.

<sup>109</sup> See *P v K* [2003] 2 NZLR 787 at para 11.

<sup>110</sup> *P v K & M* [2004] NZFLR 752 at para 36.

<sup>111</sup> *P v K* [2006] NZFLR 22 at para 30.

<sup>112</sup> *P v K & M* [2004] NZFLR 752 at para 33.

agreement treated the biological father and his male partner identically in almost all aspects, the position of the partner is entirely overlooked in all of the judgments: strike two for biology).

When the biological father applied for standing to seek parental responsibility and contact, the Court characterised legislation that severs the parental status of gamete donors as ‘distorting’ the child’s ‘family relationships’.<sup>113</sup> The child’s right to know and be cared for by his parents under domestic and international law was interpreted at all levels unhesitatingly by reference to his biological parents, not to his functional parents.<sup>114</sup> While New Zealand law according parental status to a mother’s male partner in the situation of donor conception was justifiable, according to the court, for ‘plausible policy reasons’ of ‘protecting the security of the traditional nuclear family’, the mothers’ family form was not entitled to such protection.<sup>115</sup> This clearly bears out Katherine O’Donovan’s argument that:

genetic relationships are the least important when the structural and ideological features are not contentious. In other words, when the resulting family ‘looks right’ ... the genetic links are not an issue and can be ignored. It is only when the structural or ideological features of the resulting family raise concern – for example in the case of lesbian parents – that the genetic relationships become important and questions are raised about the child’s need for a (genetic) father.<sup>116</sup>

When the child was two years old the biological father was made a guardian of the child, according him parental responsibility, (as was the co-mother)<sup>117</sup>, and granted the monthly contact he sought.<sup>118</sup> The court held that the mothers’ male friends and role models ‘could never be a substitute for a boy’s right to a special and formalised relationship with his biological father.’<sup>119</sup>

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<sup>113</sup> P v K [2003] 2 NZLR 787 at para 139.

<sup>114</sup> P v K [2003] 2 NZLR 787 at paras 73-74, 137, 143; P v K & M [2004] NZFLR 752 at para 45; P v K [2004] 2 NZLR 421 approvingly refers to counsel’s argument that this right is ‘not merely to see a biological parent from time to time but to be parented by them in the fullest possible sense’ at para 39 and continues in para 40; P v K [2006] NZFLR 22 at paras 49-50, 97.

<sup>115</sup> P v K [2003] 2 NZLR 787 at para 19. Note that this status has since been extended to a mother’s female partner through legislative reforms: Status of Children Act 1969 (NZ) s 18.

<sup>116</sup> Katherine O’Donovan, ‘Genetics, Fathers and Families: Exploring the Implications of Changing the Law in Favour of Identifying Sperm Donors’ (2006) 15 Social and Legal Studies 494.

<sup>117</sup> Although note that the co-mother’s application for legal status was characterised both by the biological father and the court as an attack upon him rather than a necessary incident of her full-time parental role: P v K [2003] 2 NZLR 787, ‘The first shot was fired by the mother’s partner’ (referring to her application for guardianship) at 20.

<sup>118</sup> P v K & M [2004] NZFLR 752; P v K [2004] 2 NZLR 421 appeal upheld.

<sup>119</sup> P v K [2004] 2 NZLR 421 at para 41.

In 2005 the biological father sought overnight contact with the child, which would encompass three days every other weekend prior to the child starting school and include half of school holidays thereafter; a 'typical' separated father contact regime, which was granted over the continued objection of the mothers. Disturbingly, the 2005 judgment repeatedly refers to the 'father and son' relationship, holds that it is irrelevant that the biological parents never lived together as a family unit,<sup>120</sup> expressly applies child psychology literature on the benefits of contact with fathers in separated heterosexual families in deciding that overnight contact is in the child's best interests,<sup>121</sup> and determines that the relationship:

'should be regarded no differently from any other father/son relationship...the circumstances surrounding [the child's] birth and his subsequent upbringing are irrelevant.'<sup>122</sup>

The mothers' view that there is a vital difference in their family between a 'biological father' and 'a parent'<sup>123</sup> is a common experience in the context of lesbian

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<sup>120</sup> P v K [2006] NZFLR 22 at para 31. The mothers' attempt to distinguish between a biological father and a parent was met with an assertion by the court that it, not they, understands the child's 'reality' of his experience of his relationship with his 'daddy', which it is authorised to create and maintain: paras 26-27, 63-66, 136.

<sup>121</sup> P v K [2006] NZFLR 22 at para 102, 109-110.

<sup>122</sup> P v K [2006] NZFLR 22 at para 67. In earlier decisions the mothers were repeatedly chastised for arguing that the biological father had no legal status as a father: see eg P v K [2003] 2 NZLR 787 at para 18 the 'mother and her partner have not hesitated to invoke procedural obstacles...The points they raised...would quite simply not have been available to them had the child been conceived as a result of heterosexual contact or a heterosexual relationship' (see also para 94). The method of conception is viewed as a mere sexual and legal technicality, not as signifying a completely different kind of family. The Court however never asks the question whether it would have granted parental responsibility and contact to a biological father if it was the primary parents who were in a heterosexual relationship with each other, rather than (as implicitly imagined here) with the biological father.

<sup>123</sup> The following cross examination of the birth mother took place:

'COUNSEL: You don't actually see [P] as a parent do you?

M: We don't see him as a primary parent no.

COUNSEL: But do you see him as a parent?

M: I see him as a biological father.

COUNSEL: And that's a problem isn't it. That he sees himself as a parent and you see him as a biological father?

M: Yeah. Absolutely. And our original intention was never that he be a primary parent and that's - to us - I think there's - if you're making a distinction as a secondary parent then that's fine but when you say parent everybody's seeing him as a primary parent. There's no distinction made. [K] and I are [D's] parents and we have always been [D's] parents. If you ask [D] who his parents are he'll say [K] and I.

We are his primary attachment figures. We are the people that he comes to. We are his focus.'

P v K [2006] NZFLR 22 at para 26.

parenting.<sup>124</sup> Yet this perspective has been met with frank bewilderment or outright disdain by judges in donor versus mother disputes.<sup>125</sup>

Functional family is invisible in court in this context; because it is same-gendered parenting, the addition of a male parent is not seen to take away anything from the family (for example by intruding on their autonomy or invalidating their family form),<sup>126</sup> it only adds to it. The mothers are viewed as inexplicably trying to deny their child something good, something special and something that their family lacks: a daddy.<sup>127</sup> The mothers' behaviour in resisting a third parent in their family is therefore selfish, non-child centred and weird;<sup>128</sup> while the donor/father's behaviour in trying to join or control that family is natural, understandable, and loving.<sup>129</sup>

Not all recent donor versus mother cases have been as openly or wholly invalidating of the mothers' perspectives on their family form as the P v K cases, but even judgments that do accept the mother-led family as the core family unit have generally failed to see anything wrong in 'adding' to it.<sup>130</sup> The mothers, we hear time and time again, will just have to accommodate their child's 'need' for a father.<sup>131</sup> Lesbian mothers may be functional family but they are not a complete family.

## II. CENTRING INTENTIONALITY

My conclusion is that the functional family standard is onerous, and moreover is frequently misused or marginalised in intra-lesbian disputes. Additionally I contend that in donor v mother disputes functional family analysis is entirely sidestepped by a focus on biology and the judicial expectation of gendered parenting. Because of

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<sup>124</sup> See Catherine Donovan, 'Who Needs a Father? Negotiating Biological Fatherhood in British Families Using Self-Insemination' (2000) 3 Sexualities 149.

<sup>125</sup> When mothers have not wanted the man to use the word 'Dad' to name his own role, they have been characterised as 'obsessed' and 'irrational': see *Re Patrick* (2002) FLC 93-096 at para 270.

<sup>126</sup> In the words of the judge in one Australian case, 'The fact that the applicants see the father as an intrusion in their family life is a matter for them. The reality is, he is not': *Re Patrick* (2002) FLC 93-096 para 163.

<sup>127</sup> See eg *P v K* [2003] 2 NZLR 787 at 53; *P v K* [2006] NZFLR 22 at 136.

<sup>128</sup> In *X v Y* (2002) SLT (Sh Ct) 161 the mothers' view of themselves as a complete family is characterised by the Glasgow Sheriff's Court as 'narrow and somewhat claustrophobic' and extremely 'possessive and selfish'.

<sup>129</sup> *Re Patrick* (2002) FLC 93-096 'a natural, ordinary, parental and fatherly manner' (at para 270), 'anxious, willing and able to play a fatherly role in a traditional sense' (at para 272).

<sup>130</sup> For a relatively thoughtful judgment which explores and validates much of the mothers' experiences, yet still makes orders in favour of the biological father that are very much tailored to satisfying his emotional needs: see *Re D* [2006] EWHC 2.

<sup>131</sup> See *Re Patrick* (2002) FLC 93-096; *Re D* [2006] EWHC 2.



these limitations I make an argument for a form of automatic, universal and stable legal recognition for co-mothers based on pre-conception intention. The rationale for recognition is that the attempt to conceive was a shared enterprise between the women. This shared enterprise is not assessed by reference to post-birth factors, such as caregiving in the functional family model posed by American scholars such as Paula Ettelbrick and Nancy Polikoff.<sup>132</sup> Nor does it require 'holding out' the child as one's own after birth, which is an element of a recent Supreme Court of California case, *Elisa B*,<sup>133</sup> which accords parental recognition to lesbian co-mothers.<sup>134</sup> This proposal centres the intention to form a family in the pre-birth context, marked by consent to the conception attempt taking place within the women's relationship.

Intention, never mind shared intention, is one of the grand vexed questions of law: one which is intensely exacerbated by informal agreements in the domestic realm. There are several additional factors which complicate the issue of agreement in the realm of gay and lesbian parenting in particular. One is that discussions take place against a backdrop of legal invalidation, so very often there simply is no framework to structure expectations or understandings of parties' roles, or to equalise unequal power relations between biological and non-biological parents. (Moreover, even if legal recognition avenues exist, they may be unknown to the parties, poorly understood or distrusted.) The case law suggests that lesbian mothers are far more likely in pre-conception planning to define a known donor's role than to address the co-mother's role (possibly because they assume that the donor has some existing legal status that must be negotiated while the co-mother has none.)

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<sup>132</sup> Paula Ettelbrick's formulation includes the final consideration 'Has the woman seeking recognition abided by that agreement [of both women to be co-equal parents] by living with the child and actually provided care to the child on a daily basis': Paula Ettelbrick, 'Who is a Parent? The Need to Develop a Lesbian Conscious Family Law' (1993) 10 *New York Law School Journal of Human Rights* 513 at 548.

<sup>133</sup> The Court refined the presumed parentage test as follows:

Emily is a presumed mother of the twins...because she received the children into her home and openly held them out as her natural children ...[and] she actively participated in causing the children to be conceived with the understanding that she would raise the children together with the birth mother she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children's second parent.

*Elisa B v Superior Court of El Dorado County*, 37 Cal 4th 108 at 125(2005).

<sup>134</sup> *Elisa B v Superior Court of El Dorado County*, 37 Cal 4th 108 (2005). This result was also achieved by an intact lesbian family which successfully argued for a gender-neutral interpretation of the statutory presumption of parenthood in the New Jersey Superior Court: *In the Matter of the Parentage of the Child Kimberly Robinson* 890 A2d 1036 (2005).

Agreements about donors or biological fathers' roles are also fraught. It is not uncommon for such agreements to be premised upon misunderstanding of the existing legal status of donors, or misunderstandings as to the enforceability of formal agreements. Many, if not most, arrangements proceed on the basis of informal agreements. Even if formalised, a written agreement may not help the parties to see in advance that they understand their respective roles in profoundly different ways (as *P v K*, above, illustrates). The case law on donor versus mother disputes strongly suggests that parties may appear to agree, while they in fact mean very different things by what they say, even when using the same words. As the court noted in the English case of *Re D*, where the parties had agreed upon donor 'involvement', this term had totally different meanings:

However behind their apparently similar objectives, they were actually hoping for different things. Mr B was expecting something of the role of the absent parent after divorce who might share the child's leisure time equally with the child's mother and participate in decisions about the child whereas Ms A and Ms C intended that he should complement their primary care of the child by being a real father but by doing so through no more than relatively infrequent visits [every three or four weeks] and benign and loving interest.<sup>135</sup>

Erica Haines and Kate Weiner highlight another example in a discussion in which a potential donor indicated that he would like 'minimal involvement' of 'about five per cent' with the mother to have '95 per cent' of the parenting role. The mother continued:

he said this thing about 95 per cent and explained what it meant to him, so he then said, 'I wouldn't feel happy...if you sent the child to a school that I didn't approve of'. And that was the point at which it kind of scared me, because I felt like whatever 95 per cent is, that's well within it to me.<sup>136</sup>

Even when intention is clearly expressed, mutually understood and evidenced, it has not been given equal attention or weight in disputes. There is a marked focus in the intra-lesbian case law upon the birth mother's intentions as to her partner's role, rather than their mutual intentions. In the donor versus mother cases there is a similar preference for the donor's desires for his own role, with little attention to the birth mother's intentions as to family form and none at all to the co-mother's

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<sup>135</sup>*Re D* [2006] EWHC 2 at para 5. See also Deborah Dempsey's discussion of the mother and biological father's completely unrelated understanding of donation, fatherhood and kinship in the Australian case of *Re Patrick*: Dempsey, 'Donor, Father or Parent? Conceiving Paternity in the Australian Family Court' (2004) 18 *International Journal of Law, Policy and the Family* 76.

<sup>136</sup> Erica Haines and Kate Weiner, "'Everybody's got a dad...". Issues for Lesbian Families in the Management of Donor Insemination' (2000) 22 *Sociology of Health and Illness* 477 at 486.

intentions.<sup>137</sup> In more than one case the court has used a ‘but for’ test of the biological father’s intention, asking: would he have agreed to donate if he thought that his role would be limited to being a sperm donor or that he would not be able to be a ‘traditional’ father?<sup>138</sup> No such ‘but for’ intention has applied to the mothers, with no court to date considering the question: would the mothers have agreed to conceiving with that particular donor if they thought he would be a ‘traditional father’ with parental responsibility over, and every-other weekend contact with, their child? As Susan Boyd has noted in her recent analysis of Canadian family law cases concerning children born through assisted reproduction:

Intentionality concerning family form and who should be named on the birth certificate seems to carry increasing importance – but not just any kind of intentionality. The privileged form of intentionality is that which is formed before the birth, either by an existing, acknowledged genetic parent, or, increasingly, by a genetic father after birth.<sup>139</sup>

Thus, a shift from biology to intention may be unhelpful if it is simply a shift of focus to the privileged intention of one of the biological parents (and moreover an inquiry that remains premised on essentialised and gendered understandings of how those intentions will be performed.)

Finally, I acknowledge that roles may alter or evolve in a positive and consensual manner after conception in a way not anticipated by the agreement. If disputes arise years later, it would be antithetical to a functional family approach to formalistically hold people to an earlier agreement that does not accord with their lived experience or actual relationships.

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<sup>137</sup> See also Susan Boyd’s observations on Canadian cases, some of which concern single mother and heterosexual family forms that, ‘The father’s intentionality in combination with his bio-genetic tie wins out over the birth mother’s bio-genetic tie and contrary intention’ and there is a clear trend of ‘over-emphasizing the (male) genetic tie’ at the expense of maternal autonomy, above note 5.

<sup>138</sup> P v K [2003] 2 NZLR 787; Re Patrick (2002) FLC 93-096 at 275; X v Y (2002) SLT (Sh Ct) 161.

<sup>139</sup> Boyd above note 5.

For all of these reasons, and more,<sup>140</sup> privatised binding pre-conception contracts placing the burden of consciously negotiating individual agreements onto each and every lesbian-led family should not be contemplated.<sup>141</sup> This is not what I mean by an intention centred model. Rather, legal presumptions of parental status embodying the likely intentions of most parents in lesbian-led families should apply automatically. It is important to note that in the vast majority of lesbian-led families these intentions as to the family form are followed through by actual family function after birth, so intention and functionality are linked elements of a continuum rather than dichotomous modes of recognition.<sup>142</sup> Automatic parental status presumptions cannot cover all situations, and thus must be tempered with some discretionary powers as well as the ability to opt-in to additional recognition mechanisms for those family forms which fall outside the sweep of presumptions.

The model is based on two 'bright line' presumptions:

1. If two women are in a committed cohabiting relationship (whether or not formalised) and the non-birth mother consents to her partner's attempt to conceive through assisted conception, she is the second parent of the resulting child or children.

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<sup>140</sup> Including, for example, that an exclusive focus on binding agreements could actually preclude a child's best interests consideration (as standing restrictions have done in many US states). Also it is possible that such an approach could be uncritically transferred across to the surrogacy context, failing to acknowledge key issues such as power imbalances and the experience of the gestational mother when the agreement is to sever rather than share the parental relationship. Such parallels are often drawn in the US as judicial analysis of parenting by intention first developed in surrogacy cases (see eg the National Center for Lesbian Rights Model Brief which extensively draws on and seeks to extend principles from surrogacy law: Shannon Minter and Kate Kendall, 'Beyond Second-Parent Adoption: The Uniform Parentage Act and the "Intended Parents" – A Model Brief' (2000) 2 *Georgetown Journal of Gender and the Law* 29). For an argument that intent-based or functional parenting recognition for lesbian parents cannot be applied to gay male parents conceiving through surrogacy, see: Susan Frelich Appleton, 'Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era' (2006) 86 *Boston University Law Review* 227.

<sup>141</sup> Polikoff has consistently argued that such agreements should be enforceable; her position being that private ordering 'is preferable to a one-size-fits-all approach to family structure': see Nancy Polikoff, 'Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are not Fathers' (2000) 2 *Georgetown Journal of Gender and the Law* 57 at 69. See also Paula Ettelbrick, 'Our Common Humanity: Vermont's Leading Role in Forging a New Basis for Family Recognition' (2000) 2 *Georgetown Journal of Gender and the Law* 135. However, Polikoff and Ettelbrick's arguments favouring enforceable agreements are based in the US context in which sperm donors may have pre-existing legal status as parents (while under the model proposed here they do not) and where parental status often exclusively determines standing to seek contact (which under the model proposed here, as elsewhere in the world, it does not).

<sup>142</sup> Alternately, Richard Storrow argues that an expansive approach to functional parenthood can and should take into account expressions of intent made before birth: see above note 47 at 640.

2. The biological father (whether known or unknown) is not a parent if assisted conception is used.

These presumptions deliberately centre the mother-led family form reflecting the widespread reality of mothers undertaking the vast majority of caregiving work and responsibility for children, even in lesbian-led family forms where there are known and involved biological fathers.<sup>143</sup> This accords with Susan Boyd's suggestion that in according parental status, 'the social bonds between mothers and children should be privileged in relation to the genetic ties of a sperm donor – who carries the heavy cultural power of a father'.<sup>144</sup> But a privileging of mothers does not exclude recognition of biological or social fathers in appropriate circumstances, as the presumptions are augmented by two additional elements:

3. Additional parents can be added through an opt-in process.

This process should require the consent of both birth mother and co-mother as the primary parents and entail a form of child's best interests inquiry before according parental status. Additional parents need not be biologically related to the child.

4. The recognition of other adult-child relationships can still be achieved if necessary through a functional family analysis.

This form of recognition need not entail full parental status, but could concern one or more elements of the bundle of parental rights and responsibilities, such as child support or contact with the child. Again this process should be informed by a child's best interests inquiry.

A discussion of each of these elements follows.

## 1. The presumed second mother

### Consent of the co-mother

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<sup>143</sup> See eg Dunne above note 59, Gartrell et al above note 61, also see evidence received by the Victorian Law Reform Commission, Assisted Reproductive Technology & Adoption, Final Report (2007) at 139.

<sup>144</sup> Boyd above note 5.

Functional family models proposed by Nancy Polikoff and Paula Ettelbrick (and the *de facto* parent analysis undertaken in many US cases) have centred inquiry on the consent of the birth mother in sharing parental status with the co-mother.<sup>145</sup> In contrast, I suggest an approach that makes the co-mother's consent the focus of inquiry.<sup>146</sup> This is conceptually important: it is not about the birth mother giving rights to the co-mother, it is about a shared enterprise undertaken by both women. This is signified by the co-mother consenting to be part of the conception process in order to balance out the existing privileging of the perspective of the biological parent when there is inquiry into disputed intention. The birth mother's intention is not irrelevant, rather it is presumed: she is attempting to conceive while in a relationship with someone who will, almost inevitably, undertake a significant share of parenting work with her, and so it is presumed that she intends to share parental status. This does not prevent a birth mother from having sole parental status if that is her true intention – but this is no longer the baseline position, and must instead be explicitly chosen by her. Such a birth mother would need to engage in a clear process in order to exclude her partner from parental status. Equally, the birth mother's partner could refuse consent and avoid being ascribed parental status if she did not wish to be a parent.<sup>147</sup>

## Assisted conception

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<sup>145</sup> See Nancy Polikoff, 'This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families' (1990) 78 *Georgetown Law Journal* 459 at 573 and Ettelbrick above note 132 at 547-51, 550. Shapiro above note 18 at 600, has been critical of this approach for continuing to grant primacy to the genetic parent.

<sup>146</sup> I don't claim that a trigger of consent is full-proof because there can always be disputes of fact. For example there may be mistakes, deception or the withdrawal of consent during the two part conception process enabled by IVF (fertilisation, followed months or possibly years later, by transfer): see a series of English cases from heterosexual families dealing with these respective scenarios analysed by Sally Sheldon in the following articles: 'Reproductive Technologies and the Legal Determination of Fatherhood' (2005) 13 *Feminist Legal Studies* 349; 'Gender Equality and Reproductive Decision-Making' (2004) 12 *Feminist Legal Studies* 303; 'Fragmenting Fatherhood: The Regulation of Reproductive Technologies' (2005) 68 *Modern Law Review* 523.

<sup>147</sup> For an example of this in a heterosexual context, see *Jane Doe and John Doe v Alberta* (2007) 35 *RFL* (6<sup>th</sup>) 265. The parties cohabited in a settled intimate relationship during which they agreed that the woman would have a child through assisted conception with an anonymous sperm donor but the man would not be a parent to the child. The parties jointly sought to put this agreement into binding effect. The Alberta Court of Appeal held that the man's lack of consent to being a parent meant that parenting presumptions in Alberta law did not apply to ascribe parental status. However, even though the man was not a legal father, the court refused the orders sought by the parties because to do so would exclude the possibility that he could become a functional parent in the future, and other Alberta legislation concerned functional rather than legal parents.

The use of assisted conception as the dividing line between parentage presumptions is consistent with presumed intention: if the parties had wanted traditional parenting relationships and parenting rights, they probably would have conceived in traditional ways, whereas deliberately using another method of conception signifies a different intention.<sup>148</sup> The setting of assisted conception, for example whether it occurs in a formal setting such as a clinic process or informally at home, does not have any legal significance (although it may be relevant factually if there is a dispute as to conception method).

## 2. Presuming the donor is not a parent

The conclusive presumption is based on the premise that biology alone does not make men (or women for that matter, such as egg donors) parents. Lesbian-led families formed through assisted conception are families of intention in which biology is not determinative of individuals' relationships with each other. Parental status here follows the family form rather than a genetic link; the birth mother and co-mother are equally parents. While the significance of a genetic connection between a biological father and the child may have many possible meanings both for the man himself and the child,<sup>149</sup> this is something that is to be determined by them through the course of their relationship (if any): a genetic link does not automatically accord parental status.

I acknowledge that the effect of this presumption could be both under and over inclusive. The presumption may be under-inclusive because there are some lesbian-led families where it was clearly intended by all that the biological father be a sperm donor, but who for a variety of reasons still conceived through sex.<sup>150</sup> It is also over-inclusive for the few lesbian-led families where it is intended by all that the biological father should be a full legal parent. However, both of these situations are relatively

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<sup>148</sup> I differ here from Nancy Polikoff who centres binding agreements such that they override the method of conception in severing parental rights from a biological father even when the conception took place through sex: see Polikoff above note 141 at 58-59.

<sup>149</sup> See Maggie Kirkman, 'Genetic Connection and Relationships in Narratives of Donor-Assisted Conception' (2004) 2 Australian Journal of Emerging Technologies and Society 1.

<sup>150</sup> See eg Re D [2006] EWHC 2; ND v BM (2003) 31 Fam LR 22.

rare, and can be dealt with through opt-in mechanisms to transfer, or grant, additional parental status.<sup>151</sup>

### **3 & 4: Adding and altering parents, because not all families fit.**

It is important to stress that the proposed model does not mean that there can only ever be two legal parents,<sup>152</sup> or that involved biological fathers, or men intended to be parents, should have no legal rights whatsoever. Rather, there can only be two presumed parents.

More parents, or other significant adult roles, can be added through other processes that are flexible and adapted to their individual needs, which may include: second (or third and fourth) parent adoption for full parental status or consent orders granting various forms of shared parental responsibility. These forms of recognition should be augmented with an approach to child-related disputes that is able to preserve existing functional relationships that are of importance to the child, regardless of legal status or biological connection. Thus I suggest that this model does not close off inquiry into the multiplicity of family forms that fall outside of its scope. Nor does it assume that family forms are eternal and unchanging: lesbians and gay men may also form step-families, or have relationships that evolve in unexpected ways over time. An intention-based parenting presumption model works in conjunction with the functional family model, which can then be used to adapt to varied family forms or changing family needs.

Fiona Kelly has warned that a multi-parent model of family, while appealing because of its ability to respond to diversity of family forms and break with hetero-normative family models of dual parenting, may in fact draw on fathers' rights ideology to further a patriarchal family model in which fathers are imposed by courts on lesbian-led families.<sup>153</sup> It is hoped that a baseline of parental status for both mothers would

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<sup>151</sup> So for example in the Ontario case of *AA v BB* [2007] OJ No 2 the same result would be reached of three legal parents, but under this model it would be the biological father and not the co-mother who must seek opt-in recognition with the consent of the presumed legal parents.

<sup>152</sup> See Fiona Kelly, 'Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and their Children into Canadian Family Law' (2004) 21 *Canadian Journal of Family Law* 133.

<sup>153</sup> *Ibid.* See also Shelley Gavigan, 'Equal Families, Equal Parents, Equal Spouses, Equal Marriage: The Case of the Missing Patriarch' (2006) 33 *Supreme Court Law Review* 317.



help to shift judicial understandings of family such that if and when a functional family analysis is undertaken regarding other adults, the reification of genetic ties and gendered parenting highlighted in earlier discussion would not continue.

It is important to remember that the presumed parent model does not provide ‘the answer’ to many, or even most, child-related disputes: rather it provides a starting point, a relatively level, predictable, equitable and lesbian-centred point from which disputes can be addressed. Parental status brings a bundle of rights, obligations and presumptions which can be modified or adapted. ‘Who is a parent?’ is a starting point addressing who has responsibility for a child’s welfare and financial support, and may also address the distribution of parental responsibility after separation (previously this followed residence but jurisdictions such as Australia and the UK now presume that such responsibility remains shared by the parents). It does not prevent non-parents from having parental responsibility, nor does it stop parents from being deprived of it, in appropriate circumstances. ‘Who is a parent?’ is only ever the beginning and not the end of any properly child-centred inquiry into who a child should live with and how to structure any contact arrangements.

A presumed parental status for lesbian co-mothers is not entirely unknown. Indeed it is gaining ground; versions of this general approach have been adopted in recent years in three state and territories in Australia<sup>154</sup> and five provinces in Canada,<sup>155</sup> and in addition are now in place in New Zealand,<sup>156</sup> South Africa<sup>157</sup> and New Jersey.<sup>158</sup> (There are of course considerable jurisdictional variations, often depending upon sperm donor’s legal status which has depended on whether they are known or unknown or whether conception took place in a clinical setting.<sup>159</sup>) Many of these

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<sup>154</sup> See Artificial Conception Act 1985 (WA) s 6A; Status of Children Act 1978 (NT) 5DA; Parentage Act 2004 (ACT) s 8(4), discussed in Jenni Millbank, above note 98. This approach has also recently been recommended in the Australian state of Victoria, above note 143, recommendations 72-78.

<sup>155</sup> See the Human Rights claims: *AA v New Brunswick (Department of Family and Community Services)* [2004] NBHRBID No 4 and *Gill v Murray* [2001] BCHRTD No 34; as well as the Charter challenges in Alberta and Ontario: *Fraess v Alberta (Minister of Justice and Attorney General)* [2005] AJ No 1665; *MDR v Ontario (Deputy Registrar General)* [2006] OJ No 2268. In addition this approach has been enshrined in legislation in Quebec and Manitoba: *Vital Statistics Act, CCSM c V60, s 3(6)*; *Quebec Civil Code art 538*.

<sup>156</sup> *Status of Children Act 1969 (NZ) s 18*.

<sup>157</sup> See *J v Director-General, Department of Home Affairs* (2003) 5 BCLR 463.

<sup>158</sup> See above note 134.

<sup>159</sup> See eg discussion of the US situation in Polikoff above note 141 at 63-69. Note that reforms to UK law to grant ‘agreed parenthood’ status to co-mothers from birth will, if passed, only apply to lesbian couples who conceive using a licensed facility, not those who conceive at home: *Human Fertilisation and Embryology Bill 2007 Cls 41-45*.

reforms have proceeded under an equal treatment approach, analogising co-mothers with the position of non-biological parents in heterosexual families. There is much appeal in such an approach, which I am not necessarily criticising - but it has produced very little engagement with the underlying principles or discussion of the 'fit' in its application to lesbian-led families. Here I have attempted to justify the presumed second parent approach as one that most closely embodies (the majority of) mothers' family formation intentions.<sup>160</sup> In addition, I argue that both intention and family function may require additional, adaptive, recognition measures to augment the parenting presumptions.<sup>161</sup>

## Conclusion

Functional family analysis has achieved an enormous amount for lesbian and gay family forms in recent decades, supporting claims to both formal and informal status for partner and parenting relationships. Functional family claims have drawn heavily upon sociological literature about family forms, and often (though not exclusively) reflect critical and feminist concerns that legal recognition of relationships should be egalitarian, flexible and adaptive.

I argue here that a form of presumed second parent recognition is necessary to preface and ground, but not entirely replace, the functional family model. While functional family should work to resolve intra-lesbian and donor versus mother disputes, the case law demonstrates that it has not done so, or has only done so at unacceptable cost – cases discussed in this article in which co-mothers were 'successful' in establishing de facto parental status commonly involved three or four years of litigation. A final observation on the intra-lesbian cases: it struck me profoundly on reading them for the first time en masse that the great majority involved mothers separating when the children were under the age of two, regardless

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<sup>160</sup> In her recent analysis of the Canadian cases and discussion of sociological literature on family forms Susan Boyd also reaches this conclusion, above note 5.

<sup>161</sup> The interim proposals of the Victorian Law Reform Commission in Australia come close to meeting all of these needs: proposing automatic parental status to the co-mother, in addition to existing law providing for the possibility of dividing parental responsibility among a number of adults and a new method of multi-parent adoption requiring the consent of both mothers in the post-birth period. However this latter proposal was dropped in the final report on the basis that it was unwieldy and did not meet a demonstrated need by gay and lesbian families because of the generally non-residential role of biological fathers: see VLRC above note 154 at 138-139.

of the length of their relationship prior to that point. While this early stage of parenting is obviously a stressful (and sleepless) one for most people, I am left wondering about the extent to which a lack of legal protection, social recognition and certainty around the co-mother's role has contributed to these outcomes. While recognition models for lesbian parents based on intention may appear to be parent rather than child-centred, as Susan Boyd notes, there are strong arguments that such presumptions are in fact highly beneficial to children because, for example, children benefit from greater certainty, more clearly defined familial ties and the lesser likelihood of conflict between biological and social parents.<sup>162</sup>

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<sup>162</sup> Boyd above note 5.