FUTURE CHILD'S RIGHTS IN NEW REPRODUCTIVE TECHNOLOGY: THINKING OUTSIDE THE TUBE AND MAINTAINING THE CONNECTIONS[1]

Dena Moyal and Carolyn Shelley

This article considers whether children born through assisted human reproduction are entitled to information about their biological origins. It examines the issue both from a clinical perspective, citing social science research and the personal narratives of donor-conceived children, and from a legal perspective, outlining the extent of a child's "right to know" in different jurisdictions. The article suggests that a uniform legal approach is needed that will recognize the right of all children to access details about their identity and conception, for the sake of their psychological well-being. The article includes a fact scenario that considers the situation of a donor-conceived child who has become the subject of a custody dispute, and who has not been told the circumstances of his conception.

Keywords: *Reproductive technology*; *assisted human reproduction*; *legal parentage*; *parental status*; *donor-assisted conception*; *biological identity*; *right to know*; *child custody*

INTRODUCTION

Until recently, researching new reproductive technologies has been restricted to medical and ethical inquiries. A recent child-focused shift in research priorities has begun to address the psychological implications for children conceived by technology, but this swing has yet to be explored within the context of family law and the interests of the child. In particular, the issue of how children may be represented in custody and access disputes, where issues of reproductive technologies must be discussed, remains unresolved. For example, how should an eleven year old who does not know he was conceived with the help of a sperm donor be advised of that when the sperm donor seeks custody on the non-biological father's death?

Post-conception parentage battles continue to be a fact of life. It is important in the exploration of these issues to be aware of how much we are challenged in our thinking and feelings in this area and where our resistance lies. In the course of seeking assisted human reproduction ("AHR") technologies to bring the gift of a child into their lives, the impact of AHR has been felt by individuals at various cross-sections of society and across jurisdictions. Although medical technology has advanced rapidly over the last 31 years since the birth of the first "test tube" baby, psychological issues related to AHR have lagged behind, especially with respect to the impact on children.

Advocates of disclosure argue that it is the child's right, that family secrets are destructive, that secrecy reinforces the stigma and that the donor's medical history is essential for a child's development. Those opposed argue that non-disclosure prevents emotional harm to children and avoids disrupting the parent-child relationship. Research, clinical practice and legislation provide no clear resolution to this debate.

This article will examine:

a) who the potential parents may be;
b) how children born as a consequence of AHR have responded from a clinical perspective to finding out their genetic origins or being denied that information;
c) the search for information about donor identity from a clinical perspective; and
d) the rights of the children conceived by AHR to be informed about the circumstances of their conception and birth.

FAMILY COURT REVIEW, Vol. 48 No. 3, July 2010 431–446

Questions developed around a fact scenario will assist in identifying issues to be considered when representing a child in a custody and access dispute that centers around parentage in these circumstances.

THE SCENARIO

John is eleven years old and has been living in the sole custody of his mother Monica, since the death of his father, Don, who died of cancer several months ago. Don suffered with cancer for two years and his health slowly and painfully deteriorated over time. Monica took Don to all medical appointments, scheduled chemotherapy sessions and ensured his medications were always taken care of. A year into the illness, however, Monica began to emotionally withdraw from the relationship because she could not cope with watching her husband deteriorate. During this time, she met George, who was a young nurse at the location where Don was undergoing chemotherapy. George and Monica's romantic relationship continues to be a secret from John. John enjoys the time he spends with George and considers him to be a friend who he has been able to talk to since his father died. Monica has decided that George is going to move into the marital home in the next few months.

Pat, a lifelong friend to Don, has made a recent application for sole custody of John, with limited access between John and his mother. In Pat's affidavit, he states that he is requesting sole custody of John because John is his biological son. Pat says that he provided the donor sperm for John's conception. Pat is highly educated and usually works long hours. He is single and financially stable. John calls Pat "uncle" and spends time with him on a regular basis. They spend time playing at the park and participating in activities as well as having the occasional weekend sleepover. He helps John with his homework and has always been a person that John could count on. Pat has been especially close to John in the past two years while John's father was spending a lot of time in hospital, due to his cancer treatment.

WHAT THE MOTHER WANTS

Monica wants sole custody because she has always been the primary parent of John. She wants to continue providing him with support, nurturance and love. She has always provided John with proper parenting and guidance. She takes him to his hockey and guitar lessons. She says he gets along well with her new boyfriend, George, who has been coming over more frequently lately. She says that John is still very much saddened by his father's death, and is benefiting from talking to George about his loss, since George has some training in grief counseling. She wants to be the one to decide whether John should visit with Pat. She does not want access to be arranged by the court because this would signal to John that there is something wrong with their relationship. She does not want John to know that Pat is his "biological" father because she does not want to confuse him. She says that John is finally doing better in school and with peers and he has a positive memory of his father. Telling John now about Pat would shatter John's life history and the memory of his father, Don.

WHAT THE DONOR WANTS

Pat wants sole custody of John now because Monica is too "fixated" on her new boyfriend, and is not addressing John's emotional needs. Pat says that Monica has always been a good mother to John, but that she can be emotionally distant and that because of this John has turned to him for emotional support while Don was unavailable during his treatment. Pat says he is very busy at work but will find the time to care for John. He says he can also afford the best private schools for John to ensure that he gets the best out of life. Pat says that John needs to know that he is his biological parent before Monica's new boyfriend steps in as the "replacement father." He says it would be unfair for John to attach to Monica's boyfriend, especially since George is emotionally immature and unethical, as he took advantage of Monica in a vulnerable period.

WHO IS A PARENT—EMERGING THEMES

> The traditional categories of "mother" and "father" can no longer be universally applied, at least without reservation as to the meaning of those words. Today the law must consider categories such as "genetic parent," "surrogate parent," "intended parent," "gamete-donor parent," and other concepts that have grown out of the new realities. Even these new legal categories of parentage are shifting and evolving as reproductive science and law continue to progress in different directions.[2]

The above quotation reminds us that concepts such as "parent" are no longer easily defined. Once predicated on a biological connection with a child, or on legal presumptions relating to the marital status of a birth mother, the term "parent" can no longer be determined solely by biology or genetics. Rather, changing family structures and reproductive technologies have required a re-visiting of the models and presumptions of legal parenthood. With the legalization of same-sex marriage in some jurisdictions and the legal recognition of same-sex cohabitants in many others, the presumptions linked to the traditional male-female models of childrearing have become less persuasive. For children conceived through AHR, parentage is not necessarily predicated on a biological connection. Rather, evidence of an *intent* to parent the child demonstrated by action or admission may suffice. This is in contrast to the historical approach in which courts generally gave no weight to the parties' original intentions or wish to parent a child when allocating parental rights and responsibilities. The act of sexual intercourse carried with it the implicit potential for legal parenthood and all its consequent obligations. When intercourse is removed as a necessary link in conception, legislatures and the courts are left to struggle with new models of parentage which may now include up to eight "parents":

a) the ova donor and her partner;
b) the sperm donor and his partner;
c) the gestational carrier[3] and her partner; and
d) two persons who live in a conjugal relationship who arrange for the persons at (a)–(c) to conceive and deliver a child with the intention of parenting the child from birth (hereafter "the social parent(s)").

Several jurisdictions have begun to develop legislative responses to some of the questions surrounding parentage by seeking to define the rights and obligations of donors and recipients in various circumstances and to codify presumptions of parentage that more adequately reflect attitudes toward the equality of same-sex and unmarried heterosexual couples.[4] However, as the case law demonstrates, these legislative efforts are insufficient to address the various circumstances in which the parental status of persons involved in the reproductive process can be unclear. In such situations, the courts have had to balance the relevance of an intention to parent against the relevance of the genetic ties between a parent and a child.

Some jurisdictions have approached this issue by legislating a ban on claims for parental rights made by gamete donors. This general prohibition on parental rights is understandable in cases of anonymous donation where it is more easily presumed that an anonymous donor does not intend to act in a parental role to the child. The issue becomes more complicated in cases of known donors and even more so in cases where a known donor has some form of subsequent interaction with the child. In such cases, the question of a donor and donor-recipient's intentions with respect to the role that the donor will play in the life of the resulting child are not so easily reduced to legal presumptions, nor can the intentions of the parties necessarily be reliably agreed upon prior to the donation in a way which will adequately address all circumstances.

One means of attempting to address the issue of intentionality in known donor families has been to deny rights to donors unless rights were established by contract prior to the act of donation.[5] In *In Re K.M.H. and K.C.H.*,[6] the Kansas Supreme Court upheld constitutional challenges to a statute requiring a known sperm donor to enter into a written agreement with the child's mother or otherwise waive all future parental rights.

The contract method may not, however, be sufficient to address all circumstances that may arise with a known donor, especially where the known donor is permitted to have some form of contact with the child. In the Ontario case of *M.A.C. v. M.K.*,[7] a lesbian couple sought an order dispensing with the consent of the biological father to the adoption of a six year old girl. M.A.C. was the child's biological mother and M.K. was the child's biological father and access parent. The child was conceived through sperm donation. After the child's birth, the parties entered into an agreement respecting custody, access and child support. The clause relating to adoption indicated, "if the court will not grant the adoption order without terminating [Mr. M.K.'s] parental rights, then [Mr. M.K.] will consent to same pursuant to the *Child and Family Services Act* and [Mr. M.K.] specifically undertakes to execute a consent as required by s. 137." The applicants now wanted to adopt the child so that M.A.C.'s partner could enjoy the same rights of a biological parent. The respondent refused to consent to the adoption. The court indicated that the agreement, although not strictly a domestic contract, was not binding on the court in proceedings relating to the child's best interests. Further, the court rejected the applicant's argument that the adoption clause constituted consent to the adoption or an enforceable "agreement to agree" to the adoption. The court then examined the issue of *intention* as expressed in the agreement and found that the terms of the agreement indicated that, although M.K. would not be a custodial parent, it was the intention of the parties that he would have a true parental role.

The importance of intention and the need for court recognition of prior contracts or agreements is strongly demonstrated in cases in which conception requires the assistance of a surrogate mother, or gestational carrier. In the British Columbia case of *B.A.N. v. J.H.*,[8] a husband and wife asked for a declaration of parentage for twins who were conceived by in vitro fertilization between the husband's sperm and an egg donor's ova, the resulting embryos then being implanted into a surrogate mother, who was the respondent. The declaration sought was that the intended parents were the sole parents of the children and that the intended mother be declared to be the sole mother of the children. The egg donor and the surrogate mother both provided affidavits in which they consented to the intended parents being the sole parents and guardians of the children. The application was allowed but the court determined that it did not have the power to grant the declaration under the *Vital Statistics Act*. The *Act* contained no provision that explicitly authorized the making of the requested declaration. The court also lacked the power to grant it under its *parens patriae* jurisdiction. Its power to grant the declaration stemmed from its general power to grant equitable declaratory relief as to legal status as contemplated by the Rules of Court. The affidavits provided by the intended parents and the surrogate mother satisfied the Agency's requirements. Given the Vital Statistic Agency's approval of the approach that was taken by the parties, the declarations were granted. The court in *B.A.N.* was careful to stipulate that "if any of those parties did not consent, either as to the substance or procedure, the result may have been different."[9]

A similar result was found in the Ontario case of *M.D. v. L.L.*,[10] in which the applicants brought a motion to name the biological mother and father as parents, rather than the gestational carrier and her spouse. The court relied heavily on *J.R. v. L.H.*[11] in looking to the intention of the applicant social parents, the respondent gestational carrier and her partner. Further, the court took into consideration the fact that their respective intentions to parent and give up the child were still current.

An apparent trend within this line of case law is the universal consent amongst the social and biological parents. These cases, however, do not address what the judicial response might be where parties enter an agreement at the time of conception, but no longer consent to the terms of the agreement at the time of the child's birth.

Another common difficulty arises when parental relationships dissolve and one parent is not biologically related to a child. In the recent Alberta Court of Appeal case, *D.W.H. v. D.J.R.*,[12] a lesbian couple and a gay male couple agreed to have two biological children together, with one child living and being parented by each couple. Here the biological parents were the same for each child but the children lived in separate homes; one with the female couple and one with the male couple. In both cases, the children understood the adult pair that they lived with to be their parents. The male parents raised child, "A" for three years with some contact from the biological mother. This continued until the separation of the male couple. Upon separation, the biological father, with the support of the female

couple, withdrew access to "A" from the non-biological parent, citing concerns about his HIV positive status, his emotional state and his choice of sexual partners. The court held that the non-biological father had acted *in loco parentis* to the child since her birth and granted him access to "A."

Despite the lack of legislative clarity on the issue of who is a legal parent, it is clear that there is a shift towards recognition of a broader range of persons who may occupy parenting roles. Although the case law still leans toward primary placements of children with biological parents, the increase in access awards to non-biologically related parents suggests a transition in the law away from biology as the sole determinant of parental status.

THE CLINICAL PERSPECTIVE

THE CHILD'S RIGHT TO KNOW

Similar to research on adoption, the research regarding AHR has consistently highlighted the rationales parents give for non-disclosure as including: the right to keep their infertility private, the need to protect a family member or the couple's relationship, a desire to be "normal," and a fear that disclosure would somehow hinder the parent-child relationship and/or otherwise negatively affect the child.[13] Stotland writes,

> One of the reasons couples use techniques is that they want others to perceive their children as biologically "theirs". They want to approximate the experience and the appearance of the "normal, average" families they envy so strongly. This is a perfectly understandable wish. Of course, parenthood does not derive only or even mostly from biology; parenting is an identity, a matter of strong feelings and attachments and a set of behavioural responses to day-by-day, minute-by-minute demands of an initially helpless and growing human being. What complicates plans to keep the circumstances of conception a secret are the curiosity of the child as he or she grows, the child's need for information about his or her origin and the exquisite sensitivity of that child to all the feelings of his or her parents as he or she grows.[14]

Although limited, research, personal narrative of children born through AHR, and clinical experience regarding family secrets suggest that the desire to protect children from knowing their biological origins can result in greater psychological upheaval for the child and their family. It can be hypothesized that the harder someone tries to keep a secret, the greater the risk that the secret will slip out. Parents have identified that, as well as a desire for openness and honesty within the family, one of the reasons they chose to provide disclosure to their child was to avoid accidental discovery. They feared that their children would discover their genetic origin through disclosure by a friend and/or family member and preferred to tackle the issue themselves to reduce the psychological distress that accidental discovery could have. A Swedish study discovered that for almost every person in the study, both male and female, there was one or more persons outside the family who knew about the donor insemination treatment and in two cases, wives had told someone without their husbands' knowledge. Supporting evidence exists for this view of accidental discovery negatively impacting children in studies on detrimental disclosures after the death of a sibling or the father, in connection with the parents' divorce or the revelation of different blood groups.[15]

Accidental disclosure often arises during a period of crisis when a family is already overloaded with stress. In one study, a teenager recalled how her mother who was "panicked" with the thought of her ex-husband's new girlfriend disclosing out of vengeance, woke the child to tell of her origins: "She was crying and hugging us, and telling us that she loved us, and saying that it really didn't matter that our father was not our father. You better believe that it was confusing and weird. It's dark and it's scary and mom isn't making much sense, and we don't know why she's doing what she's doing."[16] The participant described how the circumstances affected the relationship within her family and that her father continued to believe that being her "real father" was based on maintaining the secret. Inadvertent disclosure or disclosure prompted by stressful events can cause the child to feel betrayed. The

history on which the child bases his or her identity is shattered, and the parents become distorters of the truth in the child's eyes. Rather than feeling wanted and accepted, confusion and shame often become the prevailing emotions.

Past research suggests that there appears to be more openness to disclose biological origins based on the type of reproductive technology used, parental traits such as marital status, age, stigma scores, sexual orientation and beliefs regarding disclosure. In 2002, the European Study of Assisted Reproduction reported that of 94 families with early adolescent children, only 8.6% of the donor insemination children had been told about their genetic origins whereas 50% of the in vitro fertilization parents and 95% of adoptive parents had told their children about the circumstances of their birth.[17] Another aspect of this study shows that almost one third of parents who had originally reported intending to disclose in the future still had not disclosed by the children's adolescence. There is also some indication that in families with more than one child born by donor insemination, there is a higher incidence of non-disclosure. The authors of that study hypothesized that, in those cases, the older child would have been conceived at a time where disclosure was not the norm.

Within the last two decades we have gone from sponsored concealment to a grassroots and legislative movement seeking to promote disclosure. As with the adoption experience, some parents frequently wait to tell children of the AHR origins. However, telling the child later increases the risk that the disclosure comes as a surprise and the child may experience a great sense of confusion and possibly betrayal.[18] Waiting often makes the decision to tell more challenging. Children who have been told at a fairly early age do not seem to show any adverse reaction.[19] At a younger age the child will generally process the information factually and the story of their birth becomes part of their sense of identity, rather than a shock to their sense of security. In Rumball and Adair's study,[20] the majority of parents who disclosed to their children before the age of three characterized the experience as positive and reported the children responded with practical questions, rather than emotional distress. The parents also anticipated the issue would arise again in the future and the authors suggested the story would "grow" with the child to match their stage in development.

The voices missing from the research discussions, which are impossible to capture for clear ethical reasons, are those of young people who do not know that they were conceived by donor insemination. A 2007 study[21] looked at group discussions of young people aged 14–18 from two co-educational schools. The themes that emerged from discussion with these youths were that 1) parents need to know their child and adapt their communication accordingly; 2) parents attitudes to using donor-assisted conception are significant to the family and its adolescent members; 3) donor conception is a matter for the family as a whole; and 4) individual differences in personality and circumstances of children mean that a simple recipe for communication cannot be propounded. While a limited number of the participants maintained that they would prefer not to be told, the majority argued that there was risk of finding out in other ways. Also, while participants argued for the child's right to know, this was mediated by a sense of the parents' right to judge when and how knowledge would be communicated.

Little is written about counselling that could be provided to parents and professionals to assist in providing information to children about their origins. The lack of empirical literature leaves professionals with little direction when parents ask for guidance on disclosure. In some jurisdictions, written material in the form of pamphlets and brochures is produced to assist parents in speaking to the child about these issues.[22] One approach to assist with disclosure is described in the literature as the "family- building approach." This approach emphasizes "us" as a family instead of "you" as a child; the child is thus presented with the information concerning how "they" as a family were created.[23] More work needs to be done in this area.

Many donor-conceived children and adults have expressed frustration and anger about the lack of information about their gamete donor and the fact that parents and donors have contracted away their ability to access this information. Their primary concerns center around the fact that withholding this information impacts on their sense of identity, their health planning and their ability to avoid having biological children with their siblings and half-siblings in the next generation.

Identity is a complex construct that operates on psychological, political, personal, and social levels and takes shape by contemplating difference and sameness.[24] As AHR becomes more common, it is

not surprising that children of donor insemination are expressing interest and want knowledge about their donor parents and increasingly frequently, their donor siblings, to complete their sense of identity. They may be prepared to go to great lengths to find out more about who they are and where they come from. In 2005, an enterprising teenager tracked down, through the use of a mail-order DNA kit and online search engines, the sperm donor who was his biological father.[25]

Donor-conceived children have clearly expressed the desire to know about their background. "I'm here to tell you that emotionally many of us are not keeping up," said one teenager, whose biological father was an anonymous donor. "We didn't ask to be born into this situation, with its limitations and confusion. It's hypocritical . . . to assume that biological roots won't matter to the 'products' of the cryobanks' service when the longing for a biological connection is what brings customers to the banks in the first place." The concept of "genealogical bewilderment," applies to adopted children where a child's minimal or uncertain knowledge of their biological parents leads to an ensuing state of confusion and uncertainty which fundamentally undermines their sense of security and affects their mental health. This concept can be applied equally to the children of AHR.[26]

Curiosity about the donors: what they looked like, what they are like as persons, their education and interests, and especially details about their health and family health record were common amongst children who had been told about their origins.[27]

As genetics come to play a larger role in the diagnosis and treatment of disease, it has become important to have information about one's medical history. If children are not aware of their genetic background they risk being misdiagnosed, could forego important medical care or undergo unnecessary medical treatment.[28]

Contrasting with the lack of formal disclosure initiatives is the development of consumer organizations for parents, children and donors, as well as the media's willingness to expose and explore the issue. For example: The Toronto Star reported in 2005 that a Yahoo discussion group posted more than 4400 registered members and had accomplished 739 matches of siblings.[29] Two fairly recent *New York Times* articles raised the issue of donor siblings being connected through the Donor Sibling Registry, a website that has linked more than 6371 half siblings and/or donors. One of the articles stated that, "For children who often feel severed from half of their biological identity, finding a sibling, or in some cases, a dozen, can feel like coming home. It can also make them even more curious about the anonymous father whose genes they carry."[30] While the first New York Times article raised the specter of the sibling connection, the notoriety brought forth the sperm donor, identified as Donor 150, who made himself known to the children described in the first article.[31] Barry Steven's film "Offspring," which documents his search for his donor father and the possible 200 siblings he may be genetically linked to, was aired on CBC television in 2002. Similarly, a 60 Minutes segment discussing sperm donor siblings and family ties was aired on CBS television in March of 2006 and updated in June 2007. These are just a sampling of the quest by advocacy groups that have formed to discover these children's biological origins.

THE LEGAL PERSPECTIVE

THE CHILD'S RIGHT TO KNOW

What legal right do such children have to this information? At the moment, the answer to this question depends on the jurisdiction in which the child was conceived.

Sweden became the first country to legally regulate gamete donation in 1985 when it removed anonymity of sperm donors.[32] The law stemmed from the application of studies of the welfare of adopted children and of their wishes to learn about their biological roots to the similar desires of donor-conceived children.[33] Austria, Switzerland, Germany, the Netherlands, New Zealand, Western Australia, Southern Australia and Victoria, Australia have all passed legislation that abolishes donor anonymity and entitles donor-conceived children to receive identifying information about their donor.[34] England has had legislation relating to disclosure of identifying information to

donor-conceived children since the introduction of the *Human Fertilization and Embryology Act, 1990.*[35] In November 2008, England amended its legislation with the passing of the *Human Fertilization and Embryology Act, 2008 ("HFE Act, 2008)*.[36] Although some of the sections of the new *Act* were introduced in early April of this year,[37] the bulk of the amendments will take effect in October 2009. Like its predecessor, the *HFE Act, 2008* permits donor-conceived children, aged 18 or older, to request both identifying and non-identifying information about their donors from the Human Fertilization and Embryology Authority (HFEA). The new legislation also places a duty on HFEA to provide non-identifying information to genetically-related siblings born of donor gametes or embryos. It is interesting to note that prior to complying with an applicant's request for information relating to a donor or a donor-conceived genetic sibling, the HFEA must ensure that the applicant has been given a suitable opportunity to receive proper counseling about the implications of complying with their request.

In Canada, the *Assisted Human Reproduction Act ("AHRA")*[38] requires the collecting of "health reporting information," which includes the identity, personal characteristics, genetic information and medical history of donors of human reproductive material and *in vitro* embryos of persons who have undergone assisted reproduction procedures and of persons who were conceived by means of those procedures. The legislation reflects the fact that some parents of a donor conceived child may want to have background information about the donor for medical or genetic reasons. The *AHRA* calls for the creation of a Personal Health Information Register of health information about donors, donor-conceived people, and parents of donor-conceived people. The *AHRA* provides for the disclosure of health reporting information upon request, but this does not include the identity of the donor unless the donor specifically consents to allow his or her identity to be disclosed. The registry is intended to allow the offspring to have access to the important health, social or family history information about the donor while protecting the donor's right to privacy, if desired. The *AHRA* also aims to address the concerns of offspring relating to inadvertent incest by allowing two persons to request information from the Assisted Human Reproduction Commission as to whether they may be genetic half-siblings or full siblings.

Unlike other jurisdictions, the United States has been reluctant to take a formalized and consistent approach to anonymous gamete donation. Indeed, there is currently no federal or state legislation that either prohibits or enforces anonymous gamete donation.[39] Competing interests, such as constitutionally protected rights to privacy in reproductive choice, may account for the laissez-faire regulation of disclosure in cases of assisted reproduction.[40] A small number of states have attempted to pass legislation that would introduce greater legislative control over gamete donation, and there are several states that have enacted legislation that allows the disclosure of identifying donor-information to a donor-conceived child "for good cause."[41]

In our highly mobile society, when it is possible for people to seek infertility treatment in clinics other than in their home states, it seems illogical to allow this legal diversity to continue. On a universal basis, the United Nations *Convention on the Rights of the Child*,[42] Articles 7, provides that:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and as far as possible, the right to know and be cared for by his or her parents.
2. State parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

States that are signatories to the *Convention* are therefore obliged to treat all children equally without regard to how they were conceived and to assist and protect the child's right to know who they are and where they have come from.

The births of children conceived without assistance are registered and those children can obtain their parental information from the state without their parents' consent.[43] It follows that children conceived through assisted human reproduction should be in the same position. Moreover, it cannot

be the case that a state can have a regime that prevents children from obtaining medically and psychologically necessary personal information, as this would be inconsistent with the thrust of the entire *Convention.* Indeed, Article 7 of the *Convention* has been relied on in several jurisdictions to justify legislation that permits donor-conceived children to have access to identifying information about their donors.[44]

Additionally, in Canada, England, Australia and the United States, a child arguably has the constitutional right to know his or her biological antecedents consistent with his or her constitutional rights.

One of the most compelling cases for a child's right to information relating to his or her parentage and circumstances of conception is the English case of *Rose v. Secretary of State for Health.*[45] In *Rose*, Ms. Rose had been told in tragic circumstances, at age 7, that her social father was not her biological father. Ms. Rose, having reached the age of majority, sought a judicial review of the Secretary of State's decision not to release to her the information he had concerning the identity of her biological father. The court confirmed that under article 8(1) of the *European Convention on Human Rights*[46] a child has the right to establish the details of his or her own identity. Article 8 relates to the right to the respect for family life.[47] The policy argument raised by this case is that children have a right to know that they were conceived through assisted human reproduction. The corollary of that right is that they must also have the right to the identifying and non-identifying information that exists about their biological parents, gestational carrier and social parents. Given the substantial consistency between Article 8 of the *European Convention on Human Rights* and Article 8 of the *UN Convention on the Rights of the Child*, it is arguable that this section could be applied to all signatories to the Convention in promoting and supporting a child's right to establish details concerning his or her identity.

The *Rose* decision was followed by the decision of the High Court Queen's Bench Division in *Leeds Teaching Hospital v. A and Others.*[48] In *Leeds* there were two couples, the As and the Bs, who went to an agency to have in vitro fertilization using their own genetic material. The As were Caucasian and the Bs were a mixed race couple. Mr. B's sperm was mistakenly injected into Ms. A's ova to create embryos that were then successfully implanted without either the As or the Bs becoming aware of the mistake. Twins were then born to the As. It was agreed that the As would raise the children. The issue was who was the legal father. Dame Butler-Sloss held that:

> I respectfully agree and am certain that the truth in this case is more important to the rights of the twins and their welfare than a fictional certainty. This is not a sperm donor case and should not be treated as such when considering the position of the twins. To refuse to recognize Mr. B as their biological father is to distort the truth about which some day the twins will have to learn through knowledge of their paternal identity. The requirement to preserve the truth will not adversely affect their immediate welfare nor their welfare throughout their childhood. It does not impede the cementing of the permanent relationship of each of them with Mr. A who will act as their father throughout their childhood. In my judgment the infringement of the twins' article 8(1) rights is met by the application of article 8(2) and it is proportionate to those rights for this court not to apply section 28(2) or (3)[49]

She also made the point that in arriving at this decision, the children would "retain the great advantage of preserving the reality of their paternal identity."[50] Having acknowledged that the preservation of that reality is an advantage, it would be logically inconsistent to narrow the right so in situations that, unlike in this case, it is possible to conceal the truth from children because their genetic, gestational and social parents are all of the same race. Therefore, arguably, this right to the reality of paternity (and by corollary, maternity) now extends to all children in England and Wales.

In Canada, sections 15 and 7 of the *Canadian Charter of Rights and Freedoms*[51] are arguably engaged where a child seeks to know his or her biological antecedents. Here, children conceived without assistance have the ability and right to know who their parents are: they can apply to the province of their birth for their birth registration and receive it. Parental consent is not required. An analogy may be made here to the recent enactment in the provincial law of Ontario relating to disclosure of adoption information. Adoption used to be a process shrouded in secrecy and shame.

Adopted children and parents who had given up children for adoption were not legally permitted to receive any identifying information about each other. In Ontario, there has been a steady move toward making more information available over the past twenty years. This has culminated in amendments to the *Vital Statistics Act* to allow adopted children and biological parents to obtain identifying information about each other once the child has reached a certain age, provided that the biological parent or adopted child has not filed a disclosure veto. With the opening of adoption information, donor-offspring are now the only group who are specifically denied the right to obtain information about their biological origins. The government cannot continue to deny children born as a result of AHR the same ability to learn the identities of people involved in their conception without creating an identifiable group who are being discriminated against contrary to section 15 of the *Charter*.

Similarly, section 7 of the Canadian *Charter* protects "life, liberty and security of the person." The full meaning of "security of the person" will not be fully explored in the context of this paper, but it can include a person's "physical autonomy"[52] and their "psychological integrity."[53] If an action by the state (i.e. laws preventing disclosure) has a serious profound effect on the person's psychological integrity, there could be a violation of that person's section 7 rights to security of the person. It is possible that a section 7 challenge could be brought against any legislation that does not allow full disclosure. Indeed, a class action lawsuit was filed in British Columbia in the fall of 2008. The lawsuit claims that the present law discriminates against persons who were conceived as a result of gamete donation. By contrast, adopted children have, by law, certain legal rights and opportunities to know about their biological parents that children conceived by way of gamete donation do not. The law suit challenges the constitutionality of the current legislation that permits the destruction of fertility clinic files after 6 years and prevents donor offspring from access to those records. The law suit bases its claim in the equality and security of the person provisions of the Charter.[54] Although still in its preliminary stages, the applicants have received an interim injunction preventing further destruction of any gamete donor records by any person in British Columbia until the conclusion of the proceedings. This suggests, at least, that the court considers there to be reasonable merit to the arguments asserted in the suit.

It appears from the foregoing that constitutional rights in some jurisdictions may be engaged to entitle a child born as a result of AHR to full information about the circumstances of his or her conception and birth. These arguments become even more persuasive when combined with more universal statements of a child's right to have access to information about his or her identity.

One of the primary arguments against a legislated ability to have access to donor information is that both donors and parents of donor-conceived children should have the right to privacy in their reproductive choices. These arguments raise significant issues for the donors and parents involved in assisted reproduction, however, the child's perspective and arguments relating to the child's best interests are conspicuously absent in this debate. By way of example, in *Rypkema v. B.C.*[55] there were biological parents and a gestational carrier. The biological parents sought to be listed on the birth certificate of the child. Justice Gray analyzed the situation from the parents' perspective only and concluded that, "[i]ncluding the petitioners' particulars on the birth registration is an important means for the petitioners to participate in their child's life and for affirming the parent-child relationship.[56] All of that is undoubtedly true, but the fact is that it also allowed the social parents to conceal from their child the truth of the child's conception and birth: the gestational carrier would not be listed and the parents could choose not to tell without fear of detection. The decision not to tell a child the circumstances of their conception and birth is by no means a hypothetical one. As noted earlier, clinical research shows that up to 50% of parents do not intend to share this information with their children.

One area in which privacy may give way to a child's right to know is in the context of a demonstrated need for medical information. In the California case of *Johnson v. Superior Court*[57] the court held that the disclosure of anonymous donor information was permitted under certain circumstances. In this case, the child had been born with a genetic kidney disease. The parents claimed that the fertility clinic had failed to fully test and screen the sperm. The parents requested that the court compel the deposition of the donor and production of the donor's fertility clinic records. The court

granted the parents' request, stating that the donor's expectation of privacy was "substantially diminished." In *Johnson*, the court also considered whether the donor contract could expressly prohibit disclosure of the donor's identity, thus providing the donor with an increased right to privacy. The court found that the contract, by forbidding release of any information about the donor's identity at any time, was contrary to public policy.

It may appear easier to justify the conflict between a donor's right to privacy and the child's right to identifying information in the circumstances addressed in *Johnson*. However, it may also suggest a greater focus on the child and the child's best interests when balancing privacy with a child's right to know. It has been argued, "the court's decision implied that the overriding concern is the best interests of the child. Therefore, the health, consanguinity, and psychological concerns donor-conceived children cited as reasons for donor disclosure may take precedence over the donor's limited right to privacy in future cases."[58] Indeed, reflecting on the decisions in *Rose* and *Leeds* and on the clinical research addressed above, it may become more difficult to deny that the psychological impact on donor-conceived children of their inability to access details about their identity and conception is a valid medical concern justifying the infringement of a donor's right to privacy.

THE SCENARIO

THE CLINICAL PERSPECTIVE

So what does all of this mean when we look at our eleven year old identified in the fact scenario? Keeping in mind that a court proceeding has been commenced and that in some jurisdictions, representation for children in family law matters can be provided:[59]

1. Should John be told that Pat is his biological father? If yes, by whom? A lawyer, his mother, Pat, someone else?
2. If he is told, when should he be told? After counselling to deal with his father's death? Any other time?
3. If John is not told and does not have full knowledge of the issues, how does a lawyer who might be appointed to represent his legal interests put forward a position in court when the child cannot make an informed decision?

There is a strong element of shock in the loss of a parent even when the event is predicted. The stress and trauma of the cancer will have had a significant effect on John. Developmentally, he is approaching adolescence and has an understanding that death is permanent. Often a child of this age will worry about the other parent dying, of dying themselves, and of getting the same illness that the same sex parent died of. While children of this age are usually interested in death and have many questions, they often hide their fears, questions and grief from their surviving parent in order to protect that parent.

John likely has questions about what happens to his father now that he is dead, whether his father can see him, or know what is happening in his life, and whether he is still his father because he is dead. John's grief will have been affected by how much he was included in his father's funeral process, by how the illness was dealt with and how included he was or how disrupted his life was by the death. He may be experiencing guilt as a result of feeling relief that the strain is over. The child may hide this, as he would feel disloyal to his father if he expressed such feelings. All of these normal grief issues require support from a stable and secure surviving parent, or if that parent is also experiencing paralyzing grief as a result of the loss, another person who is close to the child.

From experience with adoption and as noted above, there is a sense that children do better when they know their origins and are supported in their decision to explore them. It would have been better for John to know the history of his conception from an early age. The concealment of this information may lead to a complicated reaction from him when he does find out and he might experience this

revelation as a breach of trust. John needs to be told, but when? He needs a safe, stable environment in which to work through his grief. He also needs time and support to experience the pain and trauma of his loss, work through his guilt, fear, and ambivalence and integrate his father's memory into his life.

His mother has been a central caregiver and that relationship is very important to his stability and security. John and his mother need counseling. Mother needs counseling to help her with her own issues around the loss of her husband, as well as to help John with his mourning and to provide direction around letting John know of his origins. John could use counseling to help with the grief process and provide him with support as the other issues in his life unfold.

Information should not come to the child in the midst of significant loss and the attendant issues. A therapist could work with the child and assess when he is ready to begin to deal with this particular issue, and his mother can then explain the entire story to him; of how she and his father wanted a child and the joy they found in having him. Ideally, this should take place with the child's therapist supporting the process.

If Pat genuinely puts the interests of John first, then it would be beneficial for him to continue in his present role in John's life. If this is not viable, then John's primary need for security and stability is likely best met with his mother, who is the one consistent person in his life.

Pat would benefit from counseling as well, to identify his motivations for moving quicky in court at this time, for example, examining the loss of his best friend, the feeling of Monica betraying John's father, and his need to maintain the connection with John.

Counseling could assist Monica with understanding the impact of having George move into the home at this time and she may be encouraged to slow down the process in the interest of her son.

THE LEGAL PERSPECTIVE

In the context of our scenario, it is clear that a number of the ambiguities relating to legal determinations of parentage arise, including:

1. Can Pat be considered a legal parent by virtue of his biological connection?
2. To what extent would Pat's involvement and long term relationship impact on a determination of his legal parentage?
3. What rights does Monica have to deny Pat's parentage?
4. What role would a prior contract or agreement have in these circumstances?

On the basis of biology, Pat can be a legal parent to John. However, depending on the jurisdiction, Pat's right to parental status may have been relinquished by virtue of being a sperm donor to a married couple, where a presumption would operate to eliminate Pat's parental rights as a donor and invest Don with the status of legal parent to John. However, these presumptions may not apply in this situation; where the death of the legal parent potentially creates an ambiguity in the legal parentage of the child and, in the absence of the presumed legal parent, Pat could assert a paternal right based on his biological connection.

As Pat is a known donor, Monica and Don's intentions regarding the role Pat would play in the family become relevant. In this scenario, Pat is a known donor to Monica and Don, but the biological connection has not been disclosed to the child, despite a relatively close relationship between them. This arrangement between Pat, Monica and Don endured until Don passed away, and it could therefore be presumed that no party had any intention of altering Pat's status or involvement. Based on this demonstrated intention, it could be presumed that Pat would not have the ability to assert parental rights while Don was alive. It is questionable whether he should be permitted to do so now that Don is deceased.

Typically, where a donor is known and has contact with the child, the courts have been more inclined to seek to preserve such relationships when disputes about parentage arise. However, the case law has focused more on a social parent's right to a continued relationship with the child and the child's interest

in maintaining a relationship with someone who has acted in a parenting role. In contrast to those cases, Pat's relationship with John has not been that of a traditional or non-traditional parent. As such, promoting Pat's parental status would not achieve the goal of maintaining a valuable relationship consistent with John's best interests. Rather, it would seek to define a new relationship between John and Pat, which may be more consistent with Pat's interests than with John's, especially considering the corollary impact this new relationship would have on John's relationship with Monica.

Another consideration may be whether the parties entered into any contract or verbal agreement prior to conception of the child and whether such an agreement contemplated or would be enforceable in the current circumstances. The basic principles of contract law need to be kept in mind in this arena. A child not yet born cannot execute a surrogacy or other assisted human reproduction contract. The after-born child is therefore not bound by those contracts or the terms therein that relate to anonymity, parentage, etc.[60]

What about the child's right to legal counsel?[61] The *United Nations Convention on the Rights of the Child*[62] enshrines into international law the inalienable rights of children. Pursuant to Article 12 of the *Convention*, a child who can form views in a matter affecting him or her can either directly or through a representative or an appropriate body, have those views placed before any judicial or administrative proceeding. If John's views and preferences are ascertainable, at least symbolically, he is entitled to have his own counsel in these proceedings before the Court. This will, of course, be determined by the *Convention* being ratified by whatever country he is domiciled in.

In Ontario, the court order requesting the appointment of child's counsel explicitly provides the right for that counsel to examine the circumstances relating to the best interests of the child, for example, looking at the strength, independence and consistency of his or her views and preferences in the context of the surrounding evidence.[63] The question arises, however, if these views can be ascertained from John in the absence of knowledge of his origins and the inability to come to some understanding of the issues surrounding them.

When child's counsel are truly independent of the parties, they are uniquely positioned to help effect a settlement in a case. By conducting multiple interviews with their child client, as well as having the opportunity to interview the parties (with their counsel's consent), counsellors, and other professionals, child's counsel is cloaked with a degree of knowledge and credibility that can provide assistance in coming to a resolution in the interests of a child. Working with a clinical investigator who has additional skills enhances the ability of counsel to provide sound, sensitive representation.

Is it too early for legal representation for this child? Counsel's role is not to advise the child of his origins; however, no informed discussion can be held with the child client when the child has no knowledge of his parentage. Therefore, counsel for the child in this circumstance may assist the parties in identifying that John needs to be told of his origins and how such disclosure could be made, including recommendations about the appropriate timing for the disclosure and how outside support or resources could be used. This is clearly a case where counsel with a clinical aid would be useful. The legal/clinical team can explore with Pat his motivations for this timing around disclosure and recommend counselling for him. Counsel and the clinical investigator could help to refocus Monica and Pat on John's issues. For example, raising the issues of John's loss of his father, questions of identity and health concerns, and issues related to school and his peer group may be able to move both adults to engage constructively outside of the court system. They may have lost sight of these issues while dealing with their loss and grief in their own way.

Cases concerning parentage are often framed as being about the social parents' right to parent the child born as a result of assisted human reproduction. However, they are also about the child's status. Parentage affects the child's rights beyond family law. Specifically, this decision could affect the child's citizenship, inheritance rights, social benefits entitlement and status as a member of a First Nation, among other things. No adult person has their legal status determined by a court, (at least in Canada) without the right to counsel. There is no reason to make a distinction with respect to children. Indeed, in some circumstances, we already recognize the child's need for legal representation. By way of example, in Ontario, a child over the age of seven is required to consent to his or her adoption and must receive independent legal advice before giving or withholding consent.

CONCLUSION

The myriad issues arising from the use of AHR demonstrates the gap between emerging technology and the law. It is clear that the law is following, not leading the technology, and consequently legislatures and courts are in a position of constantly reacting as advances in AHR push the boundaries of what is scientifically possible.

The use of this technology is not only having a profound effect on our society generally; it is also changing the way we define ourselves and each other. The parent-child bond is one of the most important relationships we experience. Changes in how we define parentage can highlight numerous tensions in this area. The rights of parents can clash with those of children when one person's right to privacy collides with another's right to know one's history.

It is almost trite to say that knowing the truth is inevitably better than deception. While in most jurisdictions there is no legal expectation of disclosure, there is generally a moral right to know. The absence of information can represent a missing piece of these children's lives, which forms the basis of their identity. Children's exploration, at any stage of their life, in search of their identity, need not be seen as a rejection of their social parents. Parents' resistance and the dynamics surrounding that resistance, as well as the privacy rights of gamete donors, need to be balanced with the rights of children and an understanding of how the issues impact them. For the children, to have the opportunity to understand their origins and gain that understanding at their own pace may be preferable to basing a family life on deception and secrecy.

Information and support to assist with disclosure and disclosure aids need to be more readily available. As well, awareness of materials, where available, should be promoted more widely. There is a place for the establishment of post-treatment services for parents who actively seek advice on how and when to tell a child. Equally necessary is the availability of services to assist families who have not disclosed to their children, and in cases where the children find out through other means.

NOTES

1. This paper is based on one originally prepared for the Federation of Law Societies, National Family Law Program in Kananaskis, Alberta in 2006 by Dena Moyal, Clare Burns, and Lorraine Martin.

2. Charles P. Kindregan, Jr. *Family Law in the Twenty-First Century: Article: Collaborative Reproduction and Rethinking Parentage* 21 J. AM. ACAD. MAT. LAW 43, 47 (2008).

3. This is a woman who carries a child that is not biologically related to herself. She acts as a "host womb."

4. *See* the Human Fertilization and Embryology Act, 2008 (UK), 2009, c. 22, key provisions of which include recognition of same-sex couples as legal parents of children conceived through the use of donated sperm, eggs or embryos.

5. *See* Elizabeth McDonald, *Sperm Donor or Thwarted Father? How Written Agreement Statutes are Changing the Way Courts Resolve Legal Parentage Issues in Assisted Reproduction Cases* 47 FAM. CT. REV. 340, 355 (2009).

6. *In re* K.M.H. and K.C.H., 169 P.3d 1025 (Kansas 2007).

7. M.A.C. v. M.K. (2009), 94 O.R. (3d) 756 (Ont. Ct. J.).

8. B.A.N. v. J.H. (2008), 86 B.C.L.R. (4th) 106 (B.C. Sup. Ct.).

9. *Id*.

10. M.D. v. L.L. (2008), 90 O.R. (3d) 127 (Ont. Sup. Ct.).

11. J.R. v. L.H., [2002] O.J. No. 3998 (Ont. Sup. Ct.).

12. D.W.H. v. D.J.R. (2007), 280 D.L.R. (4th) 90 (ABCA).

13. Rona Achilles, "Anonymity and Secrecy in Donor Insemination: In Whose Best Interests?" International Conference on New Reproductive Technologies Montreal, Canada, 1988; Susan Golombok & Clare Murray, *Social Versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation*. 40 J. OF CHILD PSYCHOL. & PSYCHIATRY 509 (1999); Emma Lycett, Ken Daniels, Ruth Curson & Susan Golombok, *School Aged Children of Donor Insemination: A Study of Parent's Disclosure Patterns*, 20 HUM. REPROD. 810 (2005).

14. Nada Stotland, *Assisted Reproduction: Helping Patients Decide What to Tell Others*, 9:2 Primary Care Update for OB/GYNS 66 (2002).

15. Ann Lalos, et al, *Legislated Right for Donor-Insemination Children to Know Their Genetic Origin: A Study of Parental Thinking*, 22 HUM. REPRO. 1759 at 1766 (2007).

16. ANNETTE BARAN & REUBEN PANNOR, LETHAL SECRETS: THE PSYCHOLOGY OF DONOR INSEMINATION, PROBLEMS AND SOLUTIONS (Amistad 1993).

17. Susan Golombok,et al.,*The European Study of Assisted Reproduction Families: The Transition to Adolescence*, 17 HUM. REPROD. 830 (2002).

18. Amanda Turner & Adrian Coyle, *What Does It Mean to Be a Donor Offspring? The Identity Experiences of Adults conceived by Donor Insemination and the Implications for Counselling and Psychotherapy*, 15 HUM. REPROD. 2041(2000).

19. Lycett et al, *supra* note 13.

20. Anna Rumball & Vivienne Adair *Telling the Story: Parents' Scripts for Donor Offspring*, 14 HUM. REPROD. 1392 (1999). *See also*: A. Lalos et al, *supra* note 15, where the most common age for the first or single child to be told for the first time was about 5 years and where either the occasion for telling the child had been prepared and planned in detail or was precipitated by mere coincidence e.g., when the child asked specific questions about where babies come from. In general, the parents said that the children's spontaneous reaction when told was straightforward and many had not asked any specific follow-up questions.

21. Maggie Kirkman et al., *Families Working It Out: Adolescents' Views On Communicating About Donor-Assisted Conception*, 22 HUM. REPROD. 1–7 (2007).

22. *Id.*

23. Jennifer Baines, *Gamete Donors And Mistaken Identities: The Importance of Genetic Awareness and Proposals Favoring Donor Identity Disclosure for Children Born From Gamete Donations in the United States,* 45 FAM. CT. REV.116,199 (2007).

24. Barry Richards, *What is Identity? in* IN THE BEST INTERESTS OF THE CHILD, CULTURE, IDENTITY AND TRANSRACIAL ADOPTION (Ivor Gaber & Jane Aldridge, eds., Free Association Books 1994).

25. Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 15–16 (2007).

26. *Id*.

27. Neda Yavari & Elaheh Motevasseli, "Confidentiality in Gamete Donation"(2006) 1 DARU Suppl. 28.

28. Annette Appell, *The Endurance of Biological Connection: Heternonormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 BYU J. PUB. L. 289 (2008).

29. Nancy White *Are You My Father,* TORONTO STAR, April 26 2005, at L1.

30. Amy Harmon, *Hello, I'm Your Sister, Our Father is Donor*, NEW YORK TIMES, Nov. 20, 2005.

31. Amy Harmon, *Sperm Donor Father Ends His Anonymity*, NEW YORK TIMES, Feb. 14, 2007.

32. Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUM. REPRO. 818, 819 (2001).

33. Dennison, *supra* note 25 at 9.

34. *Id*. at 10.

35. Human Fertilization and Embryology Act, 1990 (U.K.), c. 37.

36. Human Fertilization and Embryology Act, 2008 (U.K.), c. 22.

37. Part 2: Parenthood in Cases Involving Assisted Reproduction, took effect on April 6, 2009.

38. *Assisted Human Reproduction Act,* S.C. 2004, c. 2. Although, the majority of provisions contained in this legislation have been proclaimed in force, the provisions relating to Privacy and Access to Information (ss 14–19) are, as yet, unproclaimed.

39. Dennison, *supra* note 25 at 10.

40. *Id.* at 10–11.

41. *Id*. at 11.

42. GA Res. 44/25, UNGAOR, 44th Sess., Annex, Supp. No. 49, UN Doc. A/44/49 (1989) 167 (entered into force 2 September 1990).

43. For example, in Ontario the relevant legislation is the *Vital Statistics Act,* R.S.O. 1990, c. V. 4.

44. Frith, *supra* note 32 at 820–821.

45. [2002] E.W.J. No. 3823 (H.C.J.).

46. 4 November 1950, 213 U.N.T.S. 222,.

47. Article 8 reads:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

48. [2003] E.W.J. 906 (Q.B.D.).

49. *Id.* at para. 57.

50. *Id.* at para. 56.

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

52. *See* R. v. Morgentaler, [1998] 1 S.C.R. 30.

53. *See* New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46.

54. "First ever class action lawsuit filed by sperm donor offspring in Canada," Arvay Finlay Barristers *available at* <http://www.arvayfinlay.com/news/news-oct28-2008.html>.

55. [2003] B.C.J. No. 2721 (BCSC).

56. *Id.* at para. 31.

57. 95 Cal. Rptr. 2d 864 (Ct. App. 2000).

58. Dennison, *supra* note 25 at 24.

59. One program that provides representation for children in family law disputes is the Office of the Children's Lawyer in Ontario, Canada.

60. In the United States, the *Uniform Parentage Act* (approved by the National Conference of Commissioners on Uniform State Laws in August 2000) purports to make it possible to bind future children to the contract with court approval. This presents a serious issue about how the child would be represented at such a court approval hearing and what kind of inquiry the court would engage in before deciding to grant such an approval.

61. The Office of the Children's Lawyer (OCL) is a law office within the Ministry of the Attorney General in the Province of Ontario. Lawyers within the Office represent children in various areas of law, including child custody and access disputes, child protection proceedings, estate matters and civil litigation. In private custody and access disputes, the OCL becomes involved in a case by way of a court order. If the OCL accepts a referral from the court and a lawyer is appointed to represent the child, the role of child's counsel is to advocate a position on behalf of the child and ensure that evidence of the child's views and preferences, the circumstances surrounding those views and preferences, and all other relevant evidence about the child's interests is before the court. In some cases, the OCL may appoint a clinical investigator to assist child's counsel in representing a child. Clinical investigators are mental health, professionals with a background in separation and divorce issues. They assist child's counsel in conducting interviews, collecting information, and formulating a position on behalf of the child, and will be called by child's counsel as a witness if a matter proceeds to a contested hearing.

62. GA Res. 44/25, UNGAOR, 44th Sess., Annex, Supp. No. 49, UN Doc. A/44/49 (1989).

63. Policy Statement of the Office of the Children's Lawyer, Role of Child's Counsel, 2009.

Dena Moyal, LL.B., has been with the Office of the Children's Lawyer in Ontario since l986 and became the Legal Director, Personal Rights in 1996.Prior to joining the OCL, she practiced family law in Toronto. Before attending law school, she worked with children and families at Huntley Youth Services, Dellcrest Children's Centre and the Children's Aid Society of Metropolitan Toronto. She has presented at numerous conferences in Canada as well as in the United States, England, Sweden and Hungary on issues related to children's law.

Carolyn Shelley is an associate with Cunningham, Swan,Carty, Little and Bonham LLP in Kingston, ON with a practice focused on family law. She graduated from Dalhousie University and was called to the Ontario Bar in 2009 following articles with the Office of the Children's Lawyer.