

LA GRANDE PERTURBATION :
NOUVEAUX DÉFIS EN DROIT DE FILIATION



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TABLE OF CONTENTS

| | |
|---|----|
| 1. Introduction | 1 |
| 2. What Is Filiation? The Semantic Paradoxes | 1 |
| 3. The Problem of <i>De Facto</i> Children | 4 |
| 4. The Legislator’s Efforts at Reform in 2002 | 10 |
| 5. The Impact of the 2002 Reform | 13 |
| 6. A Brief Interlude with <i>A.A. vs. B.B.</i> | 17 |
| 7. Back to <i>Droit de la Famille 07527 and 07528</i> | 19 |
| 8. What About the Risk of Unilinear Filiation: «Monoparentalité»? | 20 |
| 9. Cases of Bad Faith – Does the Reform Protect Children? | 24 |
| 10. What Happens in the Clash between Family Stability and Biology? | 33 |
| 11. The Problem of <i>De Facto</i> Parents | 39 |
| 12. New Frontiers: Surrogate Mothers | 43 |
| 13. Draft Bill: <i>An Act to Amend the Civil Code and other legislative provisions as regards adoption and parental authority</i> | 50 |
| 14. Conclusion | 52 |
| <hr/> | |
| Annex I – Interesting U.S. Jurisprudence | 54 |
| Annex II – New Draft Bill on Adoption & Parental Authority | 56 |
| Annex III – Deposit of Draft Bill on Adoption & Parental Authority | 63 |
| Annex IV – Table to Compare Versions of the <i>Civil Code of Quebec</i> | 64 |

La jurisprudence québécoise semble, en vertu d'une étroite tradition, manquer de souplesse dans son interprétation des textes et pêche par excès de timidité.

– Baudouin

I think a noble goal for this country is that every child, born and unborn, ought to be protected in law, and welcomed into life.

– George Bush, at the U.S. Presidential Debate in Boston, October 1st 2000

1 – Introduction

The legal and jurisprudential evolution of the Quebec civil law on filiation has been dynamic and avant-garde in these last few years, introducing new principles to define how filiation is established, which are quite distant from the classic blood ties which we believe normally circumscribe it. Despite this modern and elastic approach, recent technological and social innovations have been presenting ever more complex challenges for the courts to adjudicate upon, which were heretofore unknown.

In fact, there are many situations faced by same-sex couples, particularly male couples, or by persons donating gametes, which are still today in a grey zone of dubious legitimacy. Moreover, the rapid advances in techniques of medically assisted reproduction create newer complexities that still await the reaction of the legislator.

The juxtaposition of the two existing juridical paradigms, one based on sociological realities intended to respond to social needs, and one based on biological innovations, will frame this discussion. How will the Quebec civil law deal with the evolution of same-sex parenting, particularly for male-male couples; the possibilities of multiple contributors to the «projet parental»; the risks associated with «monoparentalité» «triparentalité», or, more frightening yet, «pluriparentalité»; and the resolution, at least partial, of the problem of surrogate mothers?

2 – What Is Filiation? The Semantic Paradoxes

The law, as we understand it, is the culmination of a historical evolution which started with the Romans, traversed the religious influence of the Judeo-Christian traditions, ascended to modernity, wrestled with gender equality and biological techniques, and now stands at the cusp of a major conceptual explosion that we will try to face.

Who then are the father and the mother of a child, according to the law?

Mater semper certa est. “The mother is always certain” is a Roman law principle which had the power of *presumptio juris et de jure*, meaning that no counter-evidence could be made against this principle. Its meaning is that the mother of the child is always known. Since this principle dates from antiquity, it is necessarily premised upon the fact that for most of human history, the birth mother and the genetic mother have been one and the same.

Pater is est quem nuptiae demonstrant. “The father is he whom the marriage points out.” Since fidelity is a universal obligation of marriage, it is natural that children born to a woman be

considered the offspring of her husband. The stability of society and the family also required that children born to a woman be deemed to be the progeny of her husband, lest secret infidelities rip families apart. And finally, since a child only has access to the economic protection of his father through the door of legitimacy, it was essential for the law to protect legitimate status over biological verity.

It does not take much imagination to realize that these two Roman precepts, foundational to our *Civil Code*¹ title on *Filiation*, are no longer sufficient to encompass the situations in which ordinary human beings find themselves in the process of formation of a family. But these precepts are what the practitioner must keep in mind when reading cases on filiation, the outcomes of which often seem to defy logic and common sense, particularly in an era where illegitimacy is at least ostensibly abolished as a stigma, and what the child may think or feel is considered more important than “what the neighbours will say.”

So the purpose of this text is not to engage in a simple review of the substantive or procedural law with which the reader is presumably well-acquainted. The principles pertaining to the basic structures of the family: marriage, filiation, separation and divorce seem almost instinctive for the jurist to understand. It is as if the legislator has seemingly put formal language to simple realities lived by the most common of mortals. We have the impression, in studying these sections of the codified law, of memorizing a set of rules to describe *what we already know about life, love and kinship*.

This text does seek to disabuse the reader of this heartwarming perception. A true understanding of the section on filiation in our *Civil Code* requires an initial reflection on how these rules were conceptualized. By understanding the philosophies informing the rules on filiation, we can not only apply the existing rules with greater clarity and precision, but we can also reflect upon the significant challenges currently facing our preconceived notions of kinship, and anticipate the challenges yet to come.

To tackle the relationship between each of us and the law, between our notions of kinship and legal notions of filiation, it helps to distinguish objective reality from the words we make up to interpret and judge reality.

First, there is the fact of the *existence* of every individual. This is reality, distinct from the perceptions we develop with our senses, and distinct from the abstractions we think of to name and judge reality. We use *kinship* to express in various ways our ties by blood, adoption and affinity, to certain people around us. This is already a low-order abstraction: I may describe a man as my *brother*, and this can have a plethora of meanings, often individually ascribed, depending on the kind of tie I want to express. And generally, of course, when an individual ascribes a tie of kinship to another person, there is a subtle positive message, a voluntary acceptance of the *other* as being part of one’s family.

When a kinship tie is standardized across a community or culture, we are again moving up a ladder of abstraction. You may have a relationship of affinity with a loving older woman who has known you since you were young, and whom you call “Auntie” without regard for whether

¹ S.Q. 1991, c. 64.

she is, in fact, the sister of one of your parents. And within your immediate family, or amongst your friends, this tie may suffice. The kinship to you is subjective, immediate and ephemeral (it will last as long as your affection persists).

However, from a genealogical or sociological point of view, this woman is a stranger to you. In some cultures, your “Auntie” must have a blood tie to you, in others, the tie can be through marriage as well. If your community or culture recognize the tie, there is a process of abstraction involved, that permits strangers to assess the tie independently of your volition. We have moved up the ladder of abstraction. This can have significant consequences: in certain cultures, for instance, if your uncle – your father’s brother – were to die without children, your father would be obliged to marry your aunt, and have children with her, to perpetuate his dead brother’s line (*i.e. Levirate marriage*).

At the summit of this process of conceptualization and generalization of kinship ties, is the law. The law is at the top of the ladder of abstraction: it is defined independently of individual will, and depends solely on objective criteria to achieve a purpose and fulfill a goal independent of the wishes and aspirations of the individuals involved. And because the law stands on top of all our layers of observation, grouping, naming, labeling, abstracting and generalizing, it is only the definitions that flow from the law that carry with them the consequences of the law: *enforceable legal rights and duties*.

Let us try this again. Love is the reality. Marriage is the legal concept, creating the legal alliance. Does love carry with it anything useful? The lawyer knows this answer by instinct: *no*. It is only *marriage* that carries with it enforceable legal rights and duties. There did not used to be such a distance between the reality of human beings and the laws that afford protection: in the Judeo-Christian heritage of antiquity, sexual intercourse *was* marriage; later, it was cohabitation and repute that *were* marriage; formal “solemnization” was a creation of the Middle Ages, now rapidly fading into irrelevance. Today, the *Civil Marriage Act*² tells us that it is a “legitimate union of two people” that *is* marriage.

So it goes for filiation: The birth of a child is the reality. Filiation is the legal concept, creating the legal kinship. Does the birth of a child give the individual the tools to assert his own best interest, the right to be in the custody of a caring adult, to be supervised, to be educated? *No*. It is the determination of *filiation* of the child that carries with it enforceable legal rights and duties, sometimes exercised by the state on behalf of the child, more often exercised by the mother on behalf of the child against the putative father.

Indeed, it is ludicrous to speak of a child’s “best interest” as being “the cornerstone of the law,” unless there is someone willing and able to *assert* that child’s best interest, in his name and on his behalf.

The rules on filiation then, are foundational for a child to be able to attain: Parental Authority – custody, supervision, education. Alimentary support (articles 585 and 599 *C.C.Q.*). Inheritance Rights. Family Patrimony rights (article 414). Possession and ownership of the family residence, its moveables, family vehicles (articles 410 and 414). Safeguard of the family residence and its

² S.C. 2005, c. 33.

moveables (article 401). The benefits of the matrimonial regime of the mother... even if the marriage is declared null (article 381). The benefits of the marriage contract... even if the parents separate or divorce (article 513).

As a footnote, although the layman unaware of the parsimony of the *Quebec Child Support Guidelines* may believe that all that matters to a child is child support, the jurist knows very well that there are many more legal constructs that provide direct and indirect benefits to children beyond mere child support, but which are only attainable if the child's birth mother had the wit to marry (use of the family residence, access to the family patrimony assets, and so on).

3 – The Problem of *De Facto* Children

Now, as we can see, the benefits and protections a child needs which are safeguarded by the law are mediated by the formal institutions of marriage and filiation. There is little recognition of rights based on a functional model. A *de facto* child has no legal recourses, until his *de jure* status is recognized, such recognition flowing from *Civil Code* articles modeled around marriage and filiation – Book II *The Family*. As article 522 *C.C.Q.* instructs us:

Art. 522. All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth.

Yet again, a footnote is merited: Under the *aegis* of the *Divorce Act*³, a child acquires the right to alimentary support from the spouse of his parent, if that spouse acts as a *de facto* parent, in other words, is *functionally* a parent, without the *formality* of filiation. The concept of support being owed to a child by an adult who acts *in loco parentis* to that child, is a creation of the common law, brought to us via the federal legislation of the *Divorce Act*.

It has long been said that the doctrine of *in loco parentis* does not exist in Quebec, because we are a civilian jurisdiction that refuses to create new legal institutions; because we have no doctrine nor courts of equity; because our Superior Court judges have no *parens patriae* jurisdiction. Although the attribution of custody to a third party has long been contemplated as possible, at least if a *de jure* parent is unable to do so, such as in *T.V.-F. vs. G.C.*⁴, the same cannot be said for the right to claim support.

It was therefore with some surprise that we were treated to the judgment in *Droit de la famille – 072895*⁵, a case involving two girls, 14 and 16 years of age respectively, who were adopted more or less at birth by a woman, while cohabiting in a 14-year conjugal relationship with another woman. The two women split in 2002, so we will never know if they “would have” married, the law having only changed after their separation. The two women were not allowed to adopt together, the rules on *Filiation* not then explicitly permitting adoption by two same-sex partners, which is why only one woman was able to establish her legal filiation to the children.

³ R.S.C., 1985, c. 3 (2nd Supp.).

⁴ [1987] 2 S.C.R. 244, 9 R.F.L. (3d) 263.

⁵ [2008] R.J.Q. 49.

This case was about whether the *de facto* shared custody the children had been living since 2002 by amicable arrangement between the two ex-”spouses” could be formalized and recognized in law. The trial judge rejected this option, noting that custody and parental authority only flow from the *de jure* status conferred by legal filiation. The “co-mother’s” earlier application for legal recognition of her “co-maternity” had been denied in 2005. *Ergo*, said the trial judge, the most he could grant was “extended taking out rights” of one week out of two.

The Court of Appeal rejected the pragmatism of the trial judge, in favour of actually tackling the philosophical problem head-on. The Court considered, unanimously, not only that *T.V.-F. vs. G.C.* was valid authority to permit shared custody to be granted to the “third party” *de facto* co-mother, but also that it was advisable to prevent the legal mother from using the question of custodial status «pour enlever à l’autre de la légitimité face [aux enfants]». The Court went on to add that this would clarify their status and would confirm «leur position d’égalité quant à la garde des enfants.»

Thus far, we are on solid ground, the disposition quoted having been authored by Duval-Hessler J.A., Dalphond and Doyon J.J.A. concurring. Of course, in the absence of a clear attribution of parental authority, it is not evident to understand what precisely was contemplated by that «position d’égalité quant à la garde des enfants.»

But what is more fascinating are the additional observations of Dalphond J.A. After concurring with his colleague, Duval-Hessler J.A., he adds:

[85] ... **L’appelante pourra ainsi désormais bénéficier des effets juridiques découlant de son statut de co-gardien des filles. Cela ne signifie pas cependant qu’elle devient légalement une co-mère des filles avec droit à une modification des registres de l’état civil, qu’elle bénéficie désormais de l’autorité parentale au même titre que l’intimée, qu’elle a vocation successorale, etc.** Pour ce faire, des procédures appropriées sont requises.

[86] **Puisque l’autorité parentale demeure avec l’intimée**, l’appelante devra informer cette dernière de tout fait important concernant les filles et leur développement. Quant à l’intimée, par amour pour ses filles, elle devrait en faire tout autant; elle a d’ailleurs pris des engagements en ce sens devant le premier juge qu’elle serait mal avisée de ne pas respecter.

This is a tad difficult to decode. In fact, to the seasoned ear, this has the appearance of being a bit of a semantic legerdemain. It is only in Quebec civil law that we separate custody, a physical state, from parental authority, a legal power. Being a “co-custodial” parent has meaning in common law jurisdictions and in international law, but not in our domestic law. In fact, in the domestic law, there would be no difference between having “taking out rights” or “custody” rights of one week out of two. In the absence of a legally recognized filial tie, or legally granted parental authority, what possible «effets juridiques» could possibly flow from the “status” of shared custody?

Indeed, as we see from Dalphond J.A.’s conception, the *de facto* co-mother is the only one with a duty to disclose information about the child’s health, education and welfare to the *de jure*

mother; the latter being called upon to reciprocate out of love, not legal duty. Thus far, at least, no violence has been done to sacrosanct civilian principles.

This is followed however, by a not-so-veiled threat that «elle serait mal avisée de ne pas respecter [son engagement].» But what does this threat mean? And what would the sanction be? Damages? Change of custody? Presumably, a change of custody could only be contemplated in the best interest of the children, which, one hopes, precludes rendering such an order as a “punishment” for ill will demonstrated to the “third party” co-mother who has no right to a judgment protecting her in the first place! And how could there be damages granted by reason of a breach of a unilateral moral undertaking, that cannot be legally recognized in the first place? (And lest we refer to the judgment of *Bruker vs. Marcovitz*⁶ too readily, we will recollect that in that instance, the Supreme Court determined that a woman has a right to religious remarriage in Canada, which, as dubious a proposition as it may be, is still leagues distant from the notion that a third party has rights vis-à-vis a child whose filiation is not recognized in the civil law, simply by reason of an informal and temporary alliance with the birth mother. It also bears repeating that a “common law” relationship («union libre») simply does not create a familial tie of alliance and the two “spouses” remain unrelated to each other, unlike married spouses – a still bizarre anomaly of the civil law).

In other words, why threaten the birth mother with mysterious consequences, when the legislator failed to provide for this situation? Perhaps we may infer a subtle dissatisfaction by the Court of the impotence resulting from being *unable to render justice* in the civilian world which requires a pre-existing law and is hence inherently less able to address new injustices as they may arise.

Perhaps still labouring under this cloud of dissatisfaction, Dalphond J.A. finds further inspiration from the *Quebec Charter of Rights and Freedoms*⁷:

[80] **J’ajoute que l’article 39 de la *Charte des droits et libertés de la personne* reconnaît à un enfant le droit « à la protection, à la sécurité et à l’attention que ses parents ou les personnes qui en tiennent lieu peuvent lui donner ».** Cela me semble comprendre le droit à l’éducation et à la garde par une personne qui tient lieu de parent.

[87] En résumé, les filles ont droit à l’attention de l’appelante dans le cadre d’une garde partagée. **J’ajoute que l’art. 39 de la *Charte* me semble leur garantir aussi le droit à des aliments de la part de l’appelante. La combinaison des art. 10 et 39 de la *Charte* m’amène à conclure que la notion « *in loco parentis* » s’applique tant aux couples mariés que non mariés lorsque le conjoint du parent de l’enfant tient dans les faits lieu de deuxième parent pour l’enfant.**

First, let us consider that article 32 *C.C.Q.* says precisely the same thing:

BOOK ONE
PERSONS

TITLE TWO
CERTAIN PERSONALITY RIGHTS

⁶ [2008] 3 S.C.R. 607.

⁷ R.S.Q. c. C-12.

CHAPTER II
RESPECT OF CHILDREN'S RIGHTS

Art. 32. Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are able to give to him.

One could not seriously argue that this article is the source of a child's right to alimentary support! Had the legislator so intended, the language of articles 585 and 586 would have been far different:

TITLE THREE
OBLIGATION OF SUPPORT

Art. 585. Married or civil union spouses, and relatives in the direct line in the first degree, owe each other support.

Art. 586. Proceedings for the support of a minor child may be instituted by the holder of parental authority, his tutor, or any person who has custody of him, according to the circumstances.

A parent providing in part for the needs of a child of full age unable to support himself may institute support proceedings on the child's behalf, unless the child objects.

The court may order the support payable to the person who has custody of the child or to the parent of the child of full age who instituted the proceedings on the child's behalf.

The meaning of article 32 in the context of support becomes clear from these two articles: the person who "acts in the stead" of the parents (*i.e. in loco parentis*) may be a custodial party, and therefore has the *locus standi* simply to *claim* child support on behalf of the child, in respect of whom there is no legal kinship tie. But a person acting *in loco parentis* does not willy-nilly become a "relative" (*i.e. kin*) to the child accountable for the cost of that child's upbringing.

Second, let us consider that it was Dalphond J.A., Pelletier and Rayle JJ.A. concurring, who recently re-stated the overarching principle of the civil law, in *B.(M.) vs. L.(l.)*⁸, (in the context of a claim for unjustified enrichment between common law spouses, which had, until that point, been benefiting from an ever more liberal interpretation by lower courts and even by previous Court of Appeal benches):

[31] ...J'ajoute que les tribunaux québécois ne sont pas dans la même position que ceux des provinces de *Common Law* et ne peuvent créer de nouvelles institutions juridiques, ajustées aux besoins du moment, comme les fiducies par interprétation ou par déduction dont parle l'arrêt *Pettkus c. Becker*, 1980 CanLII 22 (CSC), [1980] 2 R.C.S. 834.

[38] ...cela reviendrait à créer une sorte de société d'acquêts pour les unions quasi matrimoniales, rôle qui ne revient pas aux tribunaux, mais au législateur, tel qu'indiqué précédemment.

So, considering that Dalphond J.A. is perhaps our most staunch «civiliste» appellate court judge, it is surprising indeed that he departs so markedly from the civilian tradition in *Droit de la*

⁸ [2003] R.D.F. 539 (C.A.).

*famille – 072895*⁹, to embrace human rights legislation as a source of substantive economic rights between individuals, based on a *functional*, but not *formal*, relationship.

Now, is Dalphond J.A. in the minority on this point? This is hard to say, since Doyon J.A. declares he concurs with both his colleagues, but that may just be with respect to the *ratio decidendi* of the case, which pertained solely to the right to the attribution of shared custody, an important legal question in its own right, but less precedent-setting than the one on *in loco parentis*. In the absence of any reserve by Doyon J.A., I conclude he does not disagree with this reasoning.

Is Dalphond J.A.’s observation a mere *obiter dictum*? That, too, is hard to say, because of the manner in which he comes to his conclusion, which makes it evident he is not making an observation simply in passing, *i.e.* as *obiter*. The Supreme Court has considered for many years now that its own judicially considered *dicta* should be considered as binding on lower courts (particularly in the area of constitutional law). I am inclined to believe that we are intended to take direction from this judgment, which invokes our own home-grown quasi-constitutional document, and we should therefore consider it binding.

This means, without so much as a notice to the Attorney General for Quebec, the civil law has been fundamentally changed, to recognize that a *de facto* child may claim alimentary support from a *de facto* parent, by reason of the functional resemblance of their relationship to one that is *de jure* recognized by the formal rules of filiation.

Let us for now consider that this judgment at least *implicitly* brings us in essence the common law definition of a parent for purposes at least of custody, access rights and child support, to “include a person who has demonstrated a settled intention to treat a child as a child of his or her family” (*Children’s Law Reform Act*¹⁰). But in civil law, we have the “dismemberment” of custody as it is understood in common law into two concepts: (1) custody, *qua* the physical possession of the child, and (2) parental authority, the actual decision-making power.

So if Dalphond J.A.’s remarks are instead viewed narrowly as pure *obiter dictum*, in the absence of any actual claim of child support by the womb mother against the non-biological *de facto* co-mother, then has this decision really changed anything at all, since parental authority remains untouched?

Let us look at it from the perspective of another «civiliste pur et dur», Rochon J.A., Beaugard and Rousseau-Houle JJ.A. concurring, in the case of *P.N. (Re)*¹¹.

In that case, an unmarried lesbian couple decided to have a child. They acquired anonymous donor sperm from California, and a child was born to one of the women in 1998. They then signed a consent to judgment by the terms of which the “biological” mother ceded an “undivided half share” of her parental authority to her partner, the co-mother. The birth certificate indicated the child’s father to be “unknown.”

⁹ *Droit de la famille – 072895*, *supra*, note 5.

¹⁰ R.S.O. 1990, c. C.12.

¹¹ [2000] R.J.Q. 2533 (C.A.).

In first instance, Jasmin J. dismissed the women's motion which sought to homologate the consent to judgment and to obtain judicial recognition of the "co-mother's" status as the psychological co-parent of the child. The Court of Appeal dismissed the appeal.

Rochon J.A. first shoots down the argument that article 46 *C.C.P.* can be viewed as a source of substantive jurisdiction for a Superior Court judge (although one would have thought that since the Superior Court is the one court of original jurisdiction in the province of Quebec, on a plain reading of the article, that it *should* be vested with general powers to permit it to fulfill its mission to achieve justice, where there are *lacunae* in the law).

Although Rochon J.A. goes on to acknowledge that the *de facto* "co-mother" was in fact fulfilling a primary parenting role vis-à-vis the child, and that this role is not being impugned, he promptly goes on to impugn this role by stating that a child may very well have *many* psychological parents over a lifetime which could justify in the child's best interest that custody or access rights be granted to such psychological parent, or that via the *Divorce Act*, a third party acting *in loco parentis* might be ordered to pay child support. But this role of "psychological parent" has nothing to do with filiation, the legal kinship tie which is determinant to acquire parental authority over a child.

[26] En l'espèce, personne ne remet en cause la relation significative entre l'enfant et madame P.... Il ne s'agit d'ailleurs pas de qualifier la nature de cette relation. L'objet du pourvoi est l'établissement d'un lien de parenté direct entre l'enfant et madame P... qui lui conférerait un statut juridique de parent. À ce titre, **les appelantes ne m'ont pas convaincu de l'existence d'un droit de filiation et encore moins du pouvoir judiciaire de le créer de toutes pièces.**

[31] **Par leur requête, les appelantes tentent d'exercer un droit qui n'existe pas. Ce n'est pas l'absence de véhicule procédural qui est en cause mais bien l'absence d'assise juridique à leur demande.** Bien que notre Cour n'ait pas à le décider, les appelantes ne sont pas pour autant sans recours. Les dispositions du *Code civil du Québec* en matière d'adoption constituent peut-être une avenue possible. Je réfère particulièrement aux articles 544, 546, 579 *C.c.Q.* Il ne nous appartient pas de décider d'avance d'une telle demande. Il suffit de mentionner que les textes législatifs qui traitent de l'adoption n'excluent «a priori» aucune personne sur la base de son orientation sexuelle. Je note à ce sujet deux décisions récentes de tribunaux canadiens qui ont invalidé les législations provinciales en matière d'adoption au nom du droit à l'égalité. La décision ontarienne concluait que la définition de «conjoint» devait inclure les conjoints de même sexe. La décision albertaine invalidait la disposition législative qui définissait le mot «conjoint» comme étant des personnes de sexe opposé.

[32] Encore une fois je le répète, il ne s'agit pas pour cette Cour de décider du bien-fondé d'une éventuelle demande d'adoption. Il appartiendra à la Cour du Québec de le faire en premier lieu.

This is a rather impractical suggestion, to say the least, because we know the courts' distaste (a) to refer to decisions from common law provinces, (b) to apply the *Canadian Charter of Rights and Freedoms* to invalidate a provision of the *Civil Code of Quebec* (because of the «civiliste» mantra that only the legislator can change the law), and (c) the analogy to «conjoints» that

Rochon J.A. cites comes from common law provinces that do not discriminate against common law spouses in the first place! Moreover, it would at the time have no doubt taken a *Charter* challenge to accomplish what the Court suggests; we can see by the absence of follow-up that the two ladies in this case declined this expensive suggestion. Since the law changed thereafter in 2002, *as long as the two women were still spouses*, they could presumably have then availed themselves of the new provisions on adoption (articles 555, 578.1 *C.C.Q.*).

But what this case evidences, is that again, Quebec civil law favours formality over function. In the fact pattern of that case, there is no ambiguity that the women *had* engaged in a “parental project”, that the sperm donor could have no chance at claiming paternity, and that as such, this Court was in essence declaring its preference the child be condemned to a perpetual state of «monoparentalité», which could have been highly detrimental to his well-being had the couple separated, and the child would have been deprived of the natural benefits of «biparentalité».

4 – The Legislator’s Efforts at Reform in 2002

The legislator did indeed solve the problem eventually, in 2002, but perhaps in a manner that would have surprised the Court of Appeal, for not only were the rules on adoption changed (as mentioned above), but the rules on the direct establishment of filiation were modified, articles 115 and 538.1 *C.C.Q.* No longer was medically assisted procreation a regime of law assisting heterosexual married couples to bear legitimate children with no fear of litigation by the donors of genetic material, but now this assistance of the law was being expanded considerably, to help *all* women, single and married, common law or civilly united, heterosexual or homosexual. Even the presence of the doctor became optional:

CHAPTER I.1

FILIATION OF CHILDREN BORN OF ASSISTED PROCREATION

Art. 538. A parental project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project.

Art. 538.1. As in the case of filiation by blood, the filiation of a child born of assisted procreation is established by the act of birth. In the absence of an act of birth, uninterrupted possession of status is sufficient; the latter is established by an adequate combination of facts which indicate the relationship of filiation between the child, **the woman who gave birth to the child** and, where applicable, the other party to the parental project.

This filiation creates the same rights and obligations as filiation by blood.

Art. 538.2. The contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project.

However, if the genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of **the woman who gave birth to the child** may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation.

Art. 538.3. If a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or the civil union or within 300 days after its dissolution or annulment, the spouse of the woman who gave birth to the child is presumed to be the child's other parent.

The presumption is rebutted if the child is born more than 300 days after the judgment ordering separation from bed and board of the married spouses, unless they have voluntarily resumed living together before the birth.

The presumption is also rebutted in respect of the former spouse if the child is born within 300 days of the termination of the marriage or civil union, but after a subsequent marriage or civil union of **the woman who gave birth to the child**.

Art. 539. No person may contest the filiation of a child solely on the grounds of the child being born of a parental project involving assisted procreation. However, the married or civil union spouse of **the woman who gave birth to the child** may contest the filiation and disavow the child if there was no mutual parental project or if it is established that the child was not born of the assisted procreation.

The rules governing actions relating to filiation by blood apply with the necessary modifications to any contestation of a filiation established pursuant to this chapter.

Art. 539.1. If both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child.

As we can see, a male-male couple, whatever their civil status, are not at all contemplated by the legislator. When taken together with the prohibition against surrogacy (article 541 *C.C.Q.*), it becomes definitive that only women were envisaged, and notably, lesbian couples were the principal beneficiaries of these new provisions. And in fact, it was principally lesbian mothers who descended upon the provincial government to beg them to bring legal rules into line with the liberalization of medical access to fertility clinics that had brought about the lesbian "baby boom" of recent years.

Now, the concept of "the woman who gave birth to the child" is developed in these new articles, not only to distinguish this woman from her possibly same-sex partner, but also, in my view, to emphasize that the legislator was not considering the *genetic* mother, but rather what I would call the *womb* mother.

Let us consider the possibilities for a moment to test this proposition. Unlike with men, there is never any doubt as to the identity of the womb mother. Moreover, a woman's egg cannot end up growing in another woman's uterus by any kind of natural accident yet known to man (save for the recent news story about the mis-implanted embryo!) If a woman has another woman's egg growing in her womb, it can only be the result of gamete donation with considerable medical assistance. And the law is absolutely strict that the donor of genetic material cannot claim a filial tie to the child later born. There is no room for error by the egg donor in her intentions or plans. This means, logically, that the *genetic* mother is at the bottom of the heap in terms of "power" in any later struggle over the determination of the filiation of the child.

The flip side of this proposition is that the womb mother is at the top of the heap in terms of this power: she is the *only* mother who is absolutely recognized by the law. As soon as she gives

birth, the accoucheur or midwife must complete the *attestation of live birth* form (article 111 *C.C.Q.*), identifying both the mother and her child and the precise details of the birth (place, date, time). This form is remitted to the Director of Civil Status, and a copy is left with the mother (who must then file a declaration of birth within 30 days – articles 112-113 *C.C.Q.*). The establishment of filiation is thereby a *fait accompli* for the woman.

Needless to say, for those women who wish to act as surrogates, given the prohibition against surrogacy in both federal and provincial law (article 541 *C.C.Q.*), avoiding this systematic establishment of maternal filiation entails either giving birth in a clandestine manner to *avoid* being declared as the infant's mother, or suffer going through a laborious adoption process that may or may not be legitimized by the Court. More on this point later.

As for the “second-ranking” person holding power in the filiation process, the married or civil union spouse of the birth mother is protected by the legal presumption of articles 525 and 583.3 *C.C.Q.* Yet again, genetic contribution is irrelevant, whether *volitionally* sought via the parental project and recourse to a sperm bank or *involuntarily* provided where the sperm contribution is the result of an illicit affair.

The author has handled more than a few cases in which the husband, *knowing* he has been cuckolded, nonetheless acts upon the protection of the legal presumption, and as such, retains the paternity the law has vested upon him. After all, unless the putative father *disavows* the child within one year from his knowledge of the birth of the child, the child is his. This does not detract from the “superior” power of the womb mother who has one year from the birth of the child to disavow her husband's paternity.

But this power goes further: yes, technically, a third party with whom the womb mother has had an illicit affair has *locus standi* to contest the filiation of the child, but if she has registered the child as being born issue of her marriage, and if her “family documents, domestic records and papers, and all other public and private writings” (article 534 *C.C.Q.* are consistent with her husband being the father – in other words, she has maintained total discretion about the existence of her lover, and denies the affair – one would be hard-pressed to see how the hapless fellow would derive comfort from the interplay of articles 533, 534 and 535.1 *C.C.Q.*:

Art. 533. Proof of filiation may be made by any mode of proof. However, testimony is not admissible unless there is a commencement of proof, or unless the presumptions or indications resulting from already clearly established facts are sufficiently strong to permit its admission.

Art. 534. Commencement of proof results from the family documents, domestic records and papers, and all other public or private writings proceeding from a party engaged in the contestation or who would have an interest therein if he were alive.

Art. 535. Every mode of proof is admissible to contest an action concerning filiation.

Any mode of proof tending to establish that the husband or civil union spouse is not the father of the child is also admissible.

Art. 535.1. Where the court is seized of an action concerning filiation, it may, on the application of an interested person, order the analysis of a sample of a bodily substance so that the genetic profile of a person involved in the action may be

established.

However, where the purpose of the action is to establish filiation, the court may not issue such an order unless a commencement of proof of filiation has been established by the person having brought the action or unless the presumptions or indications resulting from facts already clearly established by that person are sufficiently strong to warrant such an order. (...)

The *de facto* spouse of the womb mother is in a better position to establish his/her filiation, because there will be opportunity for the *de facto* spouse to sign the declaration of birth, and to acquire possession of status by dint of the *de facto* cohabitation with mother and child. (The *de facto* spouse who wants to escape filiation, is in a great position to do so, with the help of article 540 *C.C.Q.*, as we will see later.)

The (non-anonymous) sperm donor is *almost* in the worst position: the circumstances of his donation may elevate or reduce his status, based on the quality of evidence and his credibility. But the egg donor can never be anything but a gamete donor, and hence, is at the bottom in ranking, as is the anonymous sperm donor.

The “power ranking” can be summarized thusly:

- 1 – Womb mother;
- 2 – Married or civil union spouse of the womb mother;
- 3 – Common law spouse of the womb mother;
- 4 – Non-cohabiting lover of the womb mother;
- 5 – Known sperm donor;
- 6 – Egg donor.

5 – The Impact of the 2002 Reform

In *Droit de la famille – 07528*¹², a lesbian couple sought the assistance of a friend to donate sperm so that they could bear a child. They signed an agreement entitled “sperm donor,” in which the fellow ceded all responsibility of any child to be born of his gift to the future womb mother, and she in turn signed her acceptance of all responsibilities flowing from such birth. She also accepted his request that if the child were a girl, that she bear a name of his choosing.

The child was born in 2000, and her birth certificate bore only the womb mother’s name. There was no name indicated for “father” and the law did not then permit the mother’s *de facto* same-sex spouse to be the “co-mother.”

When the law changed in 2002, the couple took matters into hand, and in 2003, successfully had the second woman’s name entered in the registers of civil status as the child’s “co-mother.” In the interim, they permitted the biological father to see the child from time to time, on an amicable basis. However, once he formalized a request for fixed access rights, *qua* biological father, the two women declined his request, which they did not consider in the child’s best interest.

¹² 2007 QCCA 361 (*L.O. vs. S.J.*, [2006] R.J.Q. 775, Hurtubise J.).

The Superior Court (Hurtubise J.) and the Court of Appeal (Dussault J.A., Robert C.J. and Forget J.A. concurring) agreed.

Hurtubise J. quotes Senécal J. with approval in *F.P. vs. P.C.*¹³, to establish the criteria for the applicability of the new rules on assisted reproduction:

[42] **La lecture de l'article 538 C.c.Q., si elle ne permet pas de dégager une définition rigoureuse de l'expression projet parental** (à notre sous-paragraphe 19.1 nous avons renvoyé au désir et à la volonté d'avoir un enfant), **incite à comprendre que l'existence du projet doit précéder le recours aux forces génétiques d'une personne qui n'est pas partie au projet parental.**

[44] Nous sommes également d'accord avec l'opinion exprimée par le juge Senécal, *op. cit.*, au paragraphe [73] quand il réfère à trois conditions qui doivent être présentes pour que les articles 538 et suivants du *C.c.Q.* puissent s'appliquer, encore que dans le dossier qui était sien il y avait relation sexuelle, ce qui n'est pas le cas dans le nôtre:

- 1) qu'il existe un projet parental formé par une ou deux personnes;
- 2) que le donneur de sperme ne soit pas partie à ce projet;
- 3) qu'il agisse de façon consciente à titre d'«assistant» au projet qui n'est pas le sien, ce qui implique qu'il accepte de n'avoir que ce titre de même que les droits limités qui y sont rattachés.

There was no doubt, on the evidence, that the two women were the authors of the “parental project,” and hence the new rules on filiation applied to them. Hurtubise J. considered these new rules had *both an immediate and retroactive effect*, a point upon which the Court of Appeal later demurred, and concluded that article 538.2 *C.C.Q.* imperatively precludes the establishment of filiation by reason of the sperm donation alone. Hence, it was legitimate in the first place for the birth mother to have added her partner's name to the birth certificate.

As an aside, Hurtubise J. is not the only one to wonder aloud as to the coining of the term “parental project”, which sounds entirely benign in English, but is remarkably confusing in French. A «projet» in French is *une première rédaction, un premier essai, une ébauche d'un plan de construction, ce qu'on a l'intention de faire.*

The Court was nonetheless prepared to examine the fellow's claim that his amicable visits constituted a valid “possession of status.” Again, Hurtubise J. cites Senécal J. with approval in *P.B. vs. M.S.*¹⁴, and notes that the essence of possession of status is when the adult cares for the child and holds the child out as his own. Hence:

[95] Peut-on croire que dans les faits il s'est acquitté des droits et devoirs qu'impose l'article 599 *C.c.Q.* aux parents:

Art. 599. Les père et mère ont, à l'égard de leur enfant, le droit et le devoir de garde,

¹³ *Infra*, note 26.

¹⁴ *Infra*, note 40.

de surveillance et d'éducation.

Ils doivent nourrir et entretenir leur enfant.

La réponse est assurément négative.

Having disposed of the issue of filiation, while doing justice to the potential for an interplay between the traditional and new sections on filiation, Hurtubise J. nonetheless acknowledges other needs may come into play, that the *jus commune* simply does not address:

[100] Dans la mesure où les intimées ont accepté l'offre du requérant conscientes qu'il désirait «voir grandir» l'enfant A..., W... J..., peut-être trouveront-elles un **accommodement** qui sache répondre à ce vœu d'autant que le don de sperme ne provenait pas d'une banque de donneurs anonymes mais d'un individu identifié qui a posé la geste à titre d'ami?

L'avenir révélera si la nouvelle législation efface chez tous les enfants nés d'un projet parental avec procréation assistée, même sans relation sexuelle, le «besoin» de connaître son origine biologique.

[101] Nous précisons en terminant que ce jugement ne dispose pas des droits d'accès réclamés par monsieur O... dans la dernière conclusion de sa requête amendée. C'est que **les droits d'accès ne sont pas exclusivement réservés à ceux ou celles qui ont un lien de filiation avec l'enfant**. Le cas échéant, la Cour décidera en tenant compte de l'intérêt de l'enfant.

The Court of Appeal nuanced Hurtubise J.'s approach, accepting the immediacy of the applicability of the new rules on filiation, but without giving them a truly retroactive effect, to avoid destabilizing any filiations already established prior to June 24 2002. Hence, this child could legitimately become the legal child of the co-mother, simply because the birth certificate did not indicate the name of a father on the date the reforms came into effect (June 24 2002).

This interpretation of the law is in recognition of the legislator's intention to legitimize the filiation of the children of *lesbian* couples:

[69] **D'une part, il semble bien que l'objectif de la Loi soit de rétablir une « équité essentielle » en améliorant le sort des enfants issus de couples homosexuels féminins qui se trouvaient sans encadrement ni protection juridique, parce qu'ils n'ont pas une double filiation établie** (Québec, Assemblée nationale, *Journal des débats*, no 111, 6 juin 2002, à la p. 6656). **L'intérêt supérieur de l'enfant serait en ce sens le principe directeur de la réforme** (Québec, Assemblée nationale, *Journal des débats*, vol. 37, no 107, 30mai 2002, aux p. 6424-6425); Marie-Christine Kirouack, précitée, à la p.386; Benoît Moore, « Les enfants du nouveau siècle (libres propos sur la réforme de la filiation) » (2002) 176 *Développements récents en droit familial*, 77, à la p. 97). Même si tel peut paraître l'effet pratique de la Loi, **il n'était pas question pour le législateur de faire prévaloir le droit à la parenté homosexuelle sur l'intérêt des enfants à avoir une double filiation**, (voir le compte-rendu de Jean Pineau et Marie Pratte, *La famille*, Montréal, Les Éditions Thémis, 2006, n° 421, à la p. 672).

[70] D'autre part, la situation juridique à considérer paraît celle de l'enfant qui, conçu dans le cadre d'un projet parental, n'a une filiation établie qu'avec sa mère biologique et non avec celui ou celle qui, l'ayant désiré au même titre que sa mère biologique, a agi comme parent dans sa vie. **Il est bien entendu qu'un tel enfant ne bénéficie pas d'une double filiation, d'une part, parce que son père biologique ou géniteur a renoncé à le reconnaître avant sa conception et ne l'a pas non plus réclamé à sa naissance et, d'autre part, parce que celle qui remplace celui-ci joue le rôle de parent sans espoir de reconnaissance légale...**

This explanation from the Court of Appeal is an attractive one, because it is a satisfactory response to those who argue that filiation has now “unnaturally” been de-sexed. The Court considered, with impeccable logic, that leaving a child with a unilinear filiation is the greater evil, and moreover, in all logic (think of *Chartier!*), the other adult who has *chosen* to assist the womb mother in the plan to bring a child into the world, and to raise and educate him, is surely meritworthy of a formal co-parental status.

Unfortunately, the Court improperly credits the legislator with this noble intention! After all, a plain reading of article 538 (and 541) *C.C.Q.* certainly discloses the intention to confer rights upon lesbian mothers, but also to legitimize and promote the very unilinear filiation the Court of Appeal implicitly reviles. The parental project given formal status in the law may be undertaken by a woman *alone*. Although many would point out that there are innumerable single mothers raising children on their own in society, none would argue that this is a reality that generally favours the best interest of children.

Furthermore, all would agree that a single woman is free to bear a child in a surreptitious manner, and the male progenitor would never even know there is a filiation he could have claimed. All would also agree that bearing a child is a fundamental component of a woman's life, liberty and personal aspirations, as the Supreme Court reminded us in *R. vs. Morgentaler*¹⁵ (albeit in the opposite context!).

¹⁵ [1988] 1 S.C.R. 30. As per Wilson J., at page 172:

...the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-82). It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. **Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.**

Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 of the *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out, at p. 56, the committee bases its decision on “criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations”. **The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide**

It nonetheless remains disturbing – and all the more so in light of Dussault J.A.’s cogent remarks – that the legislator could seek to elevate a woman’s right and wish to reproduce above the resulting child’s right and interest in having a father, or a co-mother. So although single parenthood has a longer historical pedigree than same-sex parenthood, the latter still reflects a natural mutual complementarity and support of *biparentalité*, that assures a child greater stability and, hopefully as well, economic protection.

Turning back to the facts of the case, Dussault J.A. also rejected the appellant’s argument that the “sperm donor” agreement was merely a delegation of parental authority, since, after all, he had retained the right to name the child and had visited with her since birth. The Court noted that given his complete disinterest in declaring his filiation to the child until now, he could not in all logic claim he had “delegated” a parental authority he had never legally sought or obtained in the first place.

His argument that the parental project was envisaged by all three adults was soundly rejected, not only because the evidence did not disclose such an intention, but also because «le concept de la pluriparentalité ne cadre pas avec l’économie générale du *Code civil du Québec*.» The Court rejected the approach used by the Ontario Court of Appeal.

6 – A Brief Interlude with *A.A. vs. B.B.*

In *A.A. vs. B.B.*¹⁶, the Ontario Court of Appeal exercised its inherent *parens patriae* jurisdiction to declare a child had three legal parents, and this, to palliate the failure of the *Children’s Law Reform Act*¹⁷ to provide for same-sex filiation.

Interestingly, the concept, challenges and risks of recognizing *pluriparentalité* were perhaps the only points not really discussed in that landmark judgment. In that case, AA was the common-law same-sex partner of CC, the womb mother of DD. The biological father, BB, a friend of the couple, had agreed to assist the two women to start a family. The three adults agreed that the two women would be the primary caretakers of the child, but also felt it was important for the father to remain involved in the child’s life.

Given the state of the law, there was no choice but to register a declaration of parentage by which the biological parents were acknowledged as the true legal parents of the child, notwithstanding this particular living arrangement. Thus, the case began as a constitutional challenge to the hole in the *Children’s Law Reform Act*¹⁸, which did not provide for the possibility of a two-mother declaration of parentage. The Court of Appeal chose not to decide the section 7 and 15 *Charter* arguments, since its inherent *parens patriae* jurisdiction was sufficient to resolve the legal dispute.

whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman’s right to liberty by deciding for her something that she has the right to decide for herself.

¹⁶ 2007 ONCA 2, EYB 2007-112046, 220 O.A.C. 115. Leave to appeal to the Supreme Court dismissed September 13 2007, no. 31895.

¹⁷ R.S.O. 1990, c. C-12.

¹⁸ *Supra*, note 10.

Just as with filiation in Quebec law, the outcome of the litigation was fraught with consequences for the co-mother:

- the declaration of parentage is a lifelong immutable declaration of status;
- it allows the parent to fully participate in the child's life;
- the declared parent has to consent to any future adoption;
- the declaration determines lineage;
- the declaration ensures that the child will inherit on intestacy;
- the declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for the child.;
- the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada (*Citizenship Act*, R.S.C. 1985, c. C-29, s. 3(1)(b));
- the declared parent may register the child in school; and,
- the declared parent may assert her rights under various laws such as the *Health Care Consent Act, 1996*, S.O. 1996, c. s, Sched. A., s. 20(1)5.

Interestingly then, the Court thought it enough of a *wrong* that the law contemplates a child having one father and one mother, that redress was required: “Since D.D. already had one mother, the application judge had no jurisdiction under s. 4(1) to make an order in favour of A.A. that she too was the mother of D.D.” And then, without so much as a by-your-leave, the Court concluded:

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

...

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

38 I disagree with the application judge that the legislative gap in this case is deliberate. **There is no doubt that the Legislature did not foresee for the possibility of declarations of parentage for two women, but that is a product of the social conditions and medical knowledge at the time.** The Legislature did not turn its mind to that possibility, so that over thirty years later the gap in the legislation has been revealed.

From the child's perspective, this personalized solution had an internal logic that was unassailable, given that the child already enjoyed the attention and care-giving of three stable adults. However, and without daring to speak for society at large, but from a perspective simply

of a lawyer practicing in the area of family law, which is already littered with the detritus of people's shattered family lives, it is horrendous to imagine *three* adults, with perfectly equal legal status, attempting to collaborate to raise a child post-separation. As it is, there is the natural inherent risk of three new blended families. If conflicts ensue, one can just envisage two "parents" ganging up on the third one, and then what: majority rules? Or must consent always be unanimous? The negative prospects for a child are mind-boggling.

The potential for wisdom in the Quebec legislator's choice becomes apparent. Filiation is now perhaps "de-sexed," but there is at least a clear hierarchy established, with the two primary caretaking parents being conferred the legal status, and the gamete donor wishing to maintain a tie to the child he has sired, being protected in his status as a third party "visitor" (unless the circumstances of life are such that he later assumes a more serious role that permits him to claim *in loco parentis* status).

7 – Back to *Droit de la Famille 07527* and *07528*

At the same time as the judgment was rendered in *Droit de la Famille 07528*¹⁹, the same bench of the Court of Appeal came to a different conclusion in *Droit de la Famille 07527*²⁰. In this case, the womb mother B had originally lived with a fellow, D, for several years, prior to meeting A, with whom she cohabited for 4 years. During this latter relationship, the women decided to have a child, and turned to D for his sperm. It was clearly agreed and understood that he would be acting as a sperm donor, but the women agreed he could maintain a minimal contact with the child to be born.

A son was then born in 1993, but the two women separated in 1994. No father was entered on the birth certificate. At first, A exercised access rights, but when relations deteriorated, access stopped in October 1996, despite A's best efforts. Starting in 1997, D began to visit with the child, B consenting to annual visits which increased from 5 days to one month by 2005. In the interim, in 2002, D took proceedings to claim his paternity to the child, and B consented to his request.

It was about 6 months later, in early 2003, that A learned that D had claimed and obtained his paternity to the child, so she took proceedings to overturn the judgment and to claim her co-maternity, based on the new law which had come into effect on June 24 2002.

Unfortunately for A, and notwithstanding the judgment rendered the same day in the sister case, *Droit de la Famille 07528*²¹, the entire case turned on the narrow ground that B and D had signed a consent to recognize his paternity on June 10 and 20 2002, respectively, *so that even if the actual filiation judgment was rendered on July 10 2002, and hence could have normally been challenged as irregularly obtained, the fact of the signed consent prior to the coming into effect of the law was sufficient to defeat A's claim, since the law only had an immediate – and not retroactive – effect.*

¹⁹ *Supra*, note 12.

²⁰ 2007 QCCA 362.

²¹ *Supra*, note 12.

8 – What About the Risk of Unilinear Filiation: «Monoparentalité»?

Lest we take for granted that when there are three adults competing for the prize of filiation, that the courts will simply choose two parents, based on the normative precept favouring «biparentalité», the reality is that the court is free to choose «monoparentalité» amongst the possible legal solutions. So it was in *Droit de la Famille 092011*²², in which, interestingly, the ex *de facto* same-sex spouse of the womb mother merely sought joint custody of the child born during their 4-year union, without claiming filiation.

In this case, the womb mother had become pregnant as a result of an «aventure», but she did not reveal the existence of the child she bore until shortly before the biological father's death in 2005, when the child was 3 years old. Only the mother's name appeared on the birth certificate, because the child was born before the change in the law.

Nonetheless, the two women announced the pregnancy to their respective families, and the plaintiff CR at all times conducted herself as the other parent to the child:

[13] Mme R... s'est toujours affichée, avec l'accord de la mère, comme l'«*autre parent*». **Elle a d'ailleurs toujours vu elle-même son rôle comme celui de l'«*autre parent*», et la mère l'a reconnu. Elle s'est occupée de l'enfant, en a pris soin, a changé les couches, lui a procuré des soins quotidiennement, l'a gardé comme la mère. Elle est allée aux visites médicales et aux réunions de la garderie.** Elle s'est même faite élire comme «parent» au conseil d'administration de la garderie sur proposition de la mère. Il n'y a aucun doute qu'elle s'est toujours beaucoup occupée de l'enfant tout au cours de la vie commune. La mère le reconnaît et reconnaît que le rôle de sa partenaire pendant la vie commune a été celui d'un «*conjoint*», qui plus est d'un conjoint très impliqué et fiable.

The two women separated in 2004, and after a difficult period during which access was a struggle, they settled into a routine of joint custody from 2005 to 2008. Matters turned sour again in July 2008, and the womb mother cut off access between CR and the child, who was 7 years old by the time the matter came before the court.

The evidence disclosed that the womb mother had repeatedly promised to register CR as the other parent on the child's birth certificate, but never did so, and Senécal J. concluded the promises were never sincere in the first place. As such, the child's filiation to CR was never established. Given the fact that IG's original plan to conceive a child was hers alone (she never announced her plan to be impregnated by the friend), no joint parental project had ever existed.

The Judge, armed with a psycho-legal expertise conducted by Mme Diane Pérusse, had this to say about the nature of CR's role in this little boy's life:

[85] **La preuve est toutefois claire que, dans les faits, l'enfant a eu deux «mères» qui se sont occupées de lui depuis sa naissance. Plus important, il s'est également attaché aux deux et a développé un véritable lien primaire avec les deux de sorte qu'il a besoin des deux**, ainsi que le confirme sans l'ombre d'un doute l'expertise psychosociale. Non seulement le *testing* et les analyses le

²² 2009 QCCS 3782.

démontrent, mais l'enfant lui-même l'exprime clairement de façon catégorique et profonde, haut et fort.

[86] **Le fait est que le lien d'attachement primaire clé s'est développé chez cet enfant de sa naissance jusqu'à 6 ans avec deux «mamans», et on n'y peut rien. Il s'agit d'un élément clé de sa vie qui le marquera pour le restant de ses jours.** On ne peut aujourd'hui réécrire l'histoire et «détricoter» cet enfant pour le refaire. Il est là tel qu'il est, avec ses besoins, ses attachements, sa personnalité. Les liens qu'il a par ailleurs avec ses deux «mamans» n'ont rien à voir avec ceux qu'il a ou pourra développer avec d'autres compagnes de la mère. L'experte est claire à cet égard.

[87] La preuve est par ailleurs claire que non seulement l'enfant aime voir Mme R... et apprécie les moments passés avec elle, mais **il désire profondément la voir davantage** et, surtout, a besoin d'elle et a besoin de la voir plus. La preuve est claire qu'il a été profondément heurté par l'interruption des contacts l'an passé. Il va certes mieux depuis leur reprise, mais pour lui la situation n'est pas réglée pour autant puisqu'il ne la voit pas suffisamment, dit-il, et a besoin de la voir beaucoup plus. Ce que l'enfant souhaite ardemment, c'est de recommencer à voir Mme R... *«comme avant»*, ainsi que l'a constaté Mme Pérusse. L'enfant lui a même demandé son aide en ce sens, ce qui en dit long sur la profondeur de ses sentiments et l'importance de ses besoins à cet égard.

[89] ...En fait, c'est sa deuxième mère dans sa tête.

[97] En réalité, la présence de Mme R... dans la vie de l'enfant apparaît non seulement essentielle pour répondre aux besoins de l'enfant tel qu'il les ressent, mais parce que Mme R... joue un rôle différent de celui de la mère auprès de l'enfant en raison du fait qu'elle et la mère ont des personnalités très différentes. Ainsi qu'elle l'exprime en peu de mots mais de façon très juste, Mme R... **constitue pour l'enfant «son équilibre» et «fait partie de son équilibre»**. C'est bien ce que croit le Tribunal.

One would think these fine, trenchant and psychologically-minded observations of the Court would suffice to formalize the status of CR in the child's life, so that he could continue to be raised by two loving parents, post-separation, have the emotional security that comes from having two devoted and involved parents. And, after all, joint custody was restored by Senécal J., upon the recommendation of Mrs. Pérusse.

But the formalities of the law just cannot be bent any further, without the tree breaking, so it seems. Juxtapose, if you will, the heartwarming observations above with these observations of the Court drawn from different sections of the judgment:

[34] Même si elle a agi comme «parent» auprès de l'enfant et s'en est beaucoup occupée, et même si elle a assumé pendant deux ans et demi une garde partagée, **Mme R... n'est donc pas la co-mère de l'enfant et elle n'a aucun statut juridique face à lui. Elle n'en est ni la co-mère, ni un parent. Elle est un «tiers» face à l'enfant. Un tiers «privilegié», qui est dans une situation particulière, et avec lequel l'enfant a des liens forts suivant la psychologue qui a préparé l'expertise. Mais un tiers. Et sa demande de garde est celle d'un tiers, non d'un parent.**

[35] **La mère est par ailleurs la seule personne à jouir de l'autorité parentale face à l'enfant.**

[100] ...Mme R... a aussi manqué de sensibilité et de respect envers la mère et a eu tendance à vouloir se mêler de l'autorité parentale, sans égard au fait que c'est la mère seule qui la détient. Elle n'a pas toujours respecté le statut de la mère face à l'enfant et l'exclusivité de son autorité parentale. Cela dit, le passage à la cour s'est révélé très important à cet égard. Mme R... a été à même de prendre conscience du statut juridique exact de la mère qui ne peut pas et ne doit pas être contourné, et de réaliser les changements d'attitude nécessaires de sa part. La Cour n'a aucun doute que l'attitude de Mme R... à cet égard ne sera plus la même dans le futur.

[109] Mme Pérusse constate que **le conflit entre les parties «est causé essentiellement par le refus de Mme G... de reconnaître la réalité du lien entre Mme R... et X»**. C'est aussi ce que voit le Tribunal.

[134] **Il appartiendra donc à la mère seule de déterminer en tout temps le domicile de l'enfant et l'école qu'il fréquentera**, dans la mesure où cela n'entrave pas l'exercice de la garde partagée.

[135] **Il appartiendra par ailleurs à la mère seule de prendre les décisions importantes concernant l'enfant**, que ce soit relativement à sa santé, à son éducation, à ses activités, etc., encore une fois dans la mesure où cela n'affecte pas l'exercice de la garde partagée. Le Tribunal rejette l'idée de partager le pouvoir décisionnel à l'égard de l'enfant, sauf pour ce qui est des décisions reliées au quotidien lorsque Mme R... exerce la garde.

(Fortunately for the child, some of the measures the Judge wished to order were accepted by IG on a consensual basis, such as advising CR about the child's schooling, so CR would be able to do homework on her custodial week. Needless to say, had IG *not* so consented, the Judge would not have imposed any such duty.)

So on the one hand, Senécal J., considered that CR had been in every regard a devoted and involved "co-parent" to the child, who in turn considered her to be his co-mother, but then on the other hand, the Judge chastised CR for having (clearly unreasonably) believed that as a co-parent, she was entitled to share in decision-making in the child's life. The Court certainly gave her a strong wake-up call in the judgment: she is *not* the co-mother, she is *not* a parent, she is just a "third party." Yet, the trial judge also agreed with the analysis of Mme Pérusse that the source of the horrendous conflict between the two women was specifically **the refusal of IG to accept the reality of the [kinship] tie between CR and the child**.

So, which is it? If *the Court*, supported by *the law*, refuses to «reconnaître la réalité du lien entre Mme R et X», then why are we taxing IG for having acted in precisely the manner the law requires her to act, as sole parent, and sole holder of parental authority?

Conversely, if we are to believe in the reality of the [kinship] tie between CR and the child, why does the law persist in denigrating this tie, and characterizing CR as a "third party"? It puts one in mind of the classic expression of Québec jurists, when referring to common law spouses, that they are «des étrangers» as between themselves. But, as Senécal J. himself reminds us:

[50] À cet égard, on doit ajouter que la définition même de «famille» a beaucoup changé au cours des vingt dernières années, soit depuis que la Cour suprême a prononcé son arrêt [*T.V.-F. c. G.C.*], en 1987. **Des situations familiales peuvent**

aujourd'hui être envisagées qui étaient parfaitement impensables à l'époque. Celui que l'on présente comme un «tiers» n'est pas toujours un véritable «tiers» face à la cellule familiale.

Never has the chasm been greater between the reality judges see every day, that touch their hearts, but that the law does not permit them to remedy with any sense of logic or cohesion.

Other cases, perhaps somewhat less poignant, have nonetheless made the same point vis-à-vis male progenitors who have “awoken” to their «vocation paternelle» a little too late: In *Droit de la Famille 0181450*²³, a lesbian posted an ad on various websites, soliciting a sperm donor so that she could bear a child. A man answered the add, and offered to provide an “anonymous” sperm donation, on condition the insemination would be of the traditional variety. When the woman became pregnant, she advised the fellow, who in turn posted the new on the Internet, and offered himself up as a fertile sperm donor. After the child was born, he saw the child briefly on two occasions, but made no request to have his paternity acknowledged. A year and a half after that, without there having been any further contact, he instituted filiation proceedings.

Petras J. dismissed his motion, on a plain reading of the law: there was no joint parental project, and the man’s contribution was clearly solely a sperm donation. Moreover, the only «vocation» he demonstrated was as sperm donor, judging by the ads he then posted on the Internet to this end. In confirming the child’s unilinear filiation, the Court noted:

[37] Tel que l'article 538.2 C.c.Q stipule, l'apport de forces génétique de Monsieur ne peut fonder aucun lien de filiation entre Monsieur et l'enfant qui en est issu sauf si deux conditions sont rencontrées à savoir, l'apport se fait par relation sexuelle et le lien de filiation est établi dans l'année qui suit la naissance. Cette dernière condition exige que le recours en réclamation de paternité soit fait dans un délai d'un an de la naissance de l'enfant.

[38] Or, il est évident que Monsieur n'a pas agi dans le délai d'un an prescrit par l'article 538.2 C.c.Q, ayant intenté son recours quelques 2 ans et 5 mois après la naissance de l'enfant X. Cette deuxième condition n'ayant pas été respecté, aucun lien de filiation peut être établi.

Bédard J. was of the same opinion in *Protection de la jeunesse 084475*²⁴, in which a man had accepted to act as a sperm donor to a lesbian friend who was then living in a *de facto* union with another woman. The child was conceived in the traditional fashion. When the child was born, non father was declared, and the *de facto* wife was indicated as the child’s godmother. Four years later, the couple had separated, and although the child had called her mother’s spouse «maman», all contact had ceased. The fellow had maintained at least some contact, and the child knew this was his father, so when proceedings were taken against the womb mother under the *aegis* of the *Youth Protection Act*, he sought the right to intervene in the proceedings *qua* parent.

Bédard J. dismissed his intervention as premature, and had this to say about his status:

[19] La preuve sur l'absence de l'ex-conjointe de la mère sur le certificat de naissance

²³ 2008 QCCS 2677.

²⁴ 2008 QCCQ 13902.

est muette, mais cela ne donne pas pour autant, ouverture à monsieur A pour un recours en vue de faire reconnaître sa paternité. L'enfant est né le [...] 2004 et l'article 538.2 C.c.Q. précise de manière non-équivoque que la filiation, et non le recours, doit être établie dans l'année qui suit la naissance. C'est donc dire que **monsieur A ne peut demander l'établissement juridique de son lien de filiation avec l'enfant.**

[20] **Peu importe ce que l'on peut en penser, la situation est claire**, telle qu'explicitée par les auteurs Pineau et Pratte:

Après un an cependant, le géniteur ne peut plus revendiquer sa paternité. La conjointe ou le conjoint de celle qui a donné naissance à l'enfant verra alors sa «co-maternité» ou sa paternité confirmée. **Dans le cas enfin où le projet parental était celui d'une femme seule, cette dernière deviendra l'unique parent de l'enfant et n'aura plus à redouter la menace d'une réclamation de paternité; l'enfant sera irrémédiablement privé d'une ascendance paternelle.**

9 – Cases of Bad Faith – Does the Reform Protect Children?

Of course, the new rules are susceptible to all kinds of abuse by men seeking to evade their responsibilities. This is where articles 539 and 540 *C.C.Q.* come into play.

In *J.B. vs. D.J.*²⁵, the parties, a married couple, attended at a fertility clinic in Rimouski in 2002, where they signed a form called «consentement du couple receveur.» After three tries, DJ became pregnant, and the child was born in 2003. JB, deciding that fatherhood was not for him, contested his filiation to the child, claiming that the original parental project was entirely that of his wife. He stated he never thought the insemination would work because of her health problems (she suffered from endometriosis).

In this case, not only did the mother *agree* with her husband's petition, but the court-appointed attorney also concurred. The mother argued it was in the child's best interest to have the hope of one day having a responsible man to assume a parental role, instead of maintaining a legal fiction that would yield no real relationship for the child.

Gendreau J. declined the invitation of the parties, based on the authority of article 539 *C.C.Q.*, which does not permit a husband to contest the filiation of the child in these circumstances:

Art. 539. No person may contest the filiation of a child solely on the grounds of the child being born of a parental project involving assisted procreation. **However, the married or civil union spouse of the woman who gave birth to the child may contest the filiation and disavow the child if there was no mutual parental project** or if it is established that the child was not born of the assisted procreation.

The rules governing actions relating to filiation by blood apply with the necessary modifications to any contestation of a filiation established pursuant to this chapter.

The trial judge was satisfied there was no error vitiating consent within the meaning of article 1400 *C.C.Q.*, or if there was error, it was inexcusable. As Gendreau J. so pithily put it, if a man

²⁵ [2004] R.J.Q. 1907.

who impregnates a woman out of wedlock must assume his responsibilities, then the same goes for a man who consents to assisted procreation.

In *F.P. vs. P.C.*²⁶, the parties had an on-going sexual relationship, without use of contraception. A little boy was born, but the mother, FP, instituted her filiation proceedings only three years later, and the trial only took place by the time the child was 8 years old. A DNA test had established the paternity of the defendant, PC, to a probability of only 99.9999%. With not much left to lose, PC decided to take advantage of the change in the law to assert articles 538 and 538.2 *C.C.Q.*, arguing that he had not had “complete” sexual relations with FP during the period of conception. He argued that FP must have gathered the sperm he had left elsewhere upon her body, and had inseminated herself, in a sort of “artisanal” self-insemination. Hence, this was FP’s unilateral parental project, which could not establish the filiation of the child in his regard (article 538.2 *C.C.Q.*).

Senécal J. was less than impressed by PC’s efforts to hide behind the assisted reproduction articles. The absence of credibility of the explanation as to how PC’s sperm ended up implanted in FP led the trial judge to conclude that conventional means had been used. The reality was that neither adult wanted to bear a child, nor expected to do so in the course of the relationship, but once nature took its course, it was the general rules of filiation that applied, as they have from time immemorial, harkening back to when most children were born not as the fruit of a “parental project.”

Although absence of credibility of a defendant generally concludes a contentious matter, in this case, Senécal J. considered it important to reflect upon the place the new rules should have in the *corpus juris*, given the serious impact these articles have for the rights of children born into circumstances over which they remain powerless:

[64] Il ne peut y avoir procréation «assistée» et d’«assistance» si celui qui «assiste» ne sait pas qu’il «assiste» et n’agit pas à ce titre. Il agit alors forcément à un tout autre titre.

[65] Les droits de l’enfant à naître sont eux-mêmes affectés lorsque la relation sexuelle qui donne lieu à la conception puis à la naissance se déroule dans le cadre particulier d’une procréation assistée reliée à un projet parental excluant le père biologique. **L’enfant cesse alors d’être le seul que la loi veut protéger et favoriser. Il devient objet de satisfaction du désir du ou des auteurs du projet parental à qui la loi accepte de conférer droits et protection. Son droit de réclamer sa filiation face à son père biologique est annihilé. Il perd un droit qui est normalement le sien, de même que le droit de le faire valoir pendant la longue période où cela peut normalement être fait (art. 538.2). Il perd aussi le droit de pouvoir réclamer des aliments de l’un de ses parents, sans droit de recours.** Puisque sont ainsi affectés les droits d’un tiers, cela implique que les articles 538 et suivants doivent clairement trouver application aux yeux de tous et que leur application ne peut relever de la seule connaissance de la ou des parties impliquées dans le projet parental.

[66] **Les règles de filiation qui prévalent en cas de reproduction assistée par relation sexuelle sont en fait totalement exorbitantes des règles générales de la**

²⁶ S.C. Québec, no 500-04-020649-993, March 02 2005, [2005] R.D.F. 268.

filiation autrement applicables. Lorsqu'elles s'appliquent, elles ont pour effet de «privatiser» la filiation en permettant qu'elle puisse dorénavant être négociée, pour reprendre les mots du professeur Benoît Moore dans son remarquable texte «*Les enfants du nouveau siècle (libres propos sur la réforme de la filiation)*» (dans *Développement récent en droit familial – 2002*, Service de la formation permanente du Barreau du Québec, vol. 176, Cowansville, Éditions Yvon Blais, 2002, p. 75):

« Par le biais de [la “procréation assistée”] la loi tend vers une privatisation de la filiation, à une filiation qui se négocie et qui rend “disponible”, en partie du moins, l'état civil de l'enfant malgré le principe selon lequel on ne peut pas transiger sur l'état d'une personne “[...] parce que c'est l'État qui l'organise et [qu'] il ne dépend pas uniquement de la volonté individuelle”.» (p.86)

« [C]'est accepter que la filiation soit disponible, c'est-à-dire sujette à palabres et concessions privément consenties, à réduire l'enfant plus ou moins à une chose.» (p.90)

« En permettant ainsi une situation purement privée, à l'abri de toute intervention et contrôle de l'État, l'article 538.2 C.c.Q. laisse aux seuls protagonistes le soin d'établir les règles du jeu et permet à ceux-ci de négocier la filiation de l'enfant. » (p.94)

[67] Les règles de filiation qui prévalent en cas de reproduction assistée par relation sexuelle permettent que deux ou trois personnes puissent, par entente privée, modifier les droits d'un enfant et ses recours en filiation et alimentaires. Elles permettent à ces personnes de transiger sur la filiation, une matière qui a toujours été considérée d'ordre public et exclue du domaine contractuel. Un domaine dans lequel, au surplus, le législateur a toujours voulu d'abord et avant tout protéger les droits de l'enfant mais où il permet maintenant qu'ils deviennent secondaires et que, dans certaines circonstances, on cherche plutôt à protéger prioritairement les droits du ou des auteurs du projet parental.

[68] **La Cour n'a pas à décider si cela respecte les droits fondamentaux et constitutionnels de l'enfant. Elle n'est pas saisie de cette question.** Le Tribunal doit cependant constater qu'un tel système est dérogatoire aux règles générales. En ce sens, il doit être tenu pour tel. Il ne doit supplanter les règles générales que dans le cas où celles-ci sont clairement écartées et où les conditions pour qu'il en soit ainsi sont toutes réunies.

There is a temptation to disregard remarks in a first instance judgment that are not strictly necessary to support the outcome of the case; this cogent analysis could be dismissed as mere *obiter dicta*. However, the indictment of the new law is so scathing, from so respected a judge, who wholeheartedly adopts the analysis of one of the most respected «civiliste» doctrinal writers, that we are obliged to take heed of the warning: are we indeed moving improperly to a privatization of filiation, a potentially commercial or contractual approach to kinship ties heretofore considered protected by the State?

The concern is legitimate. The options, however, are muddy. Let us consider:

- Yes, filiation has made the leap from its original conception as essential to social stability to a modern conception as the guarantor of the rights of the child. But the case law has always said

that filiation is established by strict rules, *without* reference to the best interest of the child. Is this jurisprudence suddenly, conveniently forgotten?

- Is it indeed justifiable, at the time of conception, which is perhaps indeed the only time the adults get to make an independent choice, to *disregard* the intentions of those who *choose* to bear a child, considering it is they who will forevermore be required by law to be responsible to the child?
- Are the civilian jurists positing that *any* child, born in *any* circumstances, has a potential “constitutional or fundamental right” to “know” his biological parents? The first and obvious question is what would this mean for adoptive parents, save to act as a definite discouragement to adopt a child! And what of biological parents who have already been told by the law that they *cannot* establish legal filiation, as in some of the cases we saw above? What of biological parents who do not desire any such tie? Also, who would police such a concept? What would one do in the all too common event of abandonment by one or both parents? Arrest them?

Also, what would be the scope of “knowing” one’s biological parents? Is it for the purpose of child support? Is it for the purpose of obtaining a complete medical history? Is it for the purpose of *compelling* an affective relationship? Should biological parents now be naturally favoured with parental authority, without regard to their role in the conception of a child? If the absence of intention to become a parent after a one-night stand in a drunken stupor is considered irrelevant to impose the joys and burdens of filiation on a man, why should absence of intention be “protected” just because we are in the sticky wicket of assisted reproduction? The mind boggles at the possibilities and ethical quandaries.

Now, there is certainly legitimacy to one basic need that the biological tie determines, and that is health needs. But this is already covered by the law in article 542(2) *C.C.Q.* (which has its analogue in article 584 *C.C.Q.*, for adoption cases):

Art. 542(2). However, where the health of a person born of medically assisted procreation or of any descendant of that person could be seriously harmed if the person were deprived of the information requested, the court may allow the information to be transmitted confidentially to the medical authorities concerned. A descendant of such a person may also exercise this right where the health of that descendant or of a close relative could be seriously harmed if the descendant were deprived of the information requested.

There is no doubt that the law must be conceived to meet the needs of the population to whom it applies. And in this aspect, as we recall, these articles were born of the desire to assist lesbian couples in their wish to form legitimate families. The law could not continue to ignore these couples: they had been bearing children in ever-increasing numbers, and it was simply immoral to keep them in a legal limbo which children born to fertility-impaired heterosexual couples did not suffer. This was the *raison d’être* behind the change from “medically assisted” to “assisted” reproduction: lesbian couples did not need “medical” assistance, strictly speaking, and made submissions to the government that latitude was needed to cover “artisanal” insemination (*i.e.* the ever-reliable turkey baster method) and “amicable” insemination.

This led to one of the two compromises that naturally left Senécal J. and Professor Moore so uncomfortable, the first being article 538.2 *C.C.Q.* (the other being article 540 *C.C.Q.*, which we will discuss below):

Art. 538.2. The contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project.

However, if the genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation.

The discomfort arises from the necessary delay during which a child's filiation seems held hostage to a man's ambivalence about his role in the infant's life, simply because of the manner in which he provided his "genetic material." This is a legitimate concern. But then again, a messy and ambiguous situation such as this one necessarily calls for a solution that may indeed look imperfect (keeping in mind that it cannot be credibly invoked by a man in a conventional conjugal relationship with a woman!).

The reality that the two esteemed jurists perhaps do not weigh sufficiently, is that women already hold (almost) all of the power in the determination of filiation, including notably in the section on assisted filiation. From time immemorial, women have been bearing children conceived with all manners of trickery involving the hapless male, who, needless to say, is often easily duped by virtue of where his cognition is generally centred. A man often consents to sex, but less often consents to reproduce. It is hard to write guarantees into the law to ensure that a man who consents to sex has given his "informed consent" to being solely a donor of genetic material. In a "normal" circumstance, a woman who *wants* her sex partner to be considered the father, will simply claim his filiation, under the traditional articles, and the man has nothing to say about it. In an "assisted reproduction" scenario involving sexual intercourse, the law must provide the court with leeway to determine, as a matter of evidence, whether the man consented to be solely a sperm donor, or whether he consented to the conventional kind of reproductive activity (even if he protests, "she told me she was on the pill!").

At least this article, if invoked, leaves room for filiation being attributed vis-à-vis a man who *wants* to be a father, unlike many conventional filiation cases, where the tie is imposed on a man who wants nothing to do with the child!

Long before assisted reproduction ever existed, there have been ambiguous filiation situations that have required the court's intercession, and a child's filiation is then held up by the slow gears of conventional justice. It is a miserable fact of life with which we must all compose ourselves.

The other messy article is this one:

Art. 540. A person who, after consenting to a parental project outside marriage or a civil union, fails to declare his or her bond of filiation with the child born of that project

in the register of civil status is liable toward the child and the child's mother.

This is yet another ridiculous example of the Quebec legislator's staunch refusal to accept the legitimacy of common law couples in this province, which is statistically the world capital not only for percentage of couples living common law, but is also the only civilized jurisdiction in the world where more than half of children born each year are born to unmarried couples. Yet, common law couples remain subject to that mantra, «*les conjoints de fait sont des étrangers entre eux.*»

The equality of these concubinaries remains a distant dream. Hence, in this section on assisted reproduction, given that the presumption of paternity of article 525 *C.C.Q.* protects a child born to a *married* couple, article 539 *C.C.Q.* only needs to address cases where the married spouse has *not* consented to the parental project; otherwise, the child's filiation is unassailable.

It is article 540 *C.C.Q.* which deals with the situation of common law couples, and reflects the legislator's spineless response to the *absence* of a presumption of paternity in favour of the common law spouse of the womb mother (let us note that extending the presumption of paternity to common law husbands has been proposed to the legislator since at least the late 1970's by the original *Office de révision du Code civil* in its *Rapport sur le CCQ*, and again in 1996, by the *Rapport du comité interministériel*; this presumption of paternity for common law spouses exists in *every single province* except Québec, where most common law *fathers* actually reside). It basically permits a common law *husband* to get a free pass: he can literally *walk away* at any time, simply by refusing to sign the *déclaration de naissance*; not "acknowledging" the child means not engaging in the behaviours that permit there to be possession of status, hence, the child is forever condemned to a unilinear filiation to his mother.

Article 539(1) *C.C.Q.* is of no assistance to the mother, because it presumes there is already an established filiation to *contest*; if the common law husband has failed voluntarily to acknowledge his paternity, or to sign the declaration of birth, then there is no filiation yet established; if we then look more closely at the definition of the parental project in the first place in article 538 *C.C.Q.*, we see that it does not actually say what happens to the child born in terms of filiation! Yet again, the difference in treatment between common law and married couples is such that a woman can literally find herself with a child and no father responsible for him, just because of this province's insistence that the unequal treatment by the law is something women are "choosing" in the first place.

It puts one in mind of the perpetual difficulty in Quebec relating to the patronym of a family. Let us not address here the rising movement of married women who chafe at the obligation to keep their maiden names, preferring instead to revert to the practice of taking their husbands' surname upon marriage. What is far worse is the social response to the *Office de révision du Code civil*'s noble efforts in the late 1970s, which culminated in the 1981 rules pertaining to composed names for children, to preserve the matrilineal and patrilineal heritage. Until the change in the law, only 2% of children bore a double-barrelled surname, a historical average of about 4-6% bore only their mother's surname (generally born of "unknown" fathers), and the remainder of over 90% bore solely their father's surname. By 1986, 15% of children bore a hyphenated surname, and by 1992, this trend peaked, with 22% of children being so named. By the year 2000, however,

society was back to the 15% level, by 2005, down to 12%, and the progression has continued downward.

Many women interviewed on this topic tend to reason as did this young woman, “Delphine”:

J’ai deux charmantes petites filles qui portent uniquement le nom de famille de leur père. J’ai pris cette décision pour accorder à mon amoureux le pouvoir de les reconnaître symboliquement et publiquement. Ce qui n’est pas peu pour les jeunes hommes d’aujourd’hui qui sont parfois en mal de symbole les valorisant sur autre choses que leur pouvoir d’achat. Je suis fière que les couples d’aujourd’hui aient le choix de donner le nom ou la combinaison qu’ils désirent. Fière que les femmes aient acquis cette liberté. Merci mesdames des décennies passées! De mon côté, je me sentais assez investie par ma grossesse et ma maternité à venir, assez puissante de ce que je leur léguais à ce moment-là qui m’était personnel et unique pour ne pas sentir le besoin qu’elles portent le double nom de famille.

Amazing, is it not? Women are naturally so invested in their commitment to their family, they think of nothing else. But the reality is that these women, who are *not* marrying and who are left completely *without* the protection of the law, nonetheless give freely to their common law spouses the title and honour of providing the *sole* surname to their children. As Alain Roy was quoted to have said about this state of affairs, *without the slightest trace of irony*: «C’est l’exercice de leur liberté; le choix demeure pour toutes les femmes.»

No wonder the legislator was not in the slightest troubled about the possibility of abuse by common law husbands that article 540 *C.C.Q.* permits – after all, as we can see, women seem to be the last to complain about the sorry state of the family law in their regard.

The legislator commented as follows on this article:

Cet article a pour but d’affirmer la responsabilité de l’homme qui a consenti à la procréation médicalement assistée d’un enfant et qui, après la naissance, ne reconnaît pas l’enfant qui en est issu. L’enfant ainsi que la mère de cet enfant engagée de bonne foi dans un projet parental, doivent être indemnisés pour le préjudice subi par l’un et l’autre, à la suite de ce changement d’attitude.

Cette disposition sera surtout utile dans le contexte d’un concubinage, étant donné l’absence de présomption de paternité à l’égard du concubin de la mère d’un enfant dont la procréation a été médicalement assistée.²⁷

Pineau and Pratte seem comfortable with this provision of law:

Le seul fait qu’un conjoint ait partagé le projet parental avec assistance à la procréation de la mère ne permet donc pas de le lier juridiquement à l’enfant auquel celle-ci donne naissance. Certes, si ce conjoint est marié ou uni civilement à la mère, une présomption légale lui impose une paternité ou une « co-maternité » dont il ne peut, en principe, se défaire. Mais s’il s’agit d’un conjoint de fait, aucune présomption ne le rattache à l’enfant, il peut donc, nous l’avons vu, refuser de déclarer son lien de parenté au directeur de l’état civil, se désintéresser de l’enfant

²⁷ *Commentaires du ministre de la Justice*, Tome 1, Les Publications du Québec, 1993.

et, échappant à la paternité ou à la maternité, priver l'enfant d'un deuxième parent.
Un tel comportement est possible, mais il est certainement fautif; mère et enfant méritent réparation.²⁸

There is no reported jurisprudence on this article, so it remains a matter of one's imagination as to precisely what kind of lawsuit could be envisaged that would be useful to undertake: this is Canada, so "lying-in" expenses are limited (thanks to Medicare and employment insurance parental leave programs). It seems unlikely the legislator had "wrongful life" in mind as the form of such lawsuit, particularly because the defendant miscreant would respond that the plaintiff would have had the child in any event (probably true).

That would leave child support: the plaintiff would argue that she expected at least an economic contribution from her common law spouse for the child. Would a judge not then respond that she cannot get "through the back door" that which the law does not provide directly, *i.e.* the benefits of filiation. What if the pregnancy were difficult, or the child born with a handicap? Could the plaintiff, via this article which harkens to principles of civil responsibility, claim the equivalent of alimentary support, on the basis she might be unable to work for an extended period of time?

And if she could claim under either rubric, what indeed would be the timeframe? From this author's perspective, the economic prejudice caused to a woman in such a scenario would be the obligation to raise the child to financial independence, which, in today's world, is an alimentary obligation of about 25 years' duration. Yet somehow, one cannot imagine the court, with its habitual parsimony toward women, would actually indemnify a woman for the true scope of the prejudice.

So whereas male jurists may be mortified, as we see, by the risk of "privatizing" filiation, and permitting obviously awful situations to exist in which filiation may end up being bartered for money or other prestations, the perspective of the undersigned is quite different: yet again, there will be a scenario where many women will be more than happy to let recalcitrant partners walk away from their economic obligations, just to be able to keep the infant, a trade-off still seen from time to time by family law practitioners in conventional divorce cases.

The reality is that if the legislator had wanted to put teeth into the legislation, an automatic presumption of paternity could have been created for common law husbands, in recognition of the vast number of children born to common law partners, and would not have provided such an easy loophole in article 540 *C.C.Q.*: **why not have put the burden on the common law husband to *disprove* his participation in the parental project?**

Why was it easier for the legislator to create a presumption of "parentality" (to coin a suitable "de-sexed" term) for same-sex married couples – even though it defies sense, logic, biology and history – than to create a presumption of paternity for opposite-sex *de facto* spouses, who manufacture children in precisely the same manner as *de jure* spouses? The comfort experienced by the legislator vis-à-vis same-sex parenting, is because good sense and good science tell us that children raised by same-sex couples are as well-socialized and well-raised as any other children. The discomfort experienced by the legislator vis-à-vis *de facto* spouses (to whom more than 52%

²⁸ Jean PINEAU et Marie PRATTE, *La famille*, Montréal, Éditions Thémis, 2006, p. 701.

of children are born each year in Quebec) can only be a vestige of the long historical opprobrium attached to such illicit sexual relationships. And it is so anchored in the Quebec legislative mind, that even when the most modern of social problems arose, namely, assisted reproduction for infertile couples, the legislator could just not bring itself to provide an effective legal protection, whether for the mother or the child, preferring to condemn the child to eternal «monoparentalité» (the natural consequence of article 540 *C.C.Q.*) instead of simply recognizing the union of the two adults as *licit*.

Or, as Me Marie-Christine Kirouack suggested in her article *Le projet parental et les nouvelles règles relatives à la filiation*²⁹, inspired by the law in France, the legislator could have adopted formalities required of the couple prior to engaging in the assisted reproduction, such as passing before a judge or notary, or entering into a written agreement. Frankly, though, in a world where couples no longer marry, or even if they marry, they no longer conclude marriage contracts, expecting ordinary people to take a “legal” step is probably expecting too much (and creates additional costs, when fertility treatments are already expensive). The operation of a *legal presumption* would put the onus on the suddenly recalcitrant spouse to take the legal step, and that is generally a safer way for laws to approach social justice issues.

Also, if the legislator had actually considered the best interest of children as a foundational principle, there would not have been a provision of the new law that permits a woman or a man to trip up the system and thereby force a permanent unilinear filiation for a child! The fact that parents (notably men) abandon their children every day, does not mean that the law must make it any easier to do so.

At least the courts are not in a rush to permit the new articles to be abused, as we saw in Senécal J.’s firm treatment of the cad in *F.P. vs. P.C.*³⁰, or in Fréchette J.’s judgment in *S.M. vs. St. G.*³¹ In that case, the child born was already 12 years of age by the time the matter went to trial, where the mother alleged that she had cohabited briefly with the putative father, and bore a child not long after their separation. Only the mother’s name appeared on the birth certificate. The fellow, a married father of five, denied he could be the father, and attacked the mother’s credibility on all fronts (other lovers, past drug use, two other children by other men, and so on). The Court ordered a DNA test *pendente lite*, which disclosed, probably to no one’s surprise, that there was a 99.99% probability this was indeed the father³². He then argued that this must have been the

²⁹ Marie Christine KIROUACK, “Le Projet parental et les nouvelles règles relatives à la filiation: une avancée ou un recul quant à la stabilité de la filiation? », *Développements récents en droit familial* (2005), Service de la formation permanente du Barreau du Québec, 2005, EYB2005DEV1063.

³⁰ *Supra*, note 25.

³¹ 2006 QCCS 2376.

³² The Court was able to *order* a DNA test, despite a long and less than noble jurisprudential history where similar orders were often requested but systematically denied, based on a dubious interpretation of the scope of expression “integrity of the person.” This was rectified by the legislator with the adoption of article 535.1 *C.C.Q.* **after** the judgment of the Court of Appeal in *A.P. vs. L.D.*, [2001] R.J.Q. 16 (QCCA), no doubt because the court took comfort that all that was needed was a hair or saliva sample, instead of a vial of blood (which requires piercing the skin). Although there was no law then authorizing such a DNA test, the Court nonetheless confirmed Rayle J.’s first instance order, in a 2-1 decision (Forget J.A., Robert J.A. concurring). Proulx J.A., dissenting, was stunned by this wanton disregard for the letter of the law:

[59] Dans *Droit de la famille – 206*, le premier juge avait conclu qu’il était dans l’intérêt de l’enfant de

woman's personal parental project, because he had never consented to have a child with her, hence article 538.2 *C.C.Q.* proscribes a filiation being established in his regard.

Fréchette J. would have none of this argument. He correctly put the burden of proof on the putative father (article 2803 *C.C.Q.*), to prove that (1) there *was* a parental project, (2) the sperm donor was not a party to such parental project, and (3) that he acted solely as an assistant to a parental project which was not his. Given notably that the defendant had raised the argument *after* initially refusing a DNA test, and *after* the court-ordered DNA test was unfavourable to his initial arguments, the Court decided that this was simply not a credible argument, and declared the 12-year-old boy to be his son.

10 – What Happens in the Clash between Family Stability and Biology?

In *Droit de la famille – 09358*³³, GR had lived in a common law union with IB from 1998 to 2005, and during their union, a child was born in 2002. GR, believing he was the father, treated the child as his own daughter, even after the separation of the parties in 2005. It was only in 2007, after friends told him the truth, that he had a DNA test done, and discovered he was not the biological father of the little girl, now 5 years of age.

connaître son père et qu'il pouvait faire droit à la requête pour expertise sanguine. Cette Cour, prenant appui sur l'art. 19 *C.c.B.C.* et notamment sur l'art. 30 *C.c.B.C.* qui, comme le présent article 33 *C.c.Q.*, édicte que «**l'intérêt de l'enfant et le respect de ses droits doivent être les motifs déterminants des décisions prises à son sujet**», a conclu que l'ordonnance «**violait la loi**» et que les articles 399 et 414 *C.p.c.* ne pouvaient être utiles pour valider une telle ordonnance. En ce sens, je dois différer de l'avis du juge Forget qui écrit que «**dans les décisions antérieures de notre Cour, on n'a pas opposé au droit à l'intégrité de la personne celui, tout aussi fondamental, de l'enfant de connaître ses parents.**»

[60] S'il était alors pertinent pour cette Cour de souligner que déjà en 1980 le législateur avait écarté les recommandations de l'Office de révision du Code civil, refusant ainsi de modifier la portée de l'art. 19 et notamment les mots «**sans y être autorisé par la loi**», cela l'est encore et davantage en constatant le silence du législateur depuis l'adoption du *Code civil du Québec*. Comme le constate une auteure dans une toute récente publication «**la fiabilité des tests d'ADN était déjà largement reconnue et répandue tant auprès de communautés scientifiques que juridiques. De plus, leur utilisation se faisait de plus en plus fréquente en matière de filiation, dans un contexte judiciaire comme extrajudiciaire. Pourtant le législateur québécois semble avoir choisi d'exclure ce moyen de preuve en droit de la filiation.**». Il est également significatif que dans la plupart des autres provinces canadiennes, entre les années 1980 à 1990, une disposition spécifique de la loi a été prévue pour autoriser ce type d'ordonnance.

[61] Il me paraît que l'opinion du juge Forget devrait convaincre le législateur d'intervenir mais, pour l'instant, je ne crois pas que même en se fondant sur le principe énoncé par la Cour suprême du Canada dans *D.P. c. C.S.*, la présence d'une large discrétion judiciaire conférée par l'art. 33 *C.c.Q.* puisse par ailleurs passer outre à la prohibition prévue à l'art. 10 *C.c.Q.* de ne pas porter atteinte à l'intégrité de la personne **sauf dans les cas prévus par la loi**. Avec respect pour l'opinion contraire, même s'il ne fait pas de doute que l'intérêt de l'enfant doit prévaloir, il ne revient pas aux tribunaux de faire fonction de législateur et de contourner une prohibition de la loi.

To my mind, this illustrates very clearly that when civilian jurists *feel* that a change in the law is required, they are prepared, quite rationally I think, to throw past precedent, tradition and respect for the legislator straight into the trash, and **declare** the law with as much verve and courage as their common law counterparts.

³³ 2009 QCCA 332.

GR cut off all contact with the child, and contested her filiation. His motion was dismissed in first instance, and this judgment was upheld on appeal. He argued that the presumption of paternity of article 530 *C.C.Q.* must be refutable, even in cases where there exists both possession of status and identification of the father on the birth certificate, if both were obtained without the putative parent's clear consent. His consent to appear on the child's birth certificate was vitiated, he argued, and the child's possession of status acquired only as a result of his ex-spouse's duplicity.

In its judgment, the Court of Appeal (Morin J.A., Hilton and Dutil JJ.A. concurring) held that article 530 *C.C.Q.* reflected the intention of the legislator to favour family stability over biological reality, and thereby cleared any past doubts that may have subsisted about the unassailable nature of filiation which has been established by a birth certificate coupled with a possession of status consistent with it (article 530 *C.C.Q.*). The Court was unequivocal that an unassailable possession of status takes no more than 24 months to be established definitively, hence there is an implicit correlative outside delay of 24 months to contest filiation.

The Court also restated the traditional questions to answer to determine whether a child has acquired "possession of status", the nature of which is public, as in:

- Does the child bear the same family name as the putative parent?
- Is the child being raised and educated by this same person?
- In other words, is the child being held out as the child of this same person?
- Is the child known in his community and entourage to be the child of the putative father?

Lastly, absence of constant cohabitation among the mother and father does not constitute a barrier to uninterrupted possession of status. Given the outside limit set by the Court of Appeal to act, it is implicit that the mantra of "the best interest of the child" is inapplicable; all that matters is whether the putative father has held out the child to be his own.

Lest it be forgotten, in this case, GR's consent to appear on the child's birth certificate had been obtained under false pretenses. In fact, GR also sought, albeit unsuccessfully, to adduce further evidence at the appellate level to demonstrate that IB had forged his signature on the *declaration of birth* form. The Court nonetheless held that duplicity was not a ground to impugn the filiation of the child. In other words, the legislator's intention in promulgating article 530 *C.C.Q.* is to *favour family stability over biological reality*.

Moreover, possession of status must be constant, uninterrupted and indivisible during a sufficient period of time. Discretion is left to the trial judge to determine what constitutes a "sufficient period of time", considering all the contextual factors. The possession of status must have begun at the child's birth and cannot be intermittent or episodic. Lastly, the absence of constant cohabitation between the mother and father does not constitute a barrier to uninterrupted possession of status.

It bears mentioning that the appellant in this case also sought to adduce additional evidence at the appellate level, claiming he had proof that his signature on the original *attestation of birth* form

had been forged by his ex-spouse. This permission was denied; we have no way of knowing if this was a “faint hope” effort, or if his evidence was solid.

The Court felt that duplicity was not a ground to impugn the filiation of the child. In other words, the legislator’s intention in promulgating article 530 *C.C.Q.* is *to favour family stability over biological reality*.

There is no question that this judgment sits four-square with the past jurisprudence of the Court of Appeal on filiation. For instance, an oft-cited precedent in this area is the curt judgment of the appellate court in *Droit de la famille - 3544*³⁴, which applied article 530 *C.C.Q.* to deny a cuckolded husband’s petition to contest the filiation of the 13 year old child, upon the confession of his wife that she had cheated on him almost 14 years earlier, which had led to the DNA test concluding to his biological non-paternity. For the Court of Appeal, this was just all too bad: «*Le législateur a choisi de conférer à celui qui a une possession d’état conforme à son acte de naissance un filiation qui ne peut être contestée d’aucune façon...Il n’appartient pas à la Cour de se pencher sur les raisons sociales qui peuvent militer pour ou contre le contenu des articles 530 et 531 C.c.Q.*»

Clearly the Court of Appeal has become more adventurous in the interval between 2000 and 2009, now being willing to venture its opinion that the legislator “favours family stability over biological reality.” It is nonetheless interesting to consider for a moment just precisely what interests the courts think are being protected. These are questions without answers, but that does not prevent us from contemplating them:

- Is the child’s best interest really safeguarded when this man has clearly permanently repudiated the child? Do we not punish the child by requiring her forever to consider as her father a man who does not care one whit for her?
- And what about the man’s “autonomy” and “choice,” terms that are often bandied about to object to a man having any obligations to his *de facto* wife? No one can doubt that this man was well aware of the identity of the woman with whom he volitionally cohabited for 6 ½ years, yet the law ignores *that* “possession of status” and imposes no duties. Yet, this man was duped as to the identity of the child he was told he had sired, but, we are told, this is irrelevant, and legal duties were imposed upon him.
- What does this statement *really* mean: «*Le législateur a préféré la stabilité des familles à la réalité biologique.*» Here, the Court of Appeal was quoting Michel Tétrault (*Droit de la famille*, 3^e éd., Cowansville, Éditions Yvon Blais, 2005). There is no family stability to maintain in a case such as this. Does this case not give the impression that it is *social stability* that is being favoured, as if the Quiet Revolution had never happened?
- Article 380 *C.C.Q.* reminds us that even a voidable marriage can no longer be challenged after the lapse of three years from solemnization (unless public order is

³⁴ Also known as (*M.G. vs. M.D.*), 2000 CanLII 3790 (QCCA), J.E. 2000-508 (C.A.).

concerned). Now article 530 *C.C.Q.* tells us the same rule for instances of, let us call it, “voidable filiation” after the lapse of two years. *Formal civil status* reigns supreme in Quebec. Is the state of the law perhaps out of step with the needs of the society that is being served?

- Even if it were *family* stability that were being favoured over biological truth, let us also consider that the advent of the *Divorce Act* and the social (if not legal) legitimization of *de facto* unions have already sounded the death knell for “family stability.” More children than ever are being raised in household where strangers are acting *qua* parents. What favour is done to children to maintain ties to a man who has no desire to be in that role, and thereby potentially deprive the child of the opportunity to acquire a filiation later on more in keeping with his interest?
- Let us keep in mind that a review of the studies on the actual genetic link between father and child in married couples demonstrates a general “cuckolding rate” of about 3 to 10% (there are many studies that cite higher rates, but not all these studies have been validated); but in filiation challenges, the “cuckolding rate” runs as high as 35%! This tells us that in litigious situations, the law may often be maintaining a false-to-fact *kinship tie*, that may not even be desired, for the sake of social stability.

This leads us briefly to consider *Droit de la Famille 989*³⁵, a judgment of Lebel J., in which a married woman bore a child as a result of an extra-marital affair in 1986, the couple then separated in early 1987 and divorced in 1988. The cuckolded husband, unaware of this deception, signed a consent to judgment providing for access rights to the child, which he exercised regularly, and payment of child support, which he remitted, but the mother never cashed. She, in turn, started to cohabit in 1987 with her lover, true father to her child, and both her family and that of her boyfriend were told the truth.

The ex-husband and his family were left in the dark, until a lawsuit contesting his paternity was initiated the next year by his ex-wife and her boyfriend, supported by a DNA test demonstrating that the lover was indeed the biological father, and supported by the intervention of the attorney for the director of youth protection named to represent the child. By this time, the child was two years of age.

The ex-husband, unlike GR in *Droit de la famille – 09358*³⁶, declined to take a DNA test, and refused to disavow his paternity. He continued to exercise his access rights throughout. As for the mother, she married her former lover, and the two had a second son together. She continued to have custody of the first child, whose filiation was then decided by the Court.

In a harshly worded judgment, the trial judge chastised severely the biological parents for the deception that had brought the parties before the court. Reminding us again of the three criteria for the establishment of possession of status – *nomen, tractatus* and *fama* – the essential public nature of the *fama* was underscored. The ex-husband had at all times treated, and continued to treat, the little boy as his son, and in the eyes of the community, this child was the son of the ex-

³⁵ [1991] R.J.Q. 1343.

³⁶ *Supra*, note 33.

husband. The hush-hush disclosures made in the families of the biological parents did not have the essential *public* nature that could have negated the evidence adduced by the ex-husband.

The Court observed:

La possession d'état ne réfère pas à la réalité «biologique», à la filiation véritable et prouvée scientifiquement. Elle découle bien au contraire de la réalité «sociale» des rapports entre le parent et l'enfant.

and then concluded thusly:

73. Évidemment, compte tenu de la conclusion du tribunal, il est possible que l'état civil de M.B. ne soit pas conforme à la « vérité biologique ». La lecture de l'ensemble des dispositions du titre troisième du *Code civil du Québec* portant sur la filiation, amène inévitablement à la conclusion que le législateur a refusé d'ériger en système un principe selon lequel seule compterait la « vérité biologique ». Très certainement, l'acte de l'état civil n'est pas conforme à la vérité biologique lorsqu'un enfant est adopté. Il n'appartient pas au tribunal d'amender le *Code civil* pour faire triompher la vérité biologique à tout prix comme a semblé le suggérer le procureur du DPJ plaidant au nom de l'enfant M.B. (...)

And so we must ask ourselves again what “family stability” and “the best interest of the child” really mean: here is a young boy, now a young man, who has for as far back as he can remember, has only lived with his real mother and his real father; their families are his real families. Yet, technically, if he calls his father, “Dad”, he could be cited for contempt of court, because another man was blessed with the status of “father” by reason, literally, of the sin of his mother.

But do not be lulled into thinking that perhaps the error of this case was putting sympathy for the wronged husband ahead of the interest of the child. Not only does the interest of the child have nothing to do with filiation, but even an entirely absent fellow would not have changed the outcome, as in *Droit de la Famille 1663*³⁷, a judgment of Dugas J. maintaining a legal filiation in the following circumstances:

The Plaintiff was the son, now 20 years of age, who had been born to his mother and her husband in 1972, but was in fact the son of his mother's lover. For unknown reasons, this cuckolded husband did not repudiate the child at the relevant time, but in any event, he left his wife and moved to Italy in 1976, where he obtained a divorce judgment, and was never seen again.

In the meantime, the mother moved in with her lover, true biological father of the child, and the two raised the child to adulthood. The child bore the surname of his biological father, and had no contact with his “legal” father. It was also the child who took the initiative of contesting his filiation of origin, to claim a filiation which reflected the life he had lived essentially for as long as he could remember.

³⁷ [1992] R.D.F. 628 (S.C.).

Dugas J. *denied* this petition, citing *Droit de la Famille 989*³⁸, noting simply that the possession of status in the first five years of the child's life, coupled with the birth certificate bearing the ex-husband's name, satisfied the condition of article 587 *C.C.Q.* (now article 530 *C.C.Q.*) :

À notre avis, une possession d'état d'une durée de 5 (cinq) ans «est suffisamment longue pour rencontrer les exigences de la loi et satisfaire à la nécessaire stabilité des filiations dans notre droit et dans notre société, même au risque possible, parfois, d'une erreur quant à la vérité biologique.»

Undeniably, Dugas J. was simply quoting the Court of Appeal in *Droit de la Famille 737*³⁹, but precisely what stability is again at issue? If there is one stability this child, now 20 years of age, has ever known, is that his biological father raised and educated him, and in fact is the only father he knows. Whose needs are met with this interpretation of the law? How is society advanced by the refusal to formalize this filiation that is consistent both with biology and 15 years of *de facto* kinship? How are “choice” and “autonomy” favoured when the first fellow – the ex-husband – has voted with his feet by absconding across the sea, while the second fellow – true progenitor of the child – has fulfilled his moral duty by raising his son? Yet, this son cannot legally call his true father, “Dad”?

There are situations even stranger than this one. In *P.B. vs. M.S. and C.T.*⁴⁰, SM cohabited with PB, got pregnant by this fellow, then moved in with a second fellow, CT. CT accepted to have his name on the birth certificate of the child then born, and thereafter retained the child's custody – along with the custody of MS's two older children by yet another relationship – after MS left him to return to live with PB for awhile. Eventually, MS returned to live with CT, and they had a child together, his first and her fourth.

PB took proceedings to claim his paternity to the child, when the child was 8 months of age. Senécal J. granted PB's petition, noting that of the three elements of possession of status of *nomen, tractatus* and *fama*, that PB succeeded on the last point: all the members of the three families knew that PB was the biological parent (as evidenced by a DNA test), and that CT was not, *even though all three children called CT “papa,” and even though CT in fact provided the stability and continuity of caretaking that was in the children's best interests.* Moreover, the 8-month period was insufficient to establish a possession of status that would be, coupled with the birth certificate, unassailable within the meaning of article 530 *C.C.Q.*

Senécal J. quotes *Droit de la Famille 989*⁴¹, with approval, and goes on to note that even if the legislator “weakened” the presumption of paternity amongst married couples (by giving the wife and third parties the right to contest the presumption), that article 530 *C.C.Q.* nonetheless bolsters the jurisprudential understanding that the stability of filiation, once established, is imperative and of public order.

³⁸ *Supra*, note 35.

³⁹ [1990] R.J.Q. 85 (C.A.).

⁴⁰ [2003] R.D.F. 816 (S.C.).

⁴¹ *Supra*, note 35.

But what is particularly striking, given these circumstances, is the Court's affirmation and indeed insistence that in recourses pertaining to filiation, the interest of the child is *not* an element:

[27] **Au niveau du traitement, il faut constater que M. T... a toujours joué un rôle de parent auprès de l'enfant et un rôle déterminant.** Il était présent à l'accouchement. L'enfant est toujours demeuré avec lui depuis sa naissance. M. T... s'en est toujours occupé. En fait, la garde de l'enfant lui a même été confiée de fait lorsque la mère a quitté. Il est clair que M. T... a toujours traité l'enfant depuis sa naissance comme son propre enfant et que l'enfant a toujours traité M. T... comme son père.

[36] **Certes la réalité moderne reconnaît maintenant le parent psychologique; il est admis qu'il peut être plus important dans la vie de l'enfant que le parent biologique.** On en tient compte lorsqu'il s'agit par exemple de décider de la garde. Mais ce n'est pas de ce dont il s'agit lorsqu'il faut établir l'état et la filiation.

[48] En ce qui concerne l'argument de l'intérêt de l'enfant, **le Tribunal est d'avis, avec beaucoup de respect pour l'opinion contraire, que dans les recours relatifs à la filiation, l'intérêt de l'enfant ne joue pas**, si ce n'est dans la détermination des grands objectifs de la loi. Ainsi, il peut ne pas être de l'intérêt d'un enfant d'accueillir une action en désaveu de paternité, mais si les conditions de cette action sont réunies pour qu'elle soit accueillie, alors elle doit l'être.

[49] Le Tribunal n'a aucun doute ici que le défendeur T... a joué un rôle très important auprès de l'enfant B.... Il a été un très bon père pour elle, au point où lorsque la mère est partie, c'est lui qui a assumé la garde de l'enfant. Mais le Tribunal n'est pas ici pour décider d'un litige de garde. Autant ces considérations pourront être pertinentes lorsque cela sera fait, autant elles ne peuvent intervenir ici.

The Problem of *De Facto* Parents

We are reminded that filiation is more than a piece of paper in Quebec, just as marriage is more than a piece of paper: these *formal* pieces of paper are necessary to establish rights and obligations. For this reason alone, it bears turning back to *Chartier vs. Charter*⁴², the case upon which Quebeckers rely to affirm that the common law doctrine of *in loco parentis* applies here in instances of divorce, and a stepparent may be constrained to pay child support, even if he has severed his tie with the child post-separation (of course a stepparent may also claim access rights after divorce).

First of all, in *Chartier*, both the parties and the Supreme Court itself expressly acknowledged that the rights and obligations under the provincial *Family Maintenance Act* and the federal *Divorce Act* were identical for the purposes of the action and appeal. The parties were at first common law spouses from November 1989 to June 1991, during which period their common child, Jeena, was born. They married in June 1991, and separated definitively by September 1992. The wife's child from a previous union, Jessica, lived with both of them, and the husband cared for both children equally. *The parents also amended Jessica's birth registration to indicate, falsely, that Gerald Leo Joseph Chartier was her natural father, and to change her surname to his.*

⁴² [1999] 1 S.C.R. 242.

The criteria to determine whether Gerald Chartier acted as a *de facto* father, *i.e. in loco parentis*, are not dissimilar to the criteria to determine “possession of status:

[39] Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively. What must be determined is the nature of the relationship. The *Divorce Act* makes no mention of formal expressions of intent. ... The court must determine the nature of the relationship by looking at a number of factors, among which is intention. Intention will not only be expressed formally. The court must also infer intention from actions, and take into consideration that even expressed intentions may sometimes change. The actual fact of forming a new family is a key factor in drawing an inference that the step-parent treats the child as a member of his or her family, *i.e.*, a child of the marriage. **The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child’s relationship with the absent biological parent.** The manifestation of the intention of the step-parent cannot be qualified as to duration, or be otherwise made conditional or qualified, even if this intention is manifested expressly. Once it is shown that the child is to be considered, in fact, a “child of the marriage”, the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage with regard to the application of the *Divorce Act*. The step-parent, at this point, does not only incur obligations. He or she also acquires certain rights, such as the right to apply eventually for custody or access under s. 16(1) of the *Divorce Act*.

And for the fearful post-feminism feminists who somehow worry that attaching legal obligations to conjugal relationships will cause men to refuse to enter into conjugal relationships with women, especially those who already have children, the Supreme Court is not impressed by this kind of rhetoric:

[41] Huband J.A., in *Carignan*, expressed the concern that individuals may be reluctant to be generous toward children for fear that their generosity will give rise to parental obligations. I do not share those concerns. The nature of a parental relationship is complex and includes more than financial support. People do not enter into parental relationships with the view that they will be terminated. I share the view expressed by Beaulieu J. in *Siddall, supra*, at p. 337:

It is important to examine the motive behind a person’s generosity towards the children of the person they wish to be involved with or are involved with in a relationship. In many cases children are used as pawns by men and, on occasion, women who desire the attention of the children’s parent and once the relationship between the adults fail, the children are abandoned. This is not to be encouraged. **If requiring men to continue their relationship, financially and emotionally with the children is a discouragement of generosity then, perhaps such generosity should be discouraged. This type of generosity which leaves children feeling rejected and shattered once a relationship between the adults sours is not beneficial to society in general and the children, in particular.**

After all, it is the court's obligation to look out for the best interests of the children. In too many of these situations the ultimate result is that the child is a mere object used to accommodate a person's selfish and personal interests as long as the relationship is satisfying and gratifying. As soon as things sour and become less comfortable, the person can leave, abandoning both the parent and child, without any legal repercussions. . . . It is important to encourage the type of relationship that includes commitment, not superficial generosity. If relationships are more difficult for a person to extricate him- or herself from then, perhaps, more children will be spared the trauma of rejection, bruised self image and loss of financial support to which they have become accustomed.

And what of the fear that a child may have the benefit of more than one alimentary creditor of child support? The Supreme Court was also deliciously unconcerned:

[42] Huband J.A., in *Carignan*, also expressed the concern that a child might collect support from both the biological parent and the step-parent. I do not accept that this is a valid concern. The contribution to be paid by the biological parent should be assessed independently of the obligations of the step-parent. The obligation to support a child arises as soon as that child is determined to be a "child of the marriage". **The obligations of parents for a child are all joint and several. The issue of contribution is one between all of the parents who have obligations towards the child, whether they are biological parents or step-parents; it should not affect the child.** If a parent seeks contribution from another parent, he or she must, in the meantime, pay support for the child regardless of the obligations of the other parent. (See *Therault, supra*, at p. 214; James G. McLeod, Annotation on *Primeau v. Primeau* (1986), 2 R.F.L. (3d) 114.)

The legal tool of adoption, then, takes a back seat to the needs of the child, which the common law and statutory law prioritize, and is considered of importance for the transmission of capital, as in:

[43] Some concerns may also be raised with regard to the relevance of adoption proceedings where obligations regarding all "children of the marriage" are identical under the *Divorce Act* and *The Family Maintenance Act*. I recall that Mr. Chartier did not finalize his plans to adopt Jessica. **The simple answer to that is that legal adoption will nevertheless have a significant impact in other areas of the law, most notably trusts and wills; it retains its importance.**

The authority of the Quebec Court of Appeal in *Droit de la Famille 1369* is then cited with approval in the conclusion, to hold that the fact of holding out the child to be one's own during a conjugal relationship (*nomen, tractatus* and *fama*) confers a *status* which the *Divorce Act* then protects, namely, the status of "child of the marriage," which, to all intents and purposes is, **like filiation**, simply a legal recognition of a theretofore informal tie of *kinship*. A *de facto* child is conferred a formal status to a *de facto* parent, which status confers legal rights and obligations:

Conclusion

[44] The Court of Appeal, by relying on *Carignan*, made a distinction between children born of both parents and stepchildren. As mentioned earlier, the Act does not make

such a distinction. **Once it is determined that a child is a “child of the marriage” within the meaning of the *Divorce Act*, he or she must be treated as if born of the marriage. As the Quebec Court of Appeal held in *Droit de la famille --1369*, 1991 CanLII 3310 (QCCA), [1991] R.J.Q. 2822 (C.A.), at p. 2827:**

[TRANSLATION] Once the status as child of the marriage is recognized, the *Act* does not allow the distinction to be made between a biological father and someone who stands in the place of one. Nothing in the wording of this article in fact gives the impression that the legislator wanted to grant some sort of privilege to the spouse who stands in the place of the parent.

[45] Even if a relationship has broken down after a separation or divorce, the obligation of a person who stands in the place of a parent to support a child remains the same. Natural parents, even if they lose contact with their children, must continue to pay child support.

[46] On the facts of this case, the respondent stood in the place of a parent toward Jessica. **The respondent represented to Jessica and to the world that he assumed full parental responsibility for her. Mr. Chartier is the only father that Jessica has known owing to the fact that the parties led her to believe that the respondent was in fact Jessica’s biological father.** The respondent even considered adopting Jessica and the parties had Jessica’s birth registration amended to change Jessica’s name to correspond to the respondent’s. This was done by falsely submitting an application stating that the respondent was Jessica’s natural father. After the separation, the respondent continued to have visits with Jessica. Eventually access was terminated with regard to both Jessica and his biological child, Jeena.

[47] **The respondent’s unilateral withdrawal from the relationship with Jessica does not change the fact that he acted, in all ways, as a father during the time the family lived together. Therefore, Jessica was a “child of the marriage” when the parties separated and later divorced, with all of the rights and responsibilities which that status entails under the *Divorce Act*.** With respect to support from the respondent, Jessica is to be treated in the same way as Jeena.

We note the importance to the Supreme Court to underscore the absolute equality of treatment of the two children, without regard for the marital status of their parents, a happy nod to the *Charter* vision of equality (this was the same year as *M. vs. H.*, and not long after *Miron vs. Trudel*).

However, the echoes of Dalphond J.A. and Rochon J.A. resound in our minds, that we cannot be inspired by common law doctrine. Well, in fact, the Supreme Court was *rejecting* the classical common law doctrine of *in loco parentis* in its judgment in *Carignan*! This doctrine was apparently a creation of 19th century patriarchal society (Alison Diduck’s words, not mine), having “evolved during a time when it was a morally offensive notion for a man to be held responsible for another man’s child.” Diduck suggested that the *Divorce Act*’s use of the words should *not* be interpreted by the courts based on existing precedents.

The Court agreed. And it was no less than Bastarache J., as he then was, who stated that **“the policies and values reflected in the *Divorce Act* must relate to contemporary Canadian society** and that the general principles of statutory interpretation support a modern understanding of the words ‘stands in the place of a parent’.”

Is it not time then for us to look at our *Civil Code of Quebec* with fresh eyes, and free ourselves from the straitjackets of the past, as the Supreme court so imperiously – and correctly – did in *Chartier*?

12 – New Frontiers: Surrogate Mothers

At least ostensibly, surrogacy is strictly prohibited in Quebec, both by operation of federal and provincial law. Section 6 of the much contested *Assisted Human Reproduction Act*⁴³ prohibits commercialization of surrogacy, nothing more:

Payment for surrogacy

s. 6. (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.

Quebec goes much further, with what appears to be a complete prohibition:

Art. 541. Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.

It should come as no surprise to anyone that there are women acting as surrogate mothers in Quebec, and there are infertile couples who engage surrogate mothers elsewhere in the world (such as in California), where surrogacy is not explicitly prohibited.

So what does this nullity entail?

Art. 1417. A contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest.

Art. 1418. The absolute nullity of a contract may be invoked by any person having a present and actual interest in doing so; it is invoked by the court of its own motion.

A contract that is absolutely null may not be confirmed.

II. – Effect of nullity

Art. 1422. A contract that is null is deemed never to have existed.

In such a case, each party is bound to restore to the other the prestations he has received.

There is no question that the legislator must take a prudent approach, because of the serious risk of exploitation of women. Moreover, just as in cases where pregnant women decide to put up their infants for adoption, but change their minds later, the law must have safeguards built in. Finally, we live in a culture where, for better or for worse, all women are encouraged to keep their own infants, no matter what their living circumstances⁴⁴.

⁴³ S.C. 2004, c. 2.

⁴⁴ There is a strong movement afoot to favour putting infants up to adoption where it is not reasonable to foresee a woman will be able to raise her child; this is the beginning of a grudging recognition that biology does not trump everything, and that it is a grave disservice to a child to keep moving him through a

One would have thought that eliminating “wombs for hire” would suffice, since, after all, altruistic service of this nature, by a sister or close friend, is presumably not *ipso facto* a choice that offends society or puts women at risk by reason of their sex. And if one harkens back to the words of Wilson J. in *Morgentaler*⁴⁵, the decisions a woman makes in choosing to terminate or continue a pregnancy, are hers alone to make.

Although certainly the state has a duty to protect the infant once born, it would be odd indeed that the law permits a woman to *terminate* a pregnancy, but not to act as a surrogate to permit another woman to *have* a child. If we entirely correctly trust a woman’s good judgment when she chooses *not* to bring a new life into the world, surely her same good judgment should be respected if she chooses to bring a new life into the world for the benefit of an infertile couple who are her relatives or friends (or any scenario that entails humane assistance, as opposed to reproduction for profit).

Or as Professor Moore put it so cogently in his article, *Les enfants du nouveau siècle (libres propos sur la réforme de la filiation)*⁴⁶:

Par contre, comme l'a fait remarquer une auteure (Giroux), **l'interdiction des conventions de procréation ou de gestation vise à protéger l'intérêt *a priori* de l'enfant, c'est-à-dire tenter de décourager cette pratique et ainsi éviter qu'un enfant naisse dans une telle situation. Une fois qu'une telle convention existe et que la mère porteuse semble vouloir respecter son consentement, l'intérêt *a posteriori* de l'enfant demande peut-être que les personnes désirant réellement assumer le rôle de parents puissent le faire et ainsi assurer à l'enfant une «biparentalité»**. De plus, il pourrait être avantageux de permettre à la mère-porteuse de consentir à son remplacement, et ainsi voir son identité conservée, rendant éventuellement possibles des retrouvailles (Art. 583 C.c.Q.).

In *Adoption 091*⁴⁷, Dubois J. soundly rejected this laissez-faire approach, in a firm and resolute judgment harshly condemning what clearly appeared to him to be turning childbearing into a transactional operation. In that case, the infertile couple had tried for over seven years to bear a child of their own, but were unsuccessful (the woman already had two children of her own, born in a previous union). They then turned to a surrogate, who accepted to bear the husband’s child, and be compensated for the inconvenience and expense (quantified at \$ 20,000). The surrogate bore the child, and handed the infant to the couple, who have been raising the child ever since.

Upon the advice of their legal counsel, they had two choices: either let the surrogate enter her name on the declaration of live birth, and sign a special consent to adoption in favour of the father’s spouse, or *not* let the surrogate enter her name on the declaration of live birth, then wait

rotating door of repeated foster placements, instead of permitting him to develop healthy ties to an adoptive family. But that discussion is beyond the scope of this paper.

⁴⁵ *Supra*, note 15.

⁴⁶ *Développements récents en droit familial (2002), Service de la formation permanente du Barreau du Québec, 2002*. If there is one article on the topic of the filiation reform that is a “must read”, this is it. Professor Moore managed to foresee with great prescience almost every single difficulty that the reform would create in its application.

⁴⁷ 2009 QCCQ 628 (CanLII).

the 30 days, so that only the father's filiation would be legally acknowledged. Then, the father could give a special consent that his wife adopt the child. The couple chose the latter path.

Their attorney argued, quite cleverly, that the Barreau had recommended years earlier that the legislator should explicitly *prohibit* adoption if a surrogacy contract is at stake. Ergo, since the legislator did *not* adopt this recommendation, there was room for flexibility, and for the judge at an adoption hearing to respect the best interest of the child, which is the cornerstone of decisions concerning adoption. This was akin to Professor Moore's dichotomy in the law's prohibition of agreements *a priori* (as Giroux had put it, «*le corps humain est hors commerce et on ne peut décider de la filiation d'une personne par convention*»), and the law's possible tolerance *a posteriori*, when presumably the womb mother has had the time to develop a reliable and unpressured consent to adoption, as any woman would who was prepared to give up her child in other circumstances.

Dubois J. noted first that the federal law prohibits remunerated surrogacy in section 6 of the *Assisted Human Reproduction Act*⁴⁸, in a valid exercise of its constitutional power over criminal law⁴⁹. That surrogacy of any kind is prohibited in Quebec goes without saying. As such, the concept that adoption must be decided upon based on the best interest of the child is necessarily tempered by the requirement to obey the law:

Art. 543. No adoption may take place except in the interest of the child and on the conditions prescribed by law.

There was no way the court was prepared to sanction so blatant a flouting of the law:

[62] Dans le contexte factuel particulier de cette affaire, force est de conclure que le projet parental de la requérante et du père de l'enfant entraînait inévitablement, **dès le départ**, la création délibérée d'une situation d'abandon du bébé par sa mère biologique pour satisfaire leur désir d'enfant, puis dans un deuxième temps, le consentement à l'adoption (pièce R-2).

[63] Toutes les étapes chronologiquement postérieures à la décision de recruter une mère porteuse, au mépris des lois existantes et en marge du droit, ont donc logiquement engendré la suite des événements.

[64] Il est clair que la requérante mise beaucoup sur la situation de fait accompli. L'enfant étant née, le principe cardinal de l'intérêt de l'enfant en chair et en os devrait non seulement émouvoir le Tribunal, mais constituer **le** seul critère déterminant de la décision à être rendue.

[65] **La requérante espère que le Tribunal adhérera à sa conception du «droit à**

⁴⁸ *Supra*, note 43.

⁴⁹ In the Court of Appeal judgment on Quebec's constitutional challenge to the validity of the law, s. 6 was one of the articles *not* impugned – see: *Renvoi fait par le Gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d'appel, L.R.Q., ch. R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée*, L.C. 2004, ch. 2, 2008, QCCA 1167. This matter is pending before the Supreme Court, file no. 43750, *sub nom. Attorney General of Canada v. Attorney General of Quebec*, and the appeal was heard by the full bench on April 24 2009, with multiple interveners participating from across the country.

l'enfant» dont l'intérêt, une fois née, ne fait plus de doute puisqu'elle s'en occupe déjà et qu'elle veut continuer d'en prendre soin.

[66] Ainsi donc, toute la démarche conçue et réalisée dans l'illégalité aboutirait finalement à un résultat légal, grâce à l'utilisation commode du critère passe-partout de l'intérêt de l'enfant. Ce critère purifierait plus blanc que blanc et effacerait tout ce qui a été fait auparavant.

[67] L'intérêt de l'enfant permettrait donc aux initiateurs de ce projet parental d'arriver à leur fin ultime en octroyant à la requérante, par l'instrumentalisation commode de l'adoption la confirmation qu'aux yeux de la loi et de la société, elle est la mère de l'enfant.

[70] L'intérêt de l'enfant, tout important soit-il, n'est pas un argument fourre-tout permettant tout et son contraire, comme le rappellent les professeurs Deleury et Goubau : «Affirmer le principe de la primauté de l'intérêt de l'enfant ne signifie donc pas que cette notion permet de faire n'importe quoi, n'importe comment, chaque fois qu'il s'agit d'un enfant. Encore faut-il que les décisions respectent les autres règles de droit».

[78] Donner effet au consentement du père à l'adoption de son enfant serait pour le Tribunal, dans les circonstances, faire preuve d'aveuglement volontaire et confirmer que la fin justifie les moyens.

Certainly, the logic of this reasoning is impeccable. Human flesh must never become a “commodity” to be purchased, rented, bartered, or even given away. Without respect for the law, there is anarchy. The adults who planned and executed a «projet parental» in clear contravention of the law, should not be rewarded.

The only problem is in the impact of the judgment: ultimately, it is the child who is punished, and whose future is put in jeopardy: the establishment of filiation is the only means which guarantees alimentary support and abintestate succession rights. Considering that the biological mother's name is not even on the birth certificate, this means that the child is condemned to a unilinear filiation for life, whereas the rules on adoption would permit at least the possibility of future contact with the womb mother (a database is kept with biological records to permit post-adoption requests for parent-child or child-parent contacts, or access to medical records).

Why punish the child for the sins of the adults? Moreover, the punishment weighs most heavily on the woman, who is forever denied the right to claim the filiation of the child, born indeed as a result of her desire and that of her husband (and is not the normal state of human affairs to want to have children?). But the man is not punished at all: *his* filiation cannot be challenged! We do not know from the facts of the case whose fertility was impaired, but there is no question that the seven years of fertility treatments were necessarily far more onerous for the woman than for the man (a result of biology we cannot disregard). Why then was her perseverance to have a child, with all the cost and sacrifice that this endeavour entails, viewed so harshly?

A better outcome came to pass in the judgments rendered by Tremblay J. in *Adoption 09184* and *Adoption 09185*⁵⁰, involving a surrogacy agreement which led to the birth of fraternal twin boys

⁵⁰ 2009 QCCQ 9058 (CanLII) and 2009 QCCQ 8703 (CanLII).

(hence two judgments), but in a radically different situation. A and B, the proposed adoptive parents, were a common law couple cohabiting since 2003. A, the woman, had succeeded in becoming pregnant twice, but lost the first baby at 26 weeks gestation, and the second baby at 37 weeks gestation. In both pregnancies, it was uterine rupture that led to the fetal deaths, and in both, A came close to dying. Her physician forbade any further attempts at giving birth.

A's aunt (the wife of her uncle, hence her aunt only «par alliance») proposed to help the young couple bear a child, by acting as their surrogate. The medical procedure entailed extracting ripe eggs from A, fertilizing them with B's sperm *in vitro*, and then implanting the resulting embryos in C's womb, where two successfully implanted, and survived. The entire procedure was supervised and approved by the ethics committee of the fertility clinic the adults attended. C's husband, A's uncle (by blood) also participated in giving his consent to this procedure.

Needless to say, Tremblay J. was in a much more ethically comfortable situation on the facts than Dubois J. in the previous case. But he was still faced with the imperative words of article 541 *C.C.Q.* In deciding to approve the special consent to adoption by A of the child borne by C (pursuant to article 555 *C.C.Q.*), the judge dug deep into the National Assembly debates:

[19] ...Le premier article de ce chapitre, l'article 538, indique que le projet parental avec assistance à la procréation existe dès lors qu'une personne seule ou des conjoints ont décidé, afin d'avoir un enfant, de recourir aux forces génétiques d'une personne qui n'est pas partie au projet parental. **Dans le présent cas, on pourrait prétendre qu'on n'a pas recouru aux forces génétiques de la mère porteuse, la requérante-adoptante ayant fourni l'ovule et le mis-en-cause ayant fourni le sperme et qu'ainsi l'article 541 ne vise pas le cas sous étude ou à tout le moins, rend son application incertaine.** L'article 541 devrait être considéré en regard de l'article 538 et de tout le CHAPITRE PREMIER. I, en fonction de la règle de l'interdépendance des dispositions législatives [1]. **La lecture attentive des débats de l'Assemblée nationale du Québec [2] sur la question nous permet de constater le flou scientifique et juridique qui existait chez les parlementaires, par exemple lorsque madame Louise Harel déclare: "Alors, une mère porteuse, c'est un apport de forces génétiques".** Ce n'est pas le cas dans la présente affaire.

[...]

[22] Mais par delà ces prétentions, le Tribunal prend pour acquis que l'article 541 s'applique au présent cas, la question de son applicabilité constitutionnelle n'ayant pas été remise en cause, soit en regard de la *Charte canadienne des droits et libertés*, ou de la *Charte (québécoise) des droits et libertés de la personne*, ce qui n'aurait pas été sans intérêt. **Ainsi l'entente verbale intervenue entre la requérante-adoptante (mère génétique) et le mis-en-cause (père génétique) d'une part, et la mise-en-cause (mère porteuse) d'autre part, est probablement nulle de nullité absolue en regard de l'article 541 du Code civil du Québec.** Cela signifie que la requérante-adoptante A et le mis-en-cause B n'auraient pu par exemple obliger la mise-en-cause C à poursuivre sa grossesse si cette dernière avait décidé de l'interrompre. Cela signifie aussi qu'on ne pourrait invoquer l'entente de procréation et de gestation si, dans un autre exemple, la mise en cause C avait refusé de signer un consentement à l'adoption. Voilà deux exemples qui ont été cités en commission parlementaire lors de l'étude de l'article 541. **Mais ce n'est pas de ce genre de questions que j'ai à décider. Il faut décider du statut d'un enfant qui existe et qui a droit au respect intégral de ses droits, notamment ceux prévus aux articles 32, 33 et 34 du Code civil du Québec.** Le tribunal, voyant que

l'intérêt d'un mineur était en jeu, aurait pu ajourner la présente instruction afin que l'enfant soit représenté (394.1 *C.P.C.*), ce qui n'a pas été nécessaire, le présent tribunal siégeant en matière d'adoption étant investi d'office du pouvoir de sauvegarder l'intérêt d'un mineur, tels que le stipulent les articles précités 543, 32, 33 et 34 du *C.C.Q.* mais aussi implicitement les articles 36.1, 46 et 394.1 du *Code de procédure civile du Québec*. **Il s'agit donc de rendre une décision du point de vue de l'enfant et non du point de vue des personnes qui ont fait, répétons-le, en toute bonne foi et par pur altruisme en ce qui concerne la mise-en-cause, une entente de procréation assistée. Comme disait le ministre de la justice Rémillard, dans le débat entourant l'article qui est devenu l'article 541 du Code civil du Québec: "Oui M. le président, c'est évident que, dans ça, il y a aussi le droit de l'enfant".**

[23] [...] **Lors des débats parlementaires** qui ont conduit à l'adoption des articles 538 à 542 du *Code civil du Québec*, dont l'article 541, **une situation de mère porteuse très semblable à la situation présente a été évoquée** ("une mère qui accepte de porter l'enfant pour sa fille, donc qui est inséminée avec l'ovule et le sperme de son gendre et de sa fille") et **le ministre Rémillard, ayant consulté ses légistes, en venait à la conclusion que l'adoption pouvait se faire alors sous les règles du consentement spécial en faveur d'un parent en ligne collatérale.**

[24] Cela a été établi précédemment, toutes les conditions objectives fixées par la loi en matière d'adoption ont été rencontrées et permettent d'accueillir la présente requête. Agir autrement en regard de la preuve faite, serait contraire à l'intérêt de l'enfant et contraire à l'ordre public. **Comme l'indiquait la Cour d'appel du Québec, sous la plume de l'Honorable Jean-Louis Beaudoin, l'ordre public ne trouve pas seulement sa source dans le corpus législatif; les tribunaux doivent être créatifs et modeler l'ordre public en prenant en compte les valeurs fondamentales de la société:**

L'ordre public québécois ne se résume pas seulement aux valeurs protégées par les Chartes ou par la législation ordinaire. En d'autres termes, cette notion n'est pas uniquement constituée d'un corpus législatif et ce n'est donc pas au seul législateur qu'il revient d'en définir le contenu (arts 9, 1373, 1413 *C.c.Q.*). L'ordre public est aussi judiciaire dans sa détermination. Les tribunaux ont le devoir de le sanctionner et de le modeler en prenant en compte les valeurs fondamentales de la société à un moment donné de son évolution. (nos soulignements)

Il m'apparaît tout à fait souhaitable de permettre à cet enfant, qui représente l'avenir de notre société, de bénéficier de tous les avantages de sa véritable filiation maternelle.

The juxtaposition of the facts in these two cases is significant enough that one can be quite satisfied with the outcome in either case, based on the serious analyses each judge invested in each judgment. It remains troubling, nonetheless, that because of the differential impact of biology on men and women, it will always be harder for an infertile woman to be able to benefit from the rules on assisted reproduction, by reason of the prohibition of surrogacy agreements. Moreover, just on the numbers alone, even healthy women have a much shorter period of their lives during which they are fertile when compared with men. This means that we should confront the ethical problem directly, and ask these questions: What happened to the battle cry, "My body, my choice?" If a woman has an undisputed right to abortion (remember there is no law

prohibiting abortion at any stage of pregnancy), why dispute her right to bear a child, even if it is for somebody else? If the cost and of adoption of a healthy infant is going to continue to be astronomical, why not take the risk of a surrogacy contract, since it costs less? If the consequence of the law is that *the child* will be denied filiation to the woman who raises him, then why bother establishing filiation at all? As long as we are certain the doctrine of *in loco parentis* applies in Quebec, the *de facto* mother will be able to assert a custody claim should the couple ever separate.

The real problem is more likely to arise in the case of male same-sex couples. Here, the potential for a constitutional challenge is very real: if the legislator was prepared to extend the right to establish filiation without regard for biology to female same-sex couples, then it is likely impermissibly discriminatory not to have extended the same protection of law to male same-sex couples. And this is where the prohibition of surrogacy is the most dramatic, because there will be no sympathy factor to play, whether it is the seven years of unsuccessful fertility treatments or the two late-term miscarriages of the preceding cases.

In an August 4th 2009 judgment of Gregoire J. in 525-43-005607-094 (as yet unreported), a male same-sex couple, living in a civil union, hired a surrogate in the State of California, where surrogacy is perfectly legal. They paid the necessary fees to the Agency that mediated the contract, including all medical expenses of the mother and child, before, during and after the birth. The surrogate travelled to Quebec to give birth, to sign the declaration of birth as the mother, consent to the adoption by the father's same-sex civil union spouse, and to receive service of the motion before the Court.

Once again, the court was comforted by the transparency of the process, and the active participation of the womb mother in all steps of the process, which assured the court as to her consent. Moreover, the contract was concluded in a jurisdiction where it was legal. This permitted Gregoire J. to apply the rule of articles 522 and 523 *C.C.Q.* that this child, whose maternal and paternal filiation were clearly established by her birth certificate, was entitled to the full and equal protection of the law, no matter what the circumstances of her birth.

In granting the placement order, Gregoire J. had this to say:

[20] Il est clair que l'intérêt de cette enfant est d'être adoptée par le requérant et être ainsi un membre d'une famille, d'être la fille de parents qui désirent et souhaitent l'éduquer, l'élever et assumer en totalité les obligations générées par le statut de parent.

[21] Depuis près de trente ans maintenant le plus haut tribunal du pays prône que l'intérêt de l'enfant est ce qui lui permettra de s'enraciner et de grandir (*Young vs. Young*, [1993] 4 R.C.S. 3):

“La Cour doit choisir la solution qui sera le plus à même d'assurer à l'enfant une croissance, une éducation et un développement sain qui l'armeront pour faire face aux problèmes de la vie”.

[22] C'est ainsi que madame L'Heureux-Dubé s'exprimait en 1993 et que le juge McIntyre s'exprimait en 1985 ([1985] 1 R.C.S.. 87); et en 2009, la Cour Suprême (2009 CSC 30) réitérait les mêmes principes:

Comme la juge L'Heureux-Dubé l'a dit dans *Young c. Young*, [1993] 4 R.C.S. 3, «les tribunaux doivent avoir pour consigne de créer ou de favoriser les conditions les plus propices à l'épanouissement de l'enfant» (p. 65 (je souligne)). Dans *King c. Low*, [1985] 1 R.C.S. 87, le juge McIntyre a fait remarquer que «la Cour [...] doit avoir comme objectif de choisir la solution qui sera la plus à même d'assurer à l'enfant une croissance, une éducation et un développement sains qui l'armeront pour faire face aux problèmes de la vie quand il sera adulte» (p. 101 (je souligne)).

The judge concluded that although there may be controversy between the doctrinal authors as to the legality of the means chosen by the adults, and although there is no inherent “right” to be a parent, nonetheless the right of a child to be taken care of by parents or by those who stand in the place of parents, is a very real one indeed⁵¹.

13 – Draft Bill: An Act to Amend the Civil Code and other legislative provisions as regards adoption and parental authority

On the eve of publication of this article, the Minister of Justice, Mrs. Kathleen Weil, announced the deposit of a draft bill, announcing far-reaching amendments to the *Civil Code*. Some of these proposed modifications may never be passed, but considering the dramatic impact they may have on the practice of family law, it would be wise to study them now, and perhaps participate in the public consultations which will be taking place, to make our voices heard, since we saw with the 2002 reforms how effective this kind of “lobbying” can be.

First, in a welcome initiative, the law now provides for the possibility of open adoptions, reflecting a new philosophy which has taken hold in several countries. Instead of the traditional complete erasure of the child's past ties, the biological parents would be known to the child and participate in his life. The legislator proposes the creation of an “openness agreement” which would facilitate the exchange of information about the child between the biological and adoptive parents, and which would permit personal relations to be conserved between the child and the birth parents. This is particularly interesting for children who are adopted at an age when they are old enough to remember their birth parents. It is also interesting in instances where the two families already know each other.

However, the legislator also proposes that in such scenarios, the child's pre-existing filiation would not be dissolved. This is perplexing and in fact troubling. That law already provides for the possibility of contact between an adopted child and his birth parents, which is now expanded and formalized to ensure it can take place, as long as one or the other party have not entered a veto forbidding contact (a veto which can later be withdrawn at will). What then is the point of maintaining a filiation in favour of parents who are giving up the child? It would seem to contradict what filiation is supposed to entail in the first place, which is the set of rights and obligations that protect a child from infancy to adulthood.

⁵¹ Another rather clear reference to the common law doctrine of *in loco parentis*, once again outside the framework of the federal *Divorce Act*.

Another odd change is that where the pre-existing biological filiation is not dissolved, the Court assigns a surname to the child consisting of his original surname and the adopter's surname. It is almost as if the legislator has forgotten the changes brought about by the 1981 reform, which presumably entailed that any four adults may very well already have eight surnames between them – which two will then be chosen remains a mystery.

One salutary change is that if the pre-existing biological filiation is not dissolved, the adopted child retains a right to claim child support from his biological parents, if he cannot obtain support from his adoptive parents. The only weakness here is the notion of making the alimentary claim hierarchical: why would the alimentary claim not be solidary as between all four parents?

Article 584 *C.C.Q.* is strengthened in two ways: it makes it easier on the one hand for an adopted child to obtain medical information about his adoptive parents, and it puts teeth in the concept of the “contact veto”, in that a person whose “contact veto” has been breached may claim damages from the responsible person. In this fashion, the balance of interests in the privacy issues which may arise is treated sensibly, according to the contextual factors applicable to each scenario.

Another change that is proposed, that seems fraught with potential for mischief, is the formalized delegation of parental authority to one's spouse: as long as the other parent consents, and as long as the court so authorizes, a legal parent may formally share the exercise of his parental authority with his spouse, until the court terminates the arrangement. This sharing extends to all attributes of parental authority, save for the alimentary obligation and the consent to adoption.

Certainly this possibility, cloaked with the safeguard of court authorization, could be extremely important for a parent who is a member of the military and who is about to be deployed overseas, or a parent who is ill and foresees a long period of hospitalization, but other than these kinds of scenarios, who in his right mind would want to expand the potential for conflict from two people to four? Considering how parental authority is shared today between two legal parents, there must be unanimity for any real decisions to be made in a child's life – should we now foresee situations where the consent of three or four adults will be necessary? Throw an originating “open” adoption into the mix and that number increases to six adults!

The reality is that day-to-day decisions are made on the spot, by the adult in closest physical proximity to a child: put on your coat and boots, don't forget your lunch, remember to come straight home after school. These kinds of decisions follow “custody”, the simple physical “possession” («garde») of the child. The bigger decisions – who will the pediatrician be? should the child be registered in competitive hockey? Does the child need braces? – require the active collaboration of the two legal parents with each other. It seems foolhardy to bring new partners into this mix, save in an advisory role, if all the adults miraculously get along.

Just because it is said that “it takes a village to raise a child,” does not mean that child-rearing is best accomplished by committee!

These are only very preliminary observations, and it would probably be useful to explore precisely what submissions the government had in hand that inspired this draft bill, if only to

reflect whether the provisions will act as a true remedy, or whether the “cure” will be worse than the “disease”!

14 – Conclusion

The laws by which we abide seem to ebb and flow with the tides of fashion. The lines of communication are far from perfect between the population we wish to serve, the lawmakers who are supposed to guide us, and the courts entrusted with the application of the laws, before whom we appear and plead. For instance, many people believe marital fault should be relevant in custody cases, but the law states otherwise. Yet, in some of the cases reviewed in this paper, one cannot help but notice that the adjudications on issues as fundamental as filiation sometimes turned on the perception that one of the adults had bad conduct.

Similarly, since it has been socially popular to support the rights of male and female same-sex couples, the legislator has gone to great lengths to modify the family law, to be pleasing and accommodating to the needs of such couples. The same generosity of spirit, however, is not shown to common law couples, who remain in the shadow of the law, simply because the period during which they were the popular avant-gardistes has passed.

Sometimes, as in the draft bill that was just submitted, one gets the impression the legislator is just “making it up” as he goes along, making us all guinea pigs for vast social experiments, the impact of which will only be known in the next generation. Then again, the court often does the same thing, as can be evidenced by the mysterious popularity of shared custody that has grown in the past few years. It remains to be seen how the generation of children raised in suitcases is going to manifest its collective emotional security or anxiety over that social experiment.

Perhaps it would be wiser for the legislator to take a more comprehensive look at all the disparate sections of the law: traditional filiation from the original articles on the subject; the mish-mash of articles on assisted reproduction, and the uneasy way these articles interact with the traditional law; the jurisprudential evolution of the “psychological parent” and the doctrine of *in loco parentis*; and finally, the rules on parental authority. Cohesion is sorely lacking, as we can see from:

- the differential treatment between married and common law couples *qua* parents;
- between accommodation of the fertility needs of men and woman;
- between the rights afforded female same-sex couples and male same-sex couples;
- between the application of the doctrine of *in loco parentis* in the federal v. provincial law;
- between traditional closed adoption and the increasing social pressure for open adoption;
- between the attribution of parental authority with and without regard to filiation.

Certainly the advances in biology are going to make these problems ever more complex to resolve. As it is, the legislative provisions that prohibit compensation for gametes have already caused the supply of ova and sperm to dry up, making infertile couples ever more desperate and more inclined to explore options outside our territorial borders, where laws may be more lax.

Furthermore, other techniques will start to open up: for instance, for older women, a process is developing whereby the egg shell of a younger woman will be used into which the older woman's nucleus may be injected, and the resulting healthy construct fertilized with the husband's sperm and implanted... perhaps into a third woman. The egg shell is needed to counter the declining quality of an older woman's eggs. Since the egg shell actually has *some* genetic material, this would mean that technically, there would be *three* genetic parents.

Even in today's world, an older woman who wishes to bear a child – perhaps with a new husband – may resort to using her adult daughter's ova, which, after all, carry 50% of her genetic material (keeping in mind that all a woman's eggs develop *in utero* in the first place, this means that the older woman literally grew her daughter's eggs when first pregnant!). This would mean that the child then born would still have a 25% genetic link to the older woman. And considering that the womb of a woman at almost any age can be stimulated to receive an embryo, it is she who may actually carry the baby herself.

Finally, for all that cloning is constantly being declared *verboten*, the technology advances apace, and there are already cloned sheep and dogs and other animals abounding. This means that the cloning of a person is inevitable. Perhaps this will be the least difficult situation to resolve, considering the courts have readily accepted to impose unilinear filiation on children in several cases thus far. At least in an instance of cloning, the unilinear filiation will actually reflect the reality, instead of being a fiction mandated by the law.

The reality is that a piecemeal approach where the law is patched here and there is simply not going to meet the challenges that an ever more liberal and imaginative population are going to bring before the courts. Ideally, perhaps, we would rethink our adherence to the strictly "civiliste" approach and consider the advantages of conferring upon Superior Court judges the *parens patriae* jurisdiction that would permit them to tailor the solution to fit the uniqueness of each family's problem.

ANNEX I – INTERESTING U.S. JURISPRUDENCE

1. In Re Baby M, 225 N.J. Super 267 (1988)

The issue of surrogate motherhood came to national attention during the 1980s, with the *Baby M* case. In 1984 a New Jersey couple, William Stern and Elizabeth Stern, contracted to pay Mary Beth Whitehead \$10,000 to be artificially inseminated with William Stern's sperm and carry the resulting child to term. Whitehead decided to keep the child after it was born, refused to receive the \$10,000 payment, and fled to Florida. In July 1985, the police arrested Whitehead and returned the child to the Sterns.

In 1987 the New Jersey Superior Court upheld the Stern-Whitehead contract (*In re Baby M.*, 217 N.J. Super. 313, 525 A.2d 1128). The court took all parental and visitation rights away from Whitehead and permitted the Sterns to legally adopt the baby, whom they named Melissa Stern. A year later, the New Jersey Supreme Court reversed much of this decision (*In re Baby M.*, 109 N.J. 396, 537 A.2d 1227). That court declared the contract unenforceable but allowed the Sterns to retain physical custody of the child. The court also restored some of Whitehead's parental rights, including visitation rights, and voided the adoption by the Sterns. Most important, the decision voided all surrogacy contracts on the ground that they conflict with state public policy. However, the court still permitted voluntary surrogacy arrangements⁵².

2. Johnson v. Calvert (1993) 5 Cal.4th 84

Mark and Crispina Calvert wanted to have a child. Crispina had viable eggs, but could not carry a baby to term. Her eggs were surgically retrieved and then fertilized *in vitro* with Mark's sperm, and the resulting embryo was implanted in the womb of Anna Johnson. After a number of disagreements between the parties, Anna decided she wanted to keep the baby, and the case went to the California Supreme Court.

HELD: Both Anna and Crispina are "natural" mothers, Anna being the gestational mother and Crispina being the genetic mother. When two women have equally valid claims to maternity, the "tie-breaker" is intent at the time of conception. Since Crispina intended to be a mother at conception and Anna did not, the Court found that Crispina was the baby's legal mother. [Note that the issue of intent only came into play as a "tie-breaker" where each mother already had a biologically-based claim to maternity. The California Supreme Court has never addressed the issue of whether intent alone is enough to establish parental rights absent a biologically-based connection with the child.]⁵³

3. In re Marriage of Moschetta (1994) 25 Cal.App.4th 1218

Robert and Cynthia Moschetta wanted to have a child. Cynthia was infertile. Elvira Jordan agreed to be inseminated with Robert's sperm, and to carry the baby to term for them. Pursuant to the agreement, Elvira was to allow Robert sole custody, and was to consent to adoption of the child by Cynthia. However, when the Moschettas broke up during her pregnancy, Elvira decided to keep the baby, although when the couple reconciled, she relented and allowed the baby to go home with them. Seven months later, the Moschettas broke up for good. Cynthia petitioned the

⁵² Surrogate Motherhood, as defined and summarized by Law Encyclopedia, online at: Answers.com: <http://www.answers.com/topic/surrogate-mother>

⁵³ As summarized by Deborah H. Wald, California Surrogacy – A Gay Primer, online at: The Wald Law Group: http://www.waldlaw.net/ca_surrogacy_gayprimer.htm

court, arguing that Cynthia -- not Elvira -- was the baby's legal mother, based on the terms of the surrogacy contract and the fact that the baby had lived with Cynthia for most of its short life.

HELD: *Johnson v. Calvert* did not apply, since Elvira was both the genetic and the gestational mother, and Cynthia had no biological connection to the child. Established public policy requires that women giving up their babies for adoption have a time after the baby is born within which they can change their minds, and Elvira was entitled to this same protection. Legally, Elvira was the mother and Robert was the father, and the case was remanded for a determination on visitation and custody based on the best interests of the child. Ultimately, the child was placed with Robert, who subsequently moved out of state, and contact with both potential mothers gradually ceased. [This is a Court of Appeal decision. The Supreme Court did not review it.]⁵⁴

4. *In re Marriage of Buzzanca (1998) 61 Cal.App.4th 1410*

John and Luanne Buzzanca wanted to have a child. Both were infertile. They had the eggs of an anonymous egg donor fertilized with the sperm of an anonymous sperm donor, and the resulting embryos were implanted in the womb of a paid surrogate. When the Buzzancas filed for dissolution of their marriage during the pregnancy, Luanne indicated that the baby (not yet born) was a child of the marriage; John indicated that there were no children of the marriage, maintaining that he should not be held legally responsible for a child that was not genetically his and was not genetically his wife's and was not even being gestated by his wife. The trial court agreed with John, finding that the baby had *no legal parents*. However the Court of Appeal found differently.

HELD: The Court of Appeal found that when an infertile married couple causes the conception of a child by use of medical technology, with the intent to parent the child, they will be held to the status of legal parents regardless of biology. The Court explicitly declined to rule on whether the same rules would apply outside the context of marriage⁵⁵.

5. *The 2005 Trio of Lesbian and surrogacy cases (Elisa B. v. Superior Court, Kristine H. v. Lisa R. and K.M. v. E.G.)*

The 2005 California Supreme Court rulings in *Elisa B. v. Superior Court, Kristine H. v. Lisa R. and K.M. v. E.G.* were a huge victory for same-sex parents and their children, in that the Court ruled that (1) a child can have two "natural" parents of the same sex; and (2) a person who intentionally causes the conception of a child and then sticks around to raise the child will, at some point, be recognized as a legal parent. However, in its rulings on two of the cases involving applicability of the *Uniform Parentage Act* to same-sex couples intentionally conceiving children together, the Court had the opportunity to embrace the "intentional conception = parentage" approach of *Buzzanca* but declined to do so. In fact, *Buzzanca*, which the parties relied upon heavily, was only mentioned once in the Supreme Court rulings. More troubling for surrogacy attorneys are (1) the fact that the Supreme Court cited *Moschetta* with approval for the principle that where there is no tie between two women claiming maternity, intent is not a relevant issue (see *K.M. v. E.G.*); and (2) the Court's refusal to rule on the validity of a pre-birth judgment of parentage in *Kristine H. v. Lisa R.*, instead only finding that the parties to the parentage action cannot themselves challenge the judgment after changing their minds years later⁵⁶.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

ANNEX II – NEW DRAFT BILL ON ADOPTION & PARENTAL AUTHORITY



NATIONAL ASSEMBLY

FIRST SESSION

THIRTY-NINTH LEGISLATURE

Draft Bill

An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority

Tabled by

**Madam Kathleen Weil
Minister of Justice**

EXPLANATORY NOTES

This draft bill amends the Civil Code of Québec as regards adoptions and parental authority by introducing new forms of adoption and new provisions relating to responsibility for a child.

The draft bill thus provides for open adoption and for adoption in which the bond of filiation with the original parents is not dissolved. Open adoption allows the adoptive parents and the original parents to make an openness agreement to facilitate the disclosure and exchange of information about the adopted child or to maintain personal relations during the placement or after the adoption. Adoption in which the bond of filiation is not dissolved preserves the child's pre-existing bond of filiation. The act of birth established for the purposes of such an adoption will set out the child's original filiation and adoptive filiation.

The draft bill further provides for the judicial delegation of parental authority to allow the father and mother of a child to share the exercise of parental authority with their respective spouses or to allow the court to transfer the exercise of the rights and duties associated with parental authority and legal tutorship.

The draft bill makes substantial changes regarding the confidentiality of the information contained in adoption files by permitting, for future adoptions, the identity of the original parents and the adopted child to be disclosed and a reunion to be facilitated if the parties do not object.

Lastly, the draft bill makes consequential amendments, in particular to allow the required content of an adoption file and the procedure for registering or cancelling an identity disclosure

veto or contact veto to be prescribed under the Youth Protection Act.

LEGISLATION AMENDED BY THIS DRAFT BILL:

- *Civil Code of Québec* (1991, chapter 64);
- *Code of Civil Procedure* (R.S.Q., chapter C-25);
- *Youth Protection Act* (R.S.Q., chapter P-34.1);
- *Act respecting health services and social services* (R.S.Q., chapter S-4.2).

Draft Bill

AN ACT TO AMEND THE CIVIL CODE AND OTHER LEGISLATIVE PROVISIONS AS REGARDS ADOPTION AND PARENTAL AUTHORITY

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

CIVIL CODE OF QUÉBEC

1. Article 33 of the Civil Code of Québec (1991, chapter 64) is amended by adding the following paragraph at the end:

“A disagreement as to the maintenance of personal relations with a child is settled by the court, after fostering conciliation of the parties.”

2. Article 132 of the Code is amended by adding “, including, where the court has granted an adoption without dissolving the pre-existing bond of filiation, those relating to that original filiation” at the end of the first sentence of the third paragraph.

3. Article 545 of the Code is amended by adding the following sentence at the end of the first paragraph: “No child may be adopted by his father’s or mother’s former spouse unless that person stood in loco parentis towards him when he was a minor.”

4. Article 547 of the Code is amended by inserting “or former spouse” after “child of the spouse” in the first paragraph.

5. The Code is amended by inserting the following article after article 547:

“**547.1.** Consent to adoption is given for an adoption in which the pre-existing bond of filiation between the adopted person and his father and mother is dissolved, for an adoption in which that bond is preserved or for either those forms of adoption.”

6. Article 555 of the Code is amended by inserting “or former spouse” after “in favour of the spouse”.

7. Article 559 of the Code is amended by adding “, unless there has been a judicial delegation of parental authority” at the end of paragraph 2.

8. The heading of Section II of Chapter II of Title Two of Book Two of the Code is amended by striking out “AND ADOPTION JUDGMENT”.

9. Article 566 of the Code is amended

(1) by striking out “nor may the adoption of a child be granted unless the child has lived with the adopter for at least six months since the court order” in the first paragraph;

(2) by striking out the second paragraph.

10. Article 568 of the Code is amended

(1) by striking out “for the purposes of an adoption resulting in the dissolution of the pre-existing bond of filiation between the child and the child’s family of origin” in the first paragraph;

(2) by adding the following sentence at the end of the first paragraph: “In the case of a special consent to adoption, the court may order that a psychosocial assessment of the adopter be made by the director of youth protection.”;

(3) by replacing “Where the placement of a child domiciled outside Québec is made under an agreement entered into by virtue of the Youth Protection Act, the court also verifies” in the second paragraph by “Where the child is domiciled outside Québec, the court ascertains that the consents required have been given for an adoption in which the pre-existing bond of filiation between the child and the child’s family of origin is dissolved. Where the placement is made under an agreement under the Youth Protection Act, the court also verifies”.

11. Article 569 of the Code is amended by replacing “chosen by the adopter” in the first paragraph by “that may be assigned to the child by the court under article 576”.

12. Article 571 of the Code is amended by inserting “prescribed by article 572.1” after “minimum period of placement”.

13. The Code is amended by inserting the following after article 572:

“SECTION II.1

“ADOPTION JUDGMENT

“572.1. The adoption of a minor child may be granted only if the child has lived with the adopter for at least six months since the order of placement. This period may be reduced by up to three months, however, particularly in consideration of the time during which the child lived with the adopter before the order of placement.”

14. Article 573 of the Code is amended by adding the following paragraph at the end:

“The court may decide that the adoption is not to dissolve the pre-existing bond of filiation, in order to preserve the child’s meaningful ties of kinship with his family of origin. This may be decided in such cases as the adoption of an older child, the adoption of a child by the father’s or mother’s spouse or the adoption of a child by an ascendant of the child, a relative of the child in the collateral line to the third degree or the spouse of such an ascendant or relative. The court must first ascertain that the adopter and the child’s original parents understand the effects of such a decision.”

15. Article 576 of the Code is amended by adding the following paragraph at the end:

“However, when the court decides not to dissolve the pre-existing bond of filiation, it assigns to the adopted person a surname composed of his original surname and the adopter’s surname, unless the court decides otherwise in the adopted person’s interest. The surname must consist of not more than two parts, one taken from the adopted person’s original surname and the other from the adopter’s surname.”

16. Article 577 of the Code is replaced by the following article:

“**577.** Adoption confers on the adopted person a filiation that replaces his original filiation and, subject to any impediments to marriage or a civil union, the adopted person ceases to belong to his family of origin, unless the court has decided not to dissolve the pre-existing bond of filiation.

However, the adoption by a person of his spouse’s or former spouse’s child does not dissolve the bond of filiation between the spouse or former spouse and the child.”

17. Article 579 of the Code is amended by replacing the second paragraph by the following paragraph:

“However, if the court decides not to dissolve the bond of filiation between the adopted person and his father and mother, the adopted person retains the right to obtain support from them, if he is unable to obtain support from the adopters.”

18. Article 581 of the Code is amended by inserting “in which the pre-existing bond of filiation between the child and the child’s family of origin is dissolved” after “adoption judgment” in the first and second paragraphs.

19. The Code is amended by inserting the following after article 581:

“SECTION III.1

“OPENNESS AGREEMENT

“**581.1.** The father and mother, the tutor or the person having parental authority and the adopter may make an openness agreement regarding the disclosure or exchange of information concerning the adopted person and the maintenance of personal relations between themselves and with the adopted person during the placement or after the adoption.

If the adopted person is a child fourteen years of age or over, he must consent to the agreement. If the adopted person is a child under fourteen years of age of sufficient maturity and discernment, his opinion must be taken into consideration.

“**581.2.** When granting the order of placement or adoption, the court may confirm the agreement as a judgment, at the parties’ request. The court may subsequently amend or revoke an agreement so confirmed. The amendment or revocation of the agreement has no effect on the consents to adoption or on the order of placement or adoption judgment.

“**581.3.** If there is a disagreement as to the application of an agreement confirmed by the court, the parties may have recourse to a dispute settlement procedure or refer the matter to the court.”

20. The Code is amended by inserting the following articles after article 582:

“**582.1.** An adopted person of full age, an adopted minor fourteen years of age or over or, with the adoptive parents’ prior consent, an adopted minor under fourteen years of age has a right to information allowing him to identify or find his original parents, unless they have registered an identity disclosure veto or a contact veto.

The original parents have a right to information allowing them to identify or find their child of full age, unless the child, informed of his adopted status, registered an identity disclosure veto or a contact veto.

“**582.2.** A veto is a right that may not be exercised by a third person.

A veto may be registered or cancelled at any time according to the procedure prescribed under the Youth Protection Act.

The veto subsists for two years after the death of the person who registered it, unless it includes a statement of the person's wish that the veto be extended, with reasons. The court may deny the extension if it considers the reasons insufficient. The court must in such cases determine how information may be disclosed, and specify whether it authorizes communication with the family of the deceased."

21. Article 583 of the Code is amended by inserting the following paragraph before the first paragraph:

"**583.** The disclosure of information is governed by this article where the adoption was granted before (*insert the date of coming into force of this article*) or where, in the case of a person who was not adopted and his original parents, the consents to adoption were given or the declaration of eligibility for adoption was made before that date."

22. Article 584 of the Code is amended

(1) by striking out "serious" in the first and second paragraphs;

(2) by replacing "allow the adopted person to obtain such information" at the end of the first paragraph by ", even if a veto has been registered, allow the information to be disclosed confidentially to the medical authorities concerned".

23. The Code is amended by inserting the following article after article 584:

"**584.1.** A person whose contact veto has not been complied with may claim damages from the original parent or adopted person who obtained information concerning the person.

Such a person may also apply for punitive damages against the original parent or adopted person."

24. Article 600 of the Code is amended by adding the following paragraph at the end:

"With the authorization of the court and the consent of the other parent, unless that other parent is deprived of parental authority or is unable to express his or her will, the father or mother may share the exercise of parental authority with his or her spouse, except the right to consent to adoption. Such sharing of the exercise of parental authority is terminated by decision of the court."

25. The Code is amended by inserting the following article after article 600:

"**600.1.** With the authorization of the court and the consent of the other parent, unless that other parent is deprived of parental authority or is unable to express his or her will, the father or mother may delegate the exercise of all rights and duties associated with parental authority and legal tutorship to his or her spouse, an ascendant of the child, a relative of the child in the collateral line to the third degree or the spouse of such an ascendant or relative. Any of the latter may also apply to the court to receive the delegation of the exercise of those rights and duties despite the absence of the father's or mother's consent.

The father's or mother's right to consent to adoption and duty to provide support may not, however, be delegated. The delegation deprives the delegator of the exercise of all other rights and duties related to parental authority and legal tutorship. The court may specify the terms of

the delegation.

The delegation is terminated by decision of the court, on the application of any interested person.”

26. Article 603 of the Code is amended by adding the following sentence at the end: “In the same circumstances, the person authorized by the court to exercise rights and duties related to parental authority and legal tutorship is presumed to be acting with the consent of the father and mother.”

CODE OF CIVIL PROCEDURE

27. Article 823.1 of the Code of Civil Procedure (R.S.Q., chapter C-25) is amended by inserting “, except in the case of an application for an adoption in which the original bond of filiation is not dissolved” after “vice versa” in the first sentence.

28. Article 823.2 of the Code is amended by adding “, except in the case of an application for an adoption in which the original bond of filiation is not dissolved” at the end.

YOUTH PROTECTION ACT

29. Section 71 of the Youth Protection Act (R.S.Q., chapter P-34.1) is amended by adding the following paragraphs at the end:

“In addition, the director shall inform persons whose consent to adoption is required and adopters of their right to make an openness agreement under article 581.1 of the Civil Code and of the content and effects of such an agreement, and shall encourage them to seek legal advice if necessary.

The director shall also inform them of the legal effects of an adoption in which the bond of filiation is dissolved or, if applicable, of an adoption in which the bond of filiation is preserved.”

30. The Act is amended by inserting the following sections after section 71.3:

“**71.3.1.** A child’s adoption file must contain all the information and documents required by regulation, including all information and documents relating to the registration or cancellation of a veto on the disclosure of the child’s identity or the identity of the child’s original parents, or the registration or cancellation of a contact veto.

A veto must be registered or cancelled in the manner prescribed by regulation.

“**71.3.2.** It is up to the adoptive parents to inform their adopted child that he or she was adopted and may register an identity disclosure veto or a contact veto. The director may so inform an adopted person of full age after receiving a request concerning that person, or a person 14 years of age or over who has requested confirmation that he or she is adopted.

When a request is made by an adopted minor, the director must inform the adoptive parents.

After the death of an adopted person of full age, the director must inform the adoptive parents that the identity of the deceased has been disclosed to the original parents.

This section does not apply in respect of adoptions granted before (*insert the date of coming into force of this section*).

“**71.3.3.** The director may, for the purposes of research into family and medical antecedents and for the purposes of reunions between adopted persons and their original parents,

(1) have access to adoption-related judicial and administrative files, including the adoption

notices kept by the Minister of Health and Social Services; and

(2) obtain from public bodies the information required to locate the persons concerned.”

31. Section 132 of the Act is amended by inserting the following subparagraph after subparagraph *e* of the first paragraph:

“(e.1) to determine the information and documents that an adoption file must contain and the procedure for registering or cancelling a veto;”.

32. The Act is amended by inserting the following section after section 135.0.1:

“**135.0.2.** An original parent or an adopted person who disregards a contact veto registered in accordance with section 71.3.1 commits an offence and is liable to a fine of \$3,000 to \$50,000.”

ACT RESPECTING HEALTH SERVICES AND SOCIAL SERVICES

33. Section 82 of the Act respecting health services and social services (R.S.Q., chapter S-4.2) is amended by replacing “services for child placement, family mediation, expertise at the Superior Court on child custody, adoption and biological history” at the end of the first paragraph by “child placement and family mediation services, expert testimony on child custody for the Superior Court, adoption services, research into family and medical antecedents and reunion services”.

ANNEX III – DEPOSIT OF DRAFT BILL ON ADOPTION & PARENTAL AUTHORITY

Avant-projet de loi modifiant le Code civil et d'autres dispositions législatives en matière d'adoption et d'autorité parentale

Mme Weil: M. le Président, j'ai l'honneur de déposer l'avant-projet de loi modifiant le Code civil et d'autres dispositions législatives en matière d'adoption et d'autorité parentale.

Cet avant-projet de loi modifie le Code civil du Québec en matière d'adoption et d'autorité parentale en introduisant, entre autres, de nouvelles formes d'adoption et de prise en charge de l'enfant.

L'avant-projet de loi prévoit ainsi l'adoption ouverte et l'adoption sans rupture du lien de filiation d'origine. L'adoption ouverte permet aux adoptants et aux parents d'origine de conclure une entente de communication visant à faciliter la divulgation ou l'échange d'information concernant l'adopté ou visant le maintien de relations personnelles durant le placement ou après l'adoption. L'adoption sans rupture du lien de filiation, quant à elle, permet le maintien du lien préexistant de filiation de l'enfant. L'acte de naissance dressé à la suite de cette adoption fera état de la filiation d'origine de l'enfant, à laquelle la filiation adoptive sera ajoutée.

L'avant-projet de loi prévoit aussi la possibilité d'une délégation judiciaire de l'autorité parentale pour permettre aux père et mère de partager avec leurs conjoints l'exercice de leur autorité parentale ou au tribunal de transférer l'exercice de leurs droits et devoirs liés à l'autorité parentale et à la tutelle légale.

L'avant-projet de loi apporte en outre des modifications importantes au régime de la confidentialité des dossiers d'adoption en permettant, pour les adoptions futures, la divulgation de l'identité des parties et les retrouvailles entre le parent d'origine et l'adopté, en l'absence d'opposition de leur part.

Enfin, l'avant-projet de loi comporte des modifications de concordance notamment afin de permettre de prescrire, en vertu de la Loi sur la protection de la jeunesse, le contenu du dossier d'adoption ainsi que les conditions d'inscription et de retrait d'un veto à la divulgation de l'identité ou au contact.

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Le Président: Ce document est déposé. M. le leader du gouvernement.

Consultation générale

M. Dupuis: Oui, conformément à l'article 146 de notre règlement, M. le Président, je proposerais la motion suivante, de consentement:

«Que la Commission des institutions procède à une consultation générale sur l'avant-projet de loi [que Mme la ministre de la Justice vient de déposer et qu'on] tienne des auditions publiques à compter du 13 janvier[...];

«Que les mémoires et les demandes d'interventions soient reçus au Secrétariat des commissions au plus tard le 20 novembre...»

Et évidemment, M. le Président, «que la ministre de la Justice soit membre de ladite commission pour la durée du mandat».

Mise aux voix

Le Président: Est-ce qu'il y a consentement? Cette motion est donc adoptée?

Une voix: Adopté.

ANNEX IV – TABLE TO COMPARE VERSIONS OF THE CIVIL CODE OF QUEBEC

| Code civil du Québec (2002) | Code civil du Québec (1994) | Code civil du Québec (1980) |
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| TITRE DEUXIÈME DE LA FILIATION DISPOSITION GÉNÉRALE | TITRE DEUXIÈME DE LA FILIATION DISPOSITION GÉNÉRALE | TITRE TROISIÈME DE LA FILIATION CHAPITRE PREMIER DE LA FILIATION PAR LE SANG... SECTION III DES EFFETS DE LA FILIATION |
| Art. 522. Tous les enfants dont la filiation est établie ont les mêmes droits et les mêmes obligations, quelles que soient les circonstances de leur naissance. <i>1991, c. 64, a. 522.</i> | Art. 522. Tous les enfants dont la filiation est établie ont les mêmes droits et les mêmes obligations, quelles que soient les circonstances de leur naissance. <i>1991, c. 64, a. 522.</i> | Art. 594. Tous les enfants dont la filiation est établie ont les mêmes droits et les mêmes obligations, quelles que soient les circonstances de leur naissance. <i>1980, c. 39, a./s. 1.</i> |
| CHAPITRE PREMIER DE LA FILIATION PAR LE SANG SECTION I DES PREUVES DE LA FILIATION | CHAPITRE PREMIER DE LA FILIATION PAR LE SANG SECTION I DES PREUVES DE LA FILIATION | CHAPITRE PREMIER DE LA FILIATION PAR LE SANG SECTION I DES PREUVES DE LA FILIATION |
| § 1. – Du titre et de la possession d'état | § 1. – Du titre et de la possession d'état | § 1. – Du titre et de la possession d'état |
| Art. 523. La filiation tant paternelle que maternelle se prouve par l'acte de naissance, quelles que soient les circonstances de la naissance de l'enfant. À défaut de ce titre, la possession constante d'état suffit. <i>1991, c. 64, a. 523.</i> | Art. 523. La filiation tant paternelle que maternelle se prouve par l'acte de naissance, quelles que soient les circonstances de la naissance de l'enfant. À défaut de ce titre, la possession constante d'état suffit. <i>1991, c. 64, a. 523.</i> | Art. 572. La filiation tant paternelle que maternelle se prouve par l'acte de naissance, quelles que soient les circonstances de la naissance de l'enfant. À défaut de ce titre, la possession constante d'état suffit. <i>1980, c. 39, a./s. 1.</i> |
| Art. 524. La possession constante d'état s'établit par une réunion suffisante de faits qui indiquent les rapports de | Art. 524. La possession constante d'état s'établit par une réunion suffisante de faits qui indiquent les rapports de | Art. 573. La possession constante d'état s'établit par une réunion suffisante de faits qui indiquent les rapports de |

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| <p>filiation entre l'enfant et les personnes dont on le dit issu.</p> <p><i>1991, c. 64, a. 524.</i></p> | <p>filiation entre l'enfant et les personnes dont on le dit issu.</p> | <p>filiation entre l'enfant et les personnes dont on le dit issu.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>§ 2. – De la présomption de paternité</p> | <p>§ 2. – De la présomption de paternité</p> | <p>§ 2. – De la présomption de paternité</p> |
| <p>Art. 525. L'enfant né pendant le mariage ou dans les trois cents jours après sa dissolution ou son annulation est présumé avoir pour père le mari de sa mère.</p> | <p>Art. 525. L'enfant né pendant le mariage ou dans les trois cents jours après sa dissolution ou son annulation est présumé avoir pour père le mari de sa mère.</p> | <p>Art. 574. L'enfant né pendant le mariage ou dans les trois cents jours après sa dissolution ou son annulation est présumé avoir pour père le mari de sa mère.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Cette présomption de paternité du mari est écartée lorsque l'enfant naît plus de trois cents jours après le jugement prononçant la séparation de corps, sauf s'il y a eu reprise volontaire de la vie commune avant la naissance.</p> | <p>Cette présomption de paternité du mari est écartée lorsque l'enfant naît plus de trois cents jours après le jugement prononçant la séparation de corps, sauf s'il y a eu reprise volontaire de la vie commune avant la naissance.</p> | <p>Art. 575. La présomption de paternité du mari est écartée lorsque l'enfant naît plus de trois cents jours après le jugement prononçant la séparation de corps, sauf s'il y a eu reprise volontaire de la vie commune avant la naissance.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>La présomption est également écartée à l'égard de l'ex-conjoint lorsque l'enfant est né dans les trois cents jours de la dissolution ou de l'annulation du mariage ou de l'union civile, mais après le mariage ou l'union civile subséquent de sa mère.</p> <p><i>1991, c. 64, a. 525; 2002, c. 6, a. 28.</i></p> | <p>Lorsque l'enfant est né dans les trois cents jours de la dissolution ou de l'annulation du mariage, mais après le remariage de sa mère, le mari de celle-ci, lors de la naissance, est présumé être le père de l'enfant.</p> | <p>Art. 576. Lorsque l'enfant est né dans les trois cents jours de la dissolution ou de l'annulation du mariage, mais après le remariage de sa mère, le mari de celle-ci, lors de la naissance, est présumé être le père de l'enfant.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>§ 3. – De la reconnaissance volontaire</p> | <p>§ 3. – De la reconnaissance volontaire</p> | <p>§ 3. – De la reconnaissance volontaire</p> |
| <p>Art. 526. Si la maternité ou la paternité ne peut être déterminée par application des articles qui précèdent, la filiation de l'enfant peut aussi être établie par reconnaissance volontaire.</p> <p><i>1991, c. 64, a. 526</i></p> | <p>Art. 526. Si la maternité ou la paternité ne peut être déterminée par application des articles qui précèdent, la filiation de l'enfant peut aussi être établie par reconnaissance volontaire.</p> | <p>Art. 577. Si la maternité ou la paternité ne peut être déterminée par application des articles qui précèdent, la filiation de l'enfant peut aussi être établie par reconnaissance volontaire.</p> |

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| | | <i>1980, c. 39, a./s. 1.</i> |
| <p>Art. 527. La reconnaissance de maternité résulte de la déclaration faite par une femme qu'elle est la mère de l'enfant. La reconnaissance de paternité résulte de la déclaration faite par un homme qu'il est le père de l'enfant.</p> <p><i>1991, c. 64, a. 527.</i></p> | <p>Art. 527. La reconnaissance de maternité résulte de la déclaration faite par une femme qu'elle est la mère de l'enfant. La reconnaissance de paternité résulte de la déclaration faite par un homme qu'il est le père de l'enfant.</p> | <p>Art. 578. La reconnaissance de maternité résulte de la déclaration faite par une femme qu'elle est la mère de l'enfant. La reconnaissance de paternité résulte de la déclaration faite par un homme qu'il est le père de l'enfant.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 528. La seule reconnaissance de maternité ou de paternité ne lie que son auteur.</p> <p><i>1991, c. 64, a. 528.</i></p> | <p>Art. 528. La seule reconnaissance de maternité ou de paternité ne lie que son auteur.</p> | <p>Art. 579. La seule reconnaissance de maternité ou de paternité ne lie que son auteur.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 529. On ne peut contredire par la seule reconnaissance de maternité ou de paternité une filiation déjà établie et non infirmée en justice.</p> <p><i>1991, c. 64, a. 529.</i></p> | <p>Art. 529. On ne peut contredire par la seule reconnaissance de maternité ou de paternité une filiation déjà établie et non infirmée en justice.</p> | <p>Art. 580. On ne peut contredire par la seule reconnaissance de maternité ou de paternité une filiation déjà établie et non infirmée en justice.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p style="text-align: center;">SECTION II DES ACTIONS RELATIVES À LA FILIATION</p> | <p style="text-align: center;">SECTION II DES ACTIONS RELATIVES À LA FILIATION</p> | <p style="text-align: center;">SECTION II DES ACTIONS RELATIVES À LA FILIATION</p> <p style="text-align: center;">§ 2. – De la réclamation et de la contestation d'état</p> |
| <p>Art. 530. Nul ne peut réclamer une filiation contraire à celle que lui donnent son acte de naissance et la possession d'état conforme à ce titre.</p> | <p>Art. 530. Nul ne peut réclamer une filiation contraire à celle que lui donnent son acte de naissance et la possession d'état conforme à ce titre.</p> | <p>Art. 587. Nul ne peut réclamer une filiation contraire à celle que lui donnent son acte de naissance et la possession d'état conforme à ce titre.</p> |
| <p>Nul ne peut contester l'état de celui qui a une possession d'état conforme à son acte de naissance.</p> <p><i>1991, c. 64, a. 530.</i></p> | <p>Nul ne peut contester l'état de celui qui a une possession d'état conforme à son acte de naissance.</p> | <p>Sous réserve des articles 581 et 582, nul ne peut contester l'état de celui qui a une possession d'état conforme à son acte de naissance.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |

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| <p>Art. 531. Toute personne intéressée, y compris le père ou la mère, peut contester par tous moyens la filiation de celui qui n'a pas une possession d'état conforme à son acte de naissance.</p> | <p>Art. 531. Toute personne intéressée, y compris le père ou la mère, peut contester par tous moyens la filiation de celui qui n'a pas une possession d'état conforme à son acte de naissance.</p> | <p>Art. 588 al. 1. Toute personne intéressée, y compris le père ou la mère, peut, à tout moment, contester par tous moyens la filiation de celui qui n'a pas une possession d'état conforme à son acte de naissance.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>§ 1. – Du désaveu et de la contestation de paternité</p> | | |
| <p>Art. 531 al. 2. Toutefois, le père présumé ne peut contester la filiation et désavouer l'enfant que dans un délai d'un an à compter du jour où la présomption de paternité prend effet, à moins qu'il n'ait pas eu connaissance de la naissance, auquel cas le délai commence à courir du jour de cette connaissance...</p> | <p>Art. 531 al. 2. Toutefois, le père présumé ne peut contester la filiation et désavouer l'enfant que dans un délai d'un an à compter du jour où la présomption de paternité prend effet, à moins qu'il n'ait pas eu connaissance de la naissance, auquel cas le délai commence à courir du jour de cette connaissance...</p> | <p>Art. 581. Le père présumé peut désavouer l'enfant en justice.</p> <p>Le recours en désaveu ne peut être intenté que dans un délai d'un an à compter du jour où le père présumé a eu connaissance de la naissance.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 531 al. 2 (suite). ...La mère peut contester la paternité du père présumé dans l'année qui suit la naissance de l'enfant.</p> <p><i>1991, c. 64, a. 531.</i></p> | <p>Art. 531 al. 2 (suite). ...La mère peut contester la paternité du père présumé dans l'année qui suit la naissance de l'enfant.</p> | <p>Art. 582. La mère peut contester la paternité du père présumé dans l'année qui suit la naissance de l'enfant.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 532. L'enfant dont la filiation n'est pas établie par un titre et une possession d'état conforme peut réclamer sa filiation en justice. Pareillement, les père et mère peuvent réclamer la paternité ou la maternité d'un enfant dont la filiation n'est pas établie à leur égard par un titre et une possession d'état conforme.</p> | <p>Art. 532. L'enfant dont la filiation n'est pas établie par un titre et une possession d'état conforme peut réclamer sa filiation en justice. Pareillement, les père et mère peuvent réclamer la paternité ou la maternité d'un enfant dont la filiation n'est pas établie à leur égard par un titre et une possession d'état conforme.</p> | <p>Art. 589 al. 1. L'enfant dont la filiation n'est pas établie par un titre et une possession d'état conforme peut réclamer sa filiation en justice. Pareillement, les père et mère peuvent réclamer la paternité ou la maternité d'un enfant dont la filiation n'est pas établie à leur égard par un titre et une possession d'état conforme.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Si l'enfant a déjà une autre filiation établie soit par un titre,</p> | <p>Si l'enfant a déjà une autre filiation établie soit par un titre,</p> | <p>Art. 591. Si l'enfant a déjà une autre filiation établie soit</p> |

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| <p>soit par la possession d'état, soit par l'effet de la présomption de paternité, l'action en réclamation d'état ne peut être exercée qu'à la condition d'être jointe à une action en contestation de l'état ainsi établi.</p> | <p>soit par la possession d'état, soit par l'effet de la présomption de paternité, l'action en réclamation d'état ne peut être exercée qu'à la condition d'être jointe à une action en contestation de l'état ainsi établi.</p> | <p>par un titre, soit par la possession d'état, soit par l'effet de la présomption de paternité, l'action en réclamation d'état ne pourra être exercée qu'à la condition d'être jointe à une action en contestation de l'état ainsi établi.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Les recours en désaveu ou en contestation d'état sont dirigés contre l'enfant et, selon le cas, contre la mère ou le père présumé.</p> <p><i>1991, c. 64, a. 532.</i></p> | <p>Les recours en désaveu ou en contestation d'état sont dirigés contre l'enfant et, selon le cas, contre la mère ou le père présumé.</p> | <p>Art. 583. Le recours en désaveu ou en contestation de paternité est dirigé contre l'enfant et, selon le cas, contre la mère ou le père présumé.</p> <p>L'enfant mineur est représenté par son tuteur ou un tuteur <i>ad hoc</i> désigné par le tribunal saisi de la demande.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 533. La preuve de la filiation pourra se faire par tous moyens. Toutefois, les témoignages ne sont admissibles que s'il y a commencement de preuve, ou lorsque les présomptions ou indices résultant de faits déjà clairement établis sont assez graves pour en déterminer l'admission.</p> <p><i>1991, c. 64, a. 533.</i></p> | <p>Art. 533. La preuve de la filiation pourra se faire par tous moyens. Toutefois, les témoignages ne sont admissibles que s'il y a commencement de preuve, ou lorsque les présomptions ou indices résultant de faits déjà clairement établis sont assez graves pour en déterminer l'admission.</p> | <p>Art. 589 al. 2. La preuve de la filiation pourra se faire par tous moyens et notamment par témoins. Toutefois, les témoignages ne sont admissibles que s'il y a commencement de preuve par écrit, ou lorsque les présomptions ou indices résultant de faits déjà clairement établis sont assez graves pour en déterminer l'admission.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 534. Le commencement de preuve résulte des titres de famille, des registres et papiers domestiques, ainsi que de tous autres écrits publics ou privés émanés d'une partie engagée dans la contestation ou qui y</p> | <p>Art. 534. Le commencement de preuve résulte des titres de famille, des registres et papiers domestiques, ainsi que de tous autres écrits publics ou privés émanés d'une partie engagée dans la contestation ou qui y</p> | <p>Art. 590. Le commencement de preuve par écrit résulte de titres de famille, des registres et papiers domestiques, ainsi que de tous autres écrits publics ou privés émanés d'une partie engagée dans la</p> |

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| <p>aurait intérêt si elle était vivante. <i>1991, c. 64, a. 534.</i></p> | <p>aurait intérêt si elle était vivante.</p> | <p>contestation ou qui y aurait intérêt si elle était vivante. <i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 535. Tous les moyens de preuve sont admissibles pour s'opposer à une action relative à la filiation.</p> | <p>Art. 535. Tous les moyens de preuve sont admissibles pour s'opposer à une action relative à la filiation.</p> | <p>Art. 592. Tous les moyens de preuve sont admissibles pour s'opposer à une action relative à la filiation. <i>1980, c. 39, a./s. 1.</i></p> |
| <p>De même, sont recevables tous les moyens de preuve propres à établir que le mari ou le conjoint uni civilement n'est pas le père de l'enfant. <i>1991, c. 64, a. 535; 2002, c. 6, a. 29.</i></p> | <p>De même, sont recevables tous les moyens de preuve propres à établir que le mari n'est pas le père de l'enfant.</p> | <p>Art. 585. Est recevable tout moyen de preuve propre à établir que le mari n'est pas le père de l'enfant. <i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 535.1. Le tribunal saisi d'une action relative à la filiation peut, à la demande d'un intéressé, ordonner qu'il soit procédé à une analyse permettant, par prélèvement d'une substance corporelle, d'établir l'empreinte génétique d'une personne visée par l'action.</p> | | |
| <p>Toutefois, lorsque l'action vise à établir la filiation, le tribunal ne peut rendre une telle ordonnance que s'il y a commencement de preuve de la filiation établi par le demandeur ou si les présomptions ou indices résultant de faits déjà clairement établis par celui-ci sont assez graves pour justifier l'ordonnance.</p> | | |
| <p>Le tribunal fixe les conditions du prélèvement et de l'analyse, de manière qu'elles portent le moins possible atteinte à l'intégrité de la personne qui y est soumise ou au respect de son corps. Ces conditions ont trait,</p> | | |

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| <p>notamment, à la nature et aux date et lieu du prélèvement, à l'identité de l'expert chargé d'y procéder et d'en faire l'analyse, à l'utilisation des échantillons prélevés et à la confidentialité des résultats de l'analyse.</p> | | |
| <p>Le tribunal peut tirer une présomption négative du refus injustifié de se soumettre à l'analyse visée par l'ordonnance.</p> <p><i>2002, c. 19, a. 5.</i></p> | | |
| <p>Art. 536. Toutes les fois qu'elles ne sont pas enfermées par la loi dans des délais plus courts, les actions relatives à la filiation se prescrivent par trente ans, à compter du jour où l'enfant a été privé de l'état qui est réclamé ou a commencé à jouir de l'état qui lui est contesté.</p> | <p>Art. 536. Toutes les fois qu'elles ne sont pas enfermées par la loi dans des délais plus courts, les actions relatives à la filiation se prescrivent par trente ans, à compter du jour où l'enfant a été privé de l'état qui est réclamé ou a commencé à jouir de l'état qui lui est contesté.</p> | <p>Art. 593. Toutes les fois qu'elles ne sont pas enfermées par la loi dans des délais plus courts, les actions relatives à la filiation se prescrivent par trente ans, à compter du jour où l'enfant a été privé de l'état qui est réclamé ou a commencé à jouir de l'état qui lui est contesté.</p> |
| <p>Les héritiers de l'enfant décédé sans avoir réclamé son état, mais alors qu'il était encore dans les délais utiles pour le faire, peuvent agir dans les trois ans de son décès.</p> <p><i>1991, c. 64, a. 536.</i></p> | <p>Les héritiers de l'enfant décédé sans avoir réclamé son état, mais alors qu'il était encore dans les délais utiles pour le faire, peuvent agir dans les trois ans de son décès.</p> | <p>Les héritiers de l'enfant décédé sans avoir réclamé son état, mais alors qu'il était encore dans les délais utiles pour le faire, peuvent agir dans les trois ans de son décès.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 537. Le décès du père présumé ou de la mère avant l'expiration du délai prévu pour le désaveu ou la contestation d'état n'éteint pas le droit d'action.</p> <p>Toutefois, ce droit doit être exercé par les héritiers dans l'année qui suit le décès.</p> <p><i>1991, c. 64, a. 537.</i></p> | <p>Art. 537. Le décès du père présumé ou de la mère avant l'expiration du délai prévu pour le désaveu ou la contestation d'état n'éteint pas le droit d'action.</p> <p>Toutefois, ce droit doit être exercé par les héritiers dans l'année qui suit le décès.</p> | <p>Art. 584. Le décès du père présumé ou de la mère avant l'expiration du délai prévu pour le désaveu ou la contestation de paternité n'éteint pas le droit d'action.</p> <p>Toutefois, ce droit doit être exercé par les héritiers dans l'année qui suit le décès.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |

**CHAPITRE PREMIER.1
DE LA FILIATION DES
ENFANTS NÉS D'UNE
PROCRÉATION ASSISTÉE**

**SECTION III
DE LA PROCRÉATION
MÉDICALEMENT
ASSISTÉE**

Art. 538. Le projet parental avec assistance à la procréation existe dès lors qu'une personne seule ou des conjoints ont décidé, afin d'avoir un enfant, de recourir aux forces génétiques d'une personne qui n'est pas partie au projet parental.

1991, c. 64, a. 538; 2002, c. 6, a. 30.

Art. 538. La contribution au projet parental d'autrui par un apport de forces génétiques à la procréation médicalement assistée ne permet de fonder aucun lien de filiation entre l'auteur de la contribution et l'enfant issu de cette procréation.

Art. 538.1. La filiation de l'enfant né d'une procréation assistée s'établit, comme une filiation par le sang, par l'acte de naissance. À défaut de ce titre, la possession constante d'état suffit; celle-ci s'établit par une réunion suffisante de faits qui indiquent le rapport de filiation entre l'enfant, la femme qui lui a donné naissance et, le cas échéant, la personne qui a formé, avec cette femme, le projet parental commun.

Cette filiation fait naître les mêmes droits et obligations que la filiation par le sang.

2002, c. 6, a. 30.

Art. 538.1. La filiation de l'enfant né d'une procréation assistée s'établit, comme une filiation par le sang, par l'acte de naissance. À défaut de ce titre, la possession constante d'état suffit; celle-ci s'établit par une réunion suffisante de faits qui indiquent le rapport de filiation entre l'enfant, la femme qui lui a donné naissance et, le

cas échéant, la personne qui a formé, avec cette femme, le projet parental commun.

Cette filiation fait naître les mêmes droits et obligations que la filiation par le sang.

2002, c. 6, a. 30.

Art. 538.2. L'apport de forces génétiques au projet parental d'autrui ne peut fonder aucun lien de filiation entre l'auteur de l'apport et l'enfant qui en est issu

Pendant, lorsque l'apport de forces génétiques se fait par relation sexuelle, un lien de filiation peut être établi, dans l'année qui suit la naissance, entre l'auteur de l'apport et l'enfant. Pendant cette période, le conjoint de la femme qui a donné naissance à l'enfant ne peut, pour s'opposer à cette demande, invoquer une possession d'état conforme au titre.

2002, c. 6, a. 30.

Art. 538.3. L'enfant, issu par procréation assistée d'un projet parental entre époux ou conjoints unis civilement, qui est né pendant leur union ou dans les trois cents jours après sa dissolution ou son annulation est présumé avoir pour autre parent le conjoint de la femme qui lui a donné naissance.

Cette présomption est écartée lorsque l'enfant naît plus de trois cents jours après le jugement prononçant la séparation de corps des époux, sauf s'il y a eu reprise volontaire de la vie commune avant la naissance.

La présomption est également écartée à l'égard de l'ex-

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| <p>conjoint lorsque l'enfant est né dans les trois cents jours de la fin de l'union, mais après le mariage ou l'union civile subséquent de la femme qui lui a donné naissance.</p> <p><i>2002, c. 6, a. 30.</i></p> | | |
| <p>Art. 539 al. 1. Nul ne peut contester la filiation de l'enfant pour la seule raison qu'il est issu d'un projet parental avec assistance à la procréation...</p> | <p>Art. 539 al. 1. Nul ne peut contester la filiation de l'enfant pour une raison tenant au caractère médicalement assisté de sa procréation et l'enfant n'est pas recevable à réclamer un autre état.</p> | <p>Art. 588 al. 2. Toutefois, nul ne peut contester la filiation d'une personne pour le motif qu'elle a été conçue par insémination artificielle.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 539 al. 1 (suite). Toutefois, la personne mariée ou unie civilement à la femme qui a donné naissance à l'enfant peut, s'il n'y a pas eu formation d'un projet parental commun ou sur preuve que l'enfant n'est pas issu de la procréation assistée, contester la filiation et désavouer l'enfant.</p> | <p>Art. 539 al. 2. Cependant, le mari de la mère peut désavouer l'enfant ou contester la reconnaissance s'il n'a pas consenti à la procréation médicalement assistée ou s'il prouve que l'enfant n'est pas issue de celle-ci.</p> | <p>Art. 586. Le recours en désaveu ou en contestation de paternité n'est pas recevable si l'enfant a été conçu par insémination artificielle, soit des œuvres du mari, soit des œuvres d'un tiers, du consentement des époux.</p> <p><i>1980, c. 39, a./s. 1.</i></p> |
| <p>Art. 539 al. 2. Les règles relatives aux actions en matière de filiation par le sang s'appliquent, avec les adaptations nécessaires, aux contestations d'une filiation établie par application du présent chapitre.</p> <p><i>1991, c. 64, a. 539; 2002, c. 6, a. 30.</i></p> | | |
| <p>Art. 539.1. Lorsque les parents sont tous deux de sexe féminin, les droits et obligations que la loi attribue au père, là où ils se distinguent de ceux de la mère, sont attribués à celle des deux mères qui n'a pas donné naissance à l'enfant.</p> <p><i>2002, c. 6, a. 30.</i></p> | | |
| <p>Art. 540. La personne qui, après avoir formé un projet parental commun hors mariage ou union civile, ne déclare pas, au registre</p> | <p>Art. 540. Celui qui, après avoir consenti à la procréation médicalement assistée, ne reconnaît pas l'enfant qui en</p> | |

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| <p>de l'état civil, son lien de filiation avec l'enfant qui en est issu engage sa responsabilité envers cet enfant et la mère de ce dernier.</p> <p><i>1991, c. 64, a. 540; 2002, c. 6, a. 30.</i></p> | <p>est issu, engage sa responsabilité envers cet enfant et la mère de ce dernier.</p> <p><i>1991, c. 64, a. 540</i></p> <p>N.B. Art. 35. L'article 540 du nouveau est applicable même lorsque le consentement à la procréation médicalement assistée a été donné avant l'entrée en vigueur dudit code.</p> |
| <p>Art. 541. Toute convention par laquelle une femme s'engage à procréer ou à porter un enfant pour le compte d'autrui est nulle de nullité absolue.</p> <p><i>1991, c. 64, a. 541; 2002, c. 6, a. 30.</i></p> | <p>Art. 541. Les conventions de procréation ou de gestation pour le compte d'autrui sont nulles de nullité absolue.</p> |
| <p>Art. 542. Les renseignements nominatifs relatifs à la procréation médicalement assistée d'un enfant sont confidentiels.</p> | <p>Art. 542. Les renseignements nominatifs relatifs à la procréation médicalement assistée d'un enfant sont confidentiels.</p> |
| <p>Toutefois, lorsqu'un préjudice grave risque d'être causé à la santé d'une personne ainsi procréée ou de ses descendants si cette personne est privée des renseignements qu'elle requiert, le tribunal peut permettre leur transmission, confidentiellement, aux autorités médicales concernées. L'un des descendants de cette personne peut également se prévaloir de ce droit si le fait d'être privé des renseignements qu'il requiert risque de causer un préjudice grave à sa santé ou à celle de l'un de ses proches.</p> <p><i>1991, c. 64, a. 542; 2002, c. 6, a. 30.</i></p> | <p>Toutefois, lorsqu'un préjudice grave risque d'être causé à la santé d'une personne ainsi procréée ou de ses descendants si cette personne est privée des renseignements qu'elle requiert, le tribunal peut permettre leur transmission, confidentiellement, aux autorités médicales concernées. L'un des descendants de cette personne peut également se prévaloir de ce droit si le fait d'être privé des renseignements qu'il requiert risque de causer un préjudice grave à sa santé ou à celle de l'un de ses proches.</p> |
| <p>CHAPITRE DEUXIÈME DE L'ADOPTION</p> | <p>CHAPITRE DEUXIÈME DE L'ADOPTION</p> |