Chapter 33

Future Child's Rights in New Reproductive Technology:

Thinking Outside the Tube

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Introduction

In the middle of the twentieth century, the legal definition of the family started to shift as societal norms and values slowly changed. From the legalization of no-fault divorce in the 1960s, to the recognition of common law relationships and same-sex marriage, previously unacknowledged forms of adult relationships have gradually been incorporated into the law. The current Canadian vision of what constitutes a "family" is nebulous and depends upon who is asked and for what purpose. Compounding this uncertainty are the advancements in assisted human reproduction (hereafter "AHR"). AHR has enabled many, though not all, people to plan how and when to add children to their family unit. The impact of AHR has been felt by individuals at various cross-sections of society, all of whom may for differing reasons seek the assistance of AHR to bring the gift of a child into their lives. Just as societal norms and attitudes about adult relationships have advanced more quickly than the development of the family

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law, the science of AHR has developed at a much greater pace than the law. By way of example:

a) a child conceived by AHR may have one or more "parent" who the legal system in their domicile does not recognize with resulting consequences for the child's citizenship and inheritance rights; and
b) a child conceived by AHR may or may not have a right to know their genetic and gestational parents depending on where they were domiciled at their birth and where the AHR process took place.

This paper will address:

a) who the different potential "parents" of a child conceived and born through AHR are in the context of the case law and legislation stemming from the use of AHR in Canada, the United States, England, and Australia;
b) the significance of genetics and intention to parent in deciding when and how to bestow parental status;
c) how children born as a consequence of AHR have responded from a clinical perspective to finding out their genetic origins or being denied that information; and
d) the rights of the children conceived by AHR and, in particular, their arguable right to independent legal counsel, and to be informed about the circumstances of their conception and birth.

This paper will not address the numerous thorny ethical and moral dilemmas faced by all the adults involved in AHR: the putative parents, the clinicians, the doctors and the community at large. Those issues are left for other venues.

(A) Who Is A Parent

While AHR may have taken the coitus out of conception, it has not taken the courts out of post-conception parentage battles. Twenty-seven years after the first "test-tube baby"[4] was born, there is now a considerable body of case law on the legal rights accorded to, and corresponding obligations imposed on, individuals who assist by act and/or by genetic donation, in the conception a child using AHR. Many of the fact patterns discussed below test the boundaries of the legal conceptualization of parenthood. For children conceived through AHR, parentage is not necessarily predicated on a biological connection. Rather, evidence of an *intent* to parent the child, demonstrated by action or admission, may suffice. This is in contrast to the historical approach in which courts, generally speaking, gave no weight to the parties' original intentions or wish to parent a child in allocating parental rights and responsibilities. The act of sexual intercourse carried with it the implicit potential for legal parenthood and all its consequent obligations. When intercourse is removed as a necessary link in conception, legislatures and the courts have struggled to decide what acts or omissions by the parties determine parental status.

In the absence of clear legislative direction as to who is the parent in most jurisdictions[5], the courts have had to balance the relevance of an intention to parent against the relevance of the genetic ties between a parent and a child. A child who is born as a result of AHR currently may have up to 8 "parents":

a) the ova donor and her partner;
b) the sperm donor and his partner;
c) the gestational carrier[6] and her partner; and

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[4] Louise Joy Brown, born on July 25, 1978, in Manchester, England.
[5] As will be discussed, jurisdictions such as Alberta, the United Kingdom, and Australia have passed legislation explicitly dealing with the parentage of children conceived throught AHR. What the case law demonstrates however, is that legislation in this area is unable to deal with the myriad of fact scenarios which can arise through the use of AHR.
[6] This is a woman who carries a child that is not biologically related to herself. She acts as a "host womb".

d) two persons who live in a conjugal relationship who arrange for the persons at (a)-(c) to conceive and deliver a child with the intention of parenting the child from birth (hereafter "the social parent(s)").

The balancing of intention versus genetics has consequences for both the rights and obligations of those eight persons. However, it also has serious consequence for the early stability of these children's lives. So long as there is outstanding litigation as to who is the parent[7] of the child born as a consequence of AHR that child will lack permanency with all the same psychological and emotional risks attendant upon that as children who lack permanency because they are the subject of custody battles.

What then have the courts done?

(B) Balancing Genetics and the Intention to Parent

The case law stemming from the use of AHR in four jurisdictions will be examined. We will suggest that some common themes are beginning to emerge which may provide some guidance for the future legal regulation of AHR.

Canada

Until 1980, intention was not legally relevant to the definition of a parent in Canada. Consider, for example, *Anderson v. Luoma.*[8] There, the same-sex ex-partner's prior express intention to care and provide for the children born to her former partner as a result of AHR did not make her a parent with the attendant obligations under the family law legislation in British Columbia at the time. Since the advent of section 15(1) of the *Canadian Charter of Rights and Freedoms*[9] the issue of intention to parent has become

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[7] In the following discussion, the distinction between being a "parent", (which can arise from a finding that a person has served as an intended, social, psychological or de facto parent) and the determination of "parentage" should be kept in mind.

[8] (1984), 42 R.F.L. (2d) 444 (B.C.S.C.), leave to appeal to B.C.C.A. refused, [1987] B.C.J. No. 600.

[9] Part I of the *Constitution Act,* 1982, being Schedule B of the *Canada Act* (1982) (U.K.), 1982, c.11 (hereafter "the *Charter*").

relevant in Canada, at least in the context of adoptions by one same-sex partner of the biological children of his/her partner. See: *Re K*[10].

Whether intention is relevant to a declaration of parentage or inclusion on a birth certificate when a child is born as a result of AHR, remains controversial in Canada. In Quebec, the Court of Appeal concluded in 2000, in *Re P.(N.)*[11] that a contractual arrangement granting the biological mother's lesbian partner full and complete parental authority over a child was irrelevant as the couple were "attempting to assert rights which did not exist"[12] in the case of a person who was neither the father nor the mother of the child. In contrast, in Alberta, Justice Clarke read into the *Family Law Act*[13] language that makes a parent any person who is a partner of the female person who has a child as a result of assisted human reproduction if "the person consented in advance of the conception to being a parent of the resulting child". See: *Fraess v. Alberta (Minister of Justice and Attorney General)*[14]. Similarly in *Doe v. Alberta*[15] a contractual arrangement between a male and female partner to abrogate the man's obligations to the female partner's child conceived with donated sperm was relevant to the question of that partner's status as the child's parent.[16] In Ontario, in *J.R. v. L.H.*[17], Justice Kiteley relied on the intention of the applicant social parents and the respondent gestational carrier and her partner and the fact that their respective intentions to parent and to give up the child were still current to declare the social parents to be the child's parents pursuant to section 4 of the *Children's Law Reform Act* (hereafter the "*C.L.R.A.*")[18]. Thus the relevancy of intention currently depends on the legislative framework and the province in which you reside.

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[10] [1995] O.J. No. 1425 (Prov. Div.).
[11] (2000), 193 D.L.R. (4th) 706 (Qc. C.A.).
[12] *Ibid* at 707.
[13] S.A. 205 ch. F-4.5.
[14] [2005] A.J. No. 1665 at para 16 (Q.B.).
[15] [2005] A.J. No. 1719 (Q.B.).
[16] Note however, the contract did not successfully relieve the partner of child support obligations because the court held the female parent did not have the unfettered right to compromise the rights of the child.
[17] [2002] O.J. No. 3998 (Sup. Ct.).
[18] R.S.O. 1990, c. C.12, as amended.

Currently, other than in Alberta, if intention is relied upon to assert parentage of a child born of AHR it appears that counsel advise applicants to apply to adopt the child involved so as to avoid this issue. See for example: *A.A. v. B.B.*[19]; *C.E.G. (No. 2)*[20]; *Re K.*[21], *Re Nova Scotia (Birth Registration No. 1999-02-004200)*[22]; and *Re Ontario Birth Registration number 88-05-045846*[23].

The relevance of genetics does not seem to have attracted the same controversy in Canada as it appears that genetic links are universally acknowledged to be relevant to the determination of parentage. For instance, in British Columbia and Saskatchewan genetics have been held to be determinative of maternal status. Similarly, where one lesbian partner acted as gestational carrier for the ova of her partner which was fertilized by a sperm donor in *Rutherford v. Deputy Registrar General (Ontario)*[24] the Ontario government has conceded that both women may be registered on the twins' birth certificates as the children's natural parents under section 1 of the *C.L.R.A.*[25]

It is worth noting that some courts in Canada have avoided confronting the comparative relevance of intention and genetics by relying on statutory interpretation to conclude, for example, that the presumptions related to paternity solve the issue[26]; that it is not possible to have more than two parents on a birth certificate[27]; or that there can only be one mother of a child at one time.[28]

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[19] [2003] O.J. No. 1215 (Sup. Ct.), currently on appeal to the Ontario Court of Appeal.
[20] [1995] O.J. No. 4073 (Gen. Div.).
[21] *Supra* note 10.
[22] [2001] N.S.J. No 261 (S.C.).
[23] [1990] O.J. No. 608 (Prov. Div.).
[24] Court File No. 05-FA-013357, argued the week of March 27, 2006 at the Ontario Superior Court of Justice.
[25] Answer filed by Respondents on July 6, 2005.
[26] See *Zegota v. Zegota-Rzegocinski,* [1995] O.J. No. 204 (Gen. Div.).
[27] *A.A. v. B.B., supra* note 19.
[28] *K.G.T. v. P.D.,* [2005] B.C.J. No. 2935 (S.C.); *Buist v. Greaves,* [1997] O.J. No. 2646 (Gen. Div.).

United States

The case law on the relevance of intention versus the relevance of genetics is somewhat more developed in the United States although the issue is no less controversial.

Parentage is a matter within state jurisdiction. States such as New York[29], Massachusetts[30], and Ohio[31] have all rejected the relevance of intention and, more particularly, deny the right to "parenthood by contract" in cases where separating same-sex partners who are not the biological parents of their partners' children have either sought parental rights or had their partners seek to impose parental obligations upon them. Courts in these states have generally relied on the United States Supreme Court decision in *Troxel* v. *Granville*[32] to reach this conclusion. That case defined a constitutional right for biological parents to raise their children as they see fit.

Despite this approach, several of these states have developed doctrines of psychological parentage relying on the law of equitable estoppel to enforce continuing relationships between the person with no biological connection to the child and the child in order to meet the child's best interests, and in recognition of the biological parent's active encouragement of that connection prior to the relationship breakdown. See: *V.C. v. M.J.B.*[33], *J.C. v. C.T.*[34], and *E.N.O. v. L.M.M.*[35]. While this approach may secure the psychological bond between the child and the adult it does not necessarily address the legal issue of support, and, most certainly does not address the child's citizenship and inheritance rights. These rights are addressed in some, but not all, of these states by

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[29] *Matter of C.M. v. C.H.*, 789 N.Y.S. 2d 393 (Supr. Ct. 2004); *Alison D. v. Virginia M.*, 155 A.D. 2d 11 (N.Y. Sup. Ct. App. Div. 1990).
[30] *T.F. v. B.L.*, 2004 Mass. LEXIS 566 (Sup. Jud. Ct.).
[31] *In re J.D.M.*, 2004 Ohio App. LEXIS 5166 (C.A.); *In re Bonfield*, 780 N.E. 2d 241 (Ohio Sup Ct. 2002).
[32] 530 U.S. 57 (2000).
[33] 748 A. 2d 539 (N.J. Sup. Ct. 2000).
[34] 711 N.Y.S. 2d 295 (Fam. Ct. 2000).
[35] 711 N.E. 2d 886 (Mass. Sup. Jud. Ct. 1999).

way of adoption. See: *Adoption of Tammy*[36]; and *In re Adoption of Two Children by H.N.R.*[37].

Other states, most notably California, have developed a balancing approach to the relevance of intention versus genetics when deciding issues of parentage. In *Johnson v. Calvert*[38], the Supreme Court of California was faced with an opposite-sex couple who were the biological parents of the child in issue and a gestational carrier who sought to be declared a parent of the child. The court rejected submissions that the best interests of the child should govern the issue of parentage (as opposed to custody) as it represented an unwarranted intrusion into the lives of families where children are born as a result of AHR. The court concluded that both intention and genetics were relevant. In circumstances therefore where an ova donor rejected a baby the gestational carrier's biological link to the child could found a declaration of parentage. However where an ova donor who is also an intended social parent does not reject the child that woman is the child's parent.[39]

Interestingly, there is some discussion in the California case law of a "but for" formulation of the test for parentage.[40] Put simply, "but for" the acts of person "X" would this child have been born? Such a test necessarily makes relevant the intention of the social parent(s) as it could be argued that "but for" their act of arranging for AHR no child would be conceived. The difficulty with this formulation is that it does not provide a solution to a circumstance where an ova donor, sperm donor, gestational carrier and social parents are disputing parentage: each of those individuals could successfully meet the test.

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[36] 619 N.E. 2d 315 (Mass. Sup. Jud. Ct. 1993).
[37] 666 A. 2d 535 (N.J. Super. Ct. 1995).
[38] 19 Cal. 2d 494 (Sup. Ct. 1993).
[39] In this way both intention and genetics are relevant to the outcome of the case.
[40] See: *Jaycee B. v. Superior Court*, 49 Cal. 2d 694 (C.A. 1996).

Australia

The experience in Australia and England with declarations of parentage and the relevance of genetics and intention is quite different to that of North America. In each jurisdiction, AHR legislation largely determines the relevance of each type of evidence.

In most Australian states the legislation sets out rules for determining parental status. For example in Western Australia the husband of a woman who conceives a child by artificial insemination is considered the father of the child so long as he has consented[41] to the AHR. Thus, the issue of the father's intention or consent is relevant to a determination of parentage. See: *In the Marriage of P. and P.*[42] Similarly, in the Capital Territory, the woman who gives birth to the child is the child's mother. See: *Re Births, Deaths and Marriages Registration Act 1997*[43]. Further, in Victoria a sperm donor as a matter of legislation is not a parent and the husband of the woman giving birth is deemed to be the child in issue's father.[44] However, there remains a legislative vacuum in some states in relation to same-sex partners. In New South Wales, in *Re Mark*[45] a biological father and his same-sex partner used a donated ovum and entered into a surrogacy contract in California with a gestational carrier who was not the ova donor. On their return to Australia the couple sought a declaration that, *inter alia*, the biological father was the legal father of the child. The court concluded that the biological father was the parent as he had not intended to be a sperm donor. The court also included the biological father's partner in the parenting order so that if anything happened to the biological father the child would not be in a legal vacuum. Despite these remaining issues the Australian legislation has in large measure finally resolved the balance of the relevance of genetics and/or intention to the question of parentage.

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[41] The *Artificial Conception Act 1985* and the *Family Law Act 1975* state that a husband's consent is presumed but may be rebutted.
[42] (1997), No. N.C. 3115 (Fam. Ct.).
[43] (2000), 26 Fam. L.R. 234 (A.C.T.S.C.).
[44] See: *Re Patrick* (2002), 28 Fam. L.R. 579 (Fam. Ct.); and *In the Matter of B. and J.* (1996), No. ML 4677 (Fam. Ct.).
[45] (2003), 31 Fam. L.R. 162 (Fam. Ct.).

England

In England, the *Human Fertilisation and Embryology Act*[46], is largely determinative of parentage of children born as a result of AHR. Thus, for example:

(a) the husband of a woman who conceives a child with donated sperm is deemed to be that child's parent (See: *Re C.H. Minor*[47]);
(b) where a man's sperm is used in a conception without his consent (due to a mix-up at the fertility clinic involved), he may or may not be declared to be the father of the resulting child(ren) as the legislation allows a child to be declared to be fatherless (See: *Leeds Teaching Hospital v. A and Others*[48]; and *Re R*[49]); and
(c) the woman who gives birth to the child is its legal mother (See: *Re Q (Parental Order)*[50]).

However, as in Australia, the English legislation does not address every possible situation, a fact that became clear in the decision of Justice Johnson in *Re Q (Parental Order)*[51].

The case law and legislation in all four jurisdictions illustrates that there is not yet a definitive approach to the balancing of the relevance of genetics and/or intention when addressing the issue of parentage. What it does reveal, however, is a cautionary tale. That cautionary tale is two-fold. First, there is no certainty for adults embarking upon AHR as to who will be declared to be the resulting child's parents. Second, the business of AHR is global so that it is perfectly possible that a child will have been born with donated genetic material gathered in a country or countries separate from the home state of the gestational carrier and/or the social parents. This presents serious issues for

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[46] 1990 c. 37.
[47] [1995] E.W.J. No. 211 (Fam.D.).
[48] [2003] E.W.H.C. 259 (Q.B.).
[49] [2001] 1 F.L.R. 247 (Fam.D.).
[50] [1996] 1 F.L.R. 369 (Fam.D.).
[51] *Ibid.*

legislative drafters and the courts as they struggle to define the status of each of the potentially eight adults involved in the conception and birth of a child.[52]

(C) The Child's Right to Information: A Clinical Perspective

As early as 1890 donated sperm was used to artificially inseminate women and assist with reproduction. More recently some twenty-seven years ago the first test-tube baby was born in Great Britain and since that time close to a one million children have been born through AHR. Despite these numbers, the issue of disclosure to children born using these procedures has only recently been raised. Many parents choose not to tell their children that they were conceived using AHR, while others wait until the children are adults. A Swedish study in 2000 revealed 89% of parents surveyed had not disclosed to the child, even though 59% had told others within the family's social network.[53] Despite all of the children born after the 1985 Swedish legislation which gives children the right to receive identifying information regarding donors once they have reached an age of sufficient maturity, 28% of participants advised they did not intend to disclose and 16% remained unsure.[54] More recently a study of school-aged children conceived through donor insemination in Britain revealed only 39% of participant parents intended to disclose to the child.[55] Of the less than a dozen or so studies conducted in the last twenty years, a minority of parents had told their children the details regarding their conception, another very few intended to tell, and many were undecided or had decided not to tell.

What has led to this "immaculate deception"?[56] The secrecy surrounding AHR within families is often cultivated by the institutions they seek guidance from during the process itself. Some within the medical community do not consider it their role to look

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[52] See for example *Re Mark, supra* note 45.
[53] K. Daniels, *et al.*, "Semen Providers and Their Three Families" Journal of Psychosomatic Obstetrics & Gynecolgy 26.1 (Mar 2005): 15-22.
[54] *Ibid.*
[55] E. Lycett, *et al.*, "School-aged children of donor insemination: a study of parents' disclosure patterns" Human Reproduction 20.3 (2005): 810-819.
[56] Diane Ehrensaft, "Alternatives to the Stork: Fatherhood Fantasies in Donor Insemination Families" Studies in Gender and Sexuality 1.4 (2000): 371-397 at 378.

at psycho-social issues resulting from AHR and so the focus remains on their "patients", the prospective parents and donors, leaving the child's interests neglected.[57] In a 2005 publication by The American Society for Reproductive Medicine individuals considering AHR are counseled on how to prevent "future medical and legal problems" including addressing the issues of confidentiality and the extent of the relationship between the child and the donor/surrogate prior to starting treatment. The publication fails to highlight the potential need for these issues to be re-visited once the child is born and their right to a voice in this decision. In the Thorn and Daniels study of individuals who had or who planned to use donor insemination, one participant commented, "We were given the feeling that it was not morally acceptable to do [donor insemination] at all and we therefore did not have the courage to question the doctor any further"[58]. A lack of legal clarity regarding donor insemination was also highlighted by some participants as contributing to a culture of shame and need for secrecy.

Similar to research on adoption, the research regarding AHR has consistently highlighted the rationales parents give for non-disclosure as including: the right to keep their infertility private, the need to protect a family member or the couple's relationship, a desire to be "normal", and a fear that disclosure would somehow hinder the parent-child relationship and/or otherwise negatively affect the child.[59] Despite the strong desire to protect the child and family, as Stotland writes,

> One of the reasons couples use techniques of assisted reproduction is that they want others to perceive their children as biologically "theirs". They want to approximate the experience and the appearance of the 'normal, average' families they envy so strongly. This is a perfectly understandable wish. Of course, parenthood does not derive only or even mostly from

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[57] Josephine Johnston, "Mum's the Word: Donor Anonymity in Assisted Reproduction" Health Law Review 11.1 (2002): 51-55.

[58] Petra Thorn, & Ken R. Daniels, "A Group-Work Approach in Family Building by Donor Insemination: Empowering the Marginalized" Human Fertility 6 (2003): 46-50 at 49.

[59] R. Achilles, "Anonymity and Secrecy in Donor Insemination: In Whose Best Interests?" International Conference on New Reproductive Technologies. Montreal, Canada. 1988; S. Golombok & C. Murray, "Social Versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation" Journal of Child Psychology and Psychiatry 40 (1999): 519-527; E. Lycett, *et al.*, *supra* note 55.

> biology; parenting is an identity, a matter of strong feelings and attachments and a set of behavioral responses to day-by-day, minute-by-minute demands of an initially helpless and growing human being. What complicates plans to keep the circumstances of conception a secret are the curiosity of the child as he or she grows, the child's need for information about his or her origin and the exquisite sensitivity of that child to all the feelings of his or her as he or she grows. [60]

Contrasting the lack of formal disclosure initiatives is the development of consumer organizations for parents, child and donors, as well as the media's willingness to expose the issue. *The Toronto Star* reported in 2005 that a Yahoo discussion group posted more than 4400 registered members and had accomplished 739 matches of siblings[61]. Numerous articles regarding children's experiences have appeared in the print media. Barry Steven's film "Offspring", which documents his search for his donor father and the possible 200 siblings he may be genetically linked to, was aired on CBC television in 2002. Advocacy groups have also formed across the country, voicing the quest for identity as the primary motive behind the wish to know biological origins. Additionally children may be equally, if not more, interested in knowing the identity of their half siblings, as well as their parents' identities.

Which Parents Disclose And Why

Past research suggests that there appears to be more openness to disclose biological origins based on the type of reproductive technology used, parental traits such as marital status, age, stigma scores, sexual orientation, and their beliefs regarding disclosure. In 2002 the European Study of Assisted Reproduction reported of 94 families with early adolescent children only 8.6% of the donor insemination (DI) children had been told about their genetic origins whereas 50% of the in vitro fertilization (IVF) parents and 95% of adoptive parents had told their children about the circumstances of their birth.[62] Another aspect of this study shows that almost one third

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[60] N. Stotland, "Assisted Reproduction: Helping Parents Decide What to Tell Others" *Primary Care Update for OB/GYNS*, 9.2 (2002): 66-70.
[61] Nancy J. White "Are You My Father?" *Toronto Star* (16 April 2005) L1.
[62] S. Golombok, *et al.* "The European Study of Assisted Reproduction Families: The Transition to Adolescence" Human Reproduction 17.3 (2002): 830-840.

of parents who had originally reported intending to disclose in the future still had not disclosed by the children's adolescence. There is also some indication that in families with more than one child born by donor insemination there is a higher incidence of non-disclosure and the authors of that study hypothesized that in those cases the older child would have been conceived at a time where disclosure was not the norm.[63] Research also suggests lesbian parents were more open to disclosure than heterosexual parents. Lycet, Daniels, Curson & Golombok's 2005 study[64] looked at the decision making process for both disclosing parents and non-disclosing parents and found rationales similar to Rumball & Adair's earlier research in 1999. Of parents who did, and/or intended to disclose, most also did not believe their child would react negatively and wanted to lessen the chance of psychological distress because of accidental disclosure. Despite their decision to disclose, fathers in the 2005 study remained worried about the effect disclosure would have on their relationship with the child, highlighting the potential need for support services.

Within the last two decades we have gone from sponsored concealment to a grassroots and legislative movement seeking to promote disclosure. As with the adoption experience, parents frequently wait to tell children of their AHR origins. However, telling the child later increases the risk that the disclosure comes as a surprise and the child may experience a greater sense of confusion and possibly betrayal.[65] Children who have been told at a fairly early age do not seem to show any adverse reaction.[66] At a younger age the child will process the information factually and the story of their birth becomes a part of their sense of identity, rather than a shock to their sense of security. In Rumball and Adair's study, the majority of parents who disclosed to their children before the age of three characterized the experience as positive and reported the children responded with practical questions, rather than emotional distress. The

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[63] R. Nachtigall, *et al.*, "Stigma, Disclosure, and Family Functioning Among Parents of Children Conceived Through Donor Insemination" Fertility and Sterility 68.1 (1997): 83-89.
[64] *Supra* note 55.
[65] A.J. Turner & A. Coyle, "What Does It Mean to Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Psychotherapy" Human Reproduction 15.9 (2000): 2041-2051.
[66] *Supra* note 55.

parents also anticipated the issue would arise again in the future and the authors suggested the story would "grow"with the child to match their stage in development [67]

The Case For Disclosure

Although still limited, research, personal narratives of children born through AHR, and clinical experience regarding family secrets, suggest that the desire to protect children from knowing their biological origins can result in a greater psychological upheaval for the child and their family. "They have a distinct tendency to assume that things are kept secret because they are bad and that these bad things would relate directly to them. The harder someone tries to keep a secret, the more tendency there is sometimes for the secret to slip out".[68] Accidental disclosure arises often during a period of crisis when a family is already overloaded with stress. In one study a teenager recalled how her mother who was "panicked" with the thought of her ex-husband's new girlfriend disclosing out of vengeance, woke the child to tell of her origins, "She was crying and hugging us, and telling us that she loved us, and saying that it really didn't matter that our father was not our father. You better believe that it was confusing and weird. It's dark and it's scary and mom isn't making much sense, and we don't know why she's doing what she's doing"[69]. The participant described how the circumstances affected the relationships within her family and that her father continued to believe that being her "real father" was based on maintaining the secret. Inadvertent disclosure or disclosure prompted by stressful events, can cause the child to feel betrayed. The history on which the child bases his or her identity is shattered, the parents become distorters of the truth in the child's eyes and rather than feeling wanted and accepted, confusion and shame can prevail.

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[67] A. Rumball, & V. Adair, "Telling the Story: Parents' Scripts for Donor Offspring" *Human Reproduction* 14.5 (1999): 1392-1399.
[68] *Supra* note 60.
[69] A. Baran & R. Pannor, *Lethal Secrets: The Psychology of Donor Insemination, Problems and Solutions.* (New York: Amistad, 1993).

(D) The Child's Right to Information: The Legal Perspective

There is limited case law which addresses a child's right to information relating to his or her parentage and circumstances of conception. However, one of the most compelling cases is *Rose v. Secretary of State for Health*[70], an English decision. Ms Rose had been told, in traumatic circumstances, at age 7 that her social father[71] was not her biological father. Having reached the age of majority, she sought a judicial review of the Secretary of State's decision not to release to her the information he had concerning the identity of her biological father. In her affidavit in support of that application, Ms Rose stated:

> I feel that these genetic connections are very important to me, socially, emotionally, medically, and even spiritually. I believe it to be no exaggeration that non-identifying information will assist me in forming a fuller sense of self or identity and answer questions that I have been asking for a long time. I am angry that it has been assumed that this would not be the case, and can see no responsible logic for this (given the unusual pre-eminence accorded to the rights and welfare of the child), unless it is believed that if we are created artificially we will not have the natural need to know to whom we are related. I feel intense grief and loss, for the fact that I do not know my genetic father and his family. There is no closure for me, as I assume these people are not dead. In addition there is no comfort for this, as there is little social recognition of this significance or grief. I live with the uncertainty of a reunion being possible, though unlikely, and of even unknowingly passing my biological father or siblings in the street. I wonder if we would recognize each other. I wonder if they think of me, and if they do how and where there would communicate this.
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> The need to discover this information has become a central feature of my life, along with the need for recognition for this. I need to find out more about my medical, genealogical and social heritage. Other people who come from families, where they have known both of their natural parents are able to discover this through the process of time. This includes information about their background and religion, where

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[70] [2002] E.W.J. No. 3823 (H.C.J.).

[71] The person the child considers to be a parenting figure.

> certain of their talents and skills may come from (e.g. parents or relations with musical or artistic skills), why they look the way they do etc. I have a strong need to discover what most people take for granted. While I was conceived to heal the pain of others (i.e. my parents' inability to conceive children naturally), I do not feel that these are sufficient attempts to heal my pain."[72]

Given the sorts of emotions identified by Ms. Rose and others who are similarly situated, the policy argument is advanced that children have the right to know that they were conceived through assisted human reproduction. The corollary of that right is that they must also have the right to the identifying and non-identifying information that exists about their biological parents, gestational carrier [if applicable] and social parents. The supporting reasoning for this argument is that the withholding of that information otherwise negatively effects:

a) their sense of identity;
b) their health planning [In the case of gestational carriers who it is often argued are irrelevant to this issue, the long-term effects of uterine fluid on a child are only just being medically investigated.]; and
c) their ability to avoid having biological children with their siblings and half-siblings in the next generation.

So what legal right do such children have to this information?

At the moment, the answer to this question depends on the jurisdiction in which the child was conceived. In Canada, the *Assisted Human Reproduction Act*[73] requires the collecting of "health reporting information" and sections 18(3) and 18(4) when proclaimed, will entitle the child to know the name of the donors of the genetic material used in their conception provided that the donors have provided written consent to the

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[72] *Ibid.* at para 7.
[73] [Not in force] 2004, c.2.

disclosure of that information. In contrast, England and Wales have moved to a system where anonymous donation was banned in 2004.[74]

In our highly mobile society, when it is possible for people to seek infertility treatment in clinics other than in their home states, it seems illogical to allow this legal diversity to continue. This is particularly so in that it may be argued in Canada, England, Australia, and the United States, that children in this circumstance have the right to this information without regard to the terms of the AHR legislation in each jurisdiction.

On a universal basis, the United Nations *Convention on the Rights of the Children*[75], Article 7, provides that:

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

States that are signatories to the *Convention* are therefore obliged to treat all children equally without regard to how they were conceived.

The births of children conceived without assistance are registered and those children can obtain their parental information from the state without their parents' consent.[76] It follows that children conceived through assisted human reproduction should be in the same position. Moreover, it cannot be the case that a state can have a regime that

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[74] *The Human Fertilization and Embryology Authority (Disclosure of Donor Information) Regulations 2004*, Statutory Instrument 2004 No. 1511.
[75] GA Res. 44/25, UNGAOR, 44th Sess., Annex, Supp. No. 49, UN Doc. A/44/49 (1989) 167 (entered into force September 2, 1990).
[76] For example, in Ontario the relevant legislation allowing this is the *Vital Statistics Act*, R.S.O. 1990, c. V.4.

prevents children from obtaining medically and psychologically necessary personal information. That would be inconsistent with the thrust of the entire *Convention.*[77]

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

In England, *Rose v. Secretary of State for Health*[78] confirms that under article 8(1) of the *European Convention on Human Rights*[79] a child has the right to establish the details of his or her own identity. Article 8 relates to the right to the respect for family life.[80] The *Rose* decision followed from the decision of the High Court Queen's Bench Division in *Leeds Teaching Hospital v. A and Others*[81]. In *Leeds* there were two couples, the As and the Bs who went to an agency to have in vitro fertilization using their own genetic material. The As were caucasian and the Bs were a mixed race couple. The Bs' sperm was mistakenly injected into the As' ova to create embryos that were then successfully implanted without either the As or the Bs becoming aware of the mistake. Twins were then born to the As. It was agreed that the As would raise the children. The issue was who was the legal father. Dame Butler-Sloss held that:

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[77] An analogy may be made here to the change towards openness in adoption law. Adoption used to be a process shrouded in secrecy and shame. Adopted children and parents who had given children up were not legally permitted to receive any identifying information about each other. In Ontario, there has been a steady move toward making more information available over the past twenty years. This has culminated in *The Adoption Disclosure Information Act* (also referred to as Bill 183, the *Act* was passed on November 1, 2005, and is expected to be enacted within the next year) which will allow adopted children and biological parents to obtain identifying information about each other once the child has reached a certain age, barring some exceptional circumstances.

[78] *Supra* note 70.

[79] 4 November 1950, 213 U.N.T.S. 222.

[80] Article 8 reads:

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

[81] [2003] E.W.J. No. 906 (Q.B.D.)

> I respectfully agree and am certain that the truth in this case is more important to the rights of the twins and their welfare than a fictional certainty. This is not a sperm donor case and should not be treated as such when considering the position of the twins. To refuse to recognize Mr. B as their biological father is to distort the truth about which some day the twins will have to learn through knowledge of their paternal identity. The requirement to preserve the truth will not adversely affect their immediate welfare nor their welfare throughout their childhood. It does not impede the cementing of the permanent relationship of each of them with Mr. A who will act as their father throughout their childhood. In my judgment the infringement of the twins' article 8(1) rights is met by the application of article 8(2) and it is proportionate to those rights for this court not to apply section 28(2) or (3).[82]

She additionally made the point that in arriving at this decision the children would "retain the great advantage of preserving the reality of their paternal identity".[83] Having acknowledged that the preservation of that reality is an advantage, it would be logically inconsistent to narrow the right so that where, unlike in this case, it is possible to conceal the truth from children because their genetic, gestational and social parents are all of the same race. Therefore, arguably, this right to the reality of paternity (and by corollary, maternity) now extends to all children in England and Wales.

In Canada, sections 15 and 7 of the *Charter* are arguably engaged where a child seeks to know their biological antecedents. Here, children conceived without assistance have the ability and right to know who their parents are: they can apply to the province of their birth for their birth registration and receive it. Parental consent is not required. Moreover, the *Adoption Disclosure Information Act* in Ontario will allow children and parents to obtain identifying information about each other, unless some prescribed exceptional circumstances exist. The Government cannot engage a system that does not afford equal protection to children born as a result of AHR who wish to know who the people involved in their conception were without creating an identifiable group pursuant to section 15 who are being discriminated against. Similarly, section 7 of the *Charter* protects the "life, liberty, and security of the person". The full meaning of "security of the person" will not be fully explored in the context of this paper, but it can

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[82] *Ibid.* at para 57.
[83] *Ibid.* at para. 56.

include a person's "physical autonomy"[84] and their "psychological integrity"[85]. If an action by the state (i.e. laws preventing disclosure) has a serious profound effect on the person's psychological integrity, there could be a violation of that person's section 7 rights to security of the person. It is possible that a section 7 challenge could be brought against any legislation which does not allow for full disclosure.

In the United States, the American Civil Liberties Union (ALCU) argued before the California Supreme Court in *Johnson v. Calvert*[86] that children have the right to know their biological antecedents consistent with their right to life and liberty as contained in the *Bill of Rights*[87]. The Court chose not to address the issue but the argument was cogent and persuasive and may well be successful in another case. Thus constitutional rights in each jurisdiction arguably entitle the child born as a result of AHR to full information about the circumstances of his or her conception and birth.

It might be argued in response to the constitutional arguments in each of these countries that no constitutional issue is raised because there is no subsisting government action. However, in every country discussed there is a system of birth registration. To date, those birth registration systems do not allow for the recording of two genetic parents, a gestational carrier and her spouse, and two social parents. So, in each country the state has established a system that enables the concealment of a child's antecedents. Arguably, this is the government action that engages a child's constitutional rights.

By way of example, in *Rypkema v. B.C.*[88] there were biological parents and a gestational carrier. The biological parents sought to be listed on the birth certificate of the child. Justice Gray analyzed the situation from the parents' perspective only and concluded that, "[i]ncluding the petitioners' particulars on the birth registration is an important means for the petitioners to participate in their child's life and for affirming

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[84] See: *R. v. Morgentaler*, [1998] 1 S.C.R. 30.
[85] See: *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.
[86] *Supra* note 38.
[87] U.S. Const. amend. V.
[88] [2003] B.C.J. No. 2721 (S.C.).

the parent-child relationship".[89] All of that is no doubt true, but the fact is that it also allowed the social parents to conceal from their child the truth of the child's conception and birth: the gestational carrier would not be listed and the parents could choose not to tell without fear of detection. The decision not to tell a child the circumstances of their conception and birth is by no means a hypothetical one. As noted earlier, clinical research shows that up to 50% of parents do not intend to share this information with their children.[90] This sort of case needs to be analyzed by the courts not just from the perspective of the adults involved but from a perspective that reflects the child's arguable right to have this information. However, to date the child's perspective in these cases has been overlooked. For this reason the children at issue in such cases should be provided with their own counsel to put their unique concerns before the court.

Legal counsel is rarely appointed for the children who are the subjects of disputes related to AHR. Arguably it is these children who are most in need of legal representation inasmuch as their parentage is being decided without the court hearing from an advocate on their behalf and that decision can have a direct impact on a child's right to know the circumstances of his conception, his permanent residence, visitation rights, inheritance rights, and citizenship rights.

Given that the number of people who may be able to claim that they are the "parent" of a child born using this technology can range from one to six, seven, or eight, it is vital that the children who are the subject of this litigation be represented by counsel. Even if the court is using the best interests test, given the adversarial nature of the courtroom, it is possible that the parties may not advocate a child-centered approach to the issue of parentage if it does not support their position. For example, in a case such as *In Re Marriage of Buzzanca*[91], the only person that wished to be named as a parent was the intended mother, (who had neither a genetic nor a gestational connection to the child). The genetic parents and gestational mother all made it clear that they did not want to be

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[89] *Ibid.* at para. 31.
[90] *Supra* note 62.
[91] 72 Cal. 2d 280 (C.A. 1998).

considered to be legal "parents" of the child, and yet it might be argued that the child had genetic inheritance rights and citizenship rights regardless of the intention of those people to act as legal parents to the child at the time of the litigation. Without legal representation for the child, these issues may not be put before the court.

Cases concerning parentage are often framed as being about the social parents' right to parent the child born as a result of assisted human reproduction. However, they are also about the child's status. Parentage affects the child's rights beyond family law. Specifically, this decision could affect the child's citizenship, inheritance rights, social benefits entitlement and status as a member of a First Nation, among other things. No adult person has their status as it relates to those issues determined by a court, at least in Canada, without the right to counsel. There is no reason to make a distinction in this regard with respect to children. Indeed in some circumstances we already do not make such a distinction. By way of example, in Ontario a child over the age of seven is required to consent to his or her adoption and must receive independent legal advice before giving or withholding consent. Children should always be represented in these cases even where all the adults are consenting to a proposed order because you cannot rely on the adversarial system to elicit all the relevant evidence as to status unless there are adversaries.

The basic principles of contract law need to be kept in mind in this arena. A child not yet born cannot execute a surrogacy or other assisted human reproduction contract. The after-born child is therefore not bound by those contracts or the terms therein that relate to anonymity, parentage, etc[92].

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

Conclusion

The myriad of issues arising from the use of AHR demonstrates the gap between emerging technology and the law. It is clear that the law is following, rather than leading the technology, and consequently legislatures and courts are in a position of constantly reacting as advances in AHR push back the boundaries of what is scientifically possible.

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

Significant policy determinations will arise from this technology. Societies' views on fertility, or infertility, a previously very private and very personal matter, will likely also play a role. Policy decisions in this area may force people to make unwanted public admissions. Legislation pertaining to the use of AHR will potentially also have repercussions on the laws relating to adoption, consanguinity, marriage, nationality and child support. From parentage issues arise parenting issues: who will bring up a child when there are eight parents? Who will be responsible for supporting the child financially? What will the nationality of that child be? These are questions best answered by addressing the child's interests as the primary consideration.