

# Lesbian Parental Projects in Word and Deed

Robert LECKEY\*

---

## Résumé

Le *Code civil du Québec* prévoit, depuis 2002, un moyen d'établir la filiation des enfants nés de couples lesbiens à la suite d'une procréation assistée. Diverses affaires ont depuis donné lieu à des différends concernant l'existence ou les termes d'un «projet parental». Cet essai étudie les demandes de modification législative visant à imposer aux projets parentaux des exigences formelles, notamment celle d'un acte notarié en minute. Le législateur s'est inspiré du régime de la filiation par le

## Abstract

Since 2002, the *Civil Code of Québec* has provided a means of recognizing the filiation of children born of assisted procreation to lesbian couples. Meanwhile, disputes have arisen as to the existence or content of a “parental project.” This paper studies the calls for a legislative amendment imposing formalities, such as a notarial act *en minute*, for parental projects. The legislature copied the regime of filiation by blood, which requires no formalities, but it might reasonably

---

\* Associate Professor, Faculty of Law and Quebec Research Centre of Private & Comparative Law, McGill University. I acknowledge the funding of the Social Sciences and Humanities Research Council of Canada and the excellent research assistance of Camille Bérubé, Anja Kortenaar, Ewa Krajewska, Ilana Ludwin, Derrick McIntosh, Alexander Steinhouse, and Robert Whillans. For comments on earlier versions, I thank Joanna Baron, Ilana Ludwin, Alexander Steinhouse, and the editorial committee of the *Revue*. I am grateful to Éric Bellemare for assistance with the French abstract.

sang, qui ne requiert aucune formalité, tandis qu'il aurait raisonnablement pu se tourner vers d'autres domaines du droit privé, qui sont soumis à des contraintes de forme. Vu l'objectif législatif de reconnaître la vie familiale des couples lesbiens, il convient d'examiner l'appel à un tel formalisme à la lumière des descriptions des pratiques familiales lesbiennes fournies par les recherches en sciences sociales. Il est difficile de concilier le portrait que tracent ces dernières, qui révèle le caractère délibéré et profondément réfléchi du processus typique conduisant deux femmes à décider de devenir parents, avec la spontanéité permise par le pur consensualisme du Code civil. En définitive, l'opportunité d'imposer des formalités au régime de la filiation des enfants nés d'une procréation assistée demeure un jugement politique.

---

have drawn inspiration from other areas of the private law, which do. Given the legislative objective of recognizing lesbian family life, the paper also tests the idea of formalities against accounts, in social science literature, of the family practices of lesbian parents. That literature's account of the deliberative and reflexive character of lesbian decision making in relation to mothering contrasts with the spontaneity or informality permitted by the Civil Code's purely consensual mechanism. Ultimately, the appropriateness of imposing formalities for parental projects remains a political judgment.

## Table of contents

<b>Introduction</b> .....	319
<b>I. The parental project and the civil law</b> .....	323
A. A new juridical act .....	323
B. The resources of the general private law.....	327
<b>II. Testing formalism against lesbian family practices</b> .....	330
A. Deciding to have a child.....	331
B. Negotiating the donor's role.....	333
<b>Conclusion</b> .....	336

—

|

|

—

—

|

|

—

While other jurisdictions wrestle for the first time with the challenge of legally addressing parenting by same-sex couples, Québec enjoys the luxury of reflecting on its effort made nearly a decade ago. In 2002, as part of an effort to provide a civil status for same-sex couples, one resulting in the civil union<sup>1</sup>, the Québec legislature also amended its regime of filiation<sup>2</sup>. It marked itself as a world pioneer in providing an avenue for a child to acquire two parents of the same sex, not only by adoption, but also by the more direct mechanism of birth registration. Into the title on filiation, between chapters on filiation by blood and on adoption, the legislature interposed a chapter on the filiation of children “born of assisted procreation.” Article 538 henceforth states:

**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.

**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.

Crucially, in Québec law “spouses” may be of the same sex<sup>3</sup>. In addition, by stating that “a person alone” may have a child with the genetic material of another, the regime provides an opportunity for establishing an original filiation where the father is not only undeclared or unknown, but eliminated *a priori*. Contributing genetic material “for the purposes of a third-party parental project” creates no bond of filiation between the contributor and the child eventually born<sup>4</sup>. That rule displaces the long-held, if often unexamined, assumption that the male progenitor of a child

<sup>1</sup> Arts. 521.1 ff. C.C.Q.

<sup>2</sup> See e.g. Alain ROY, “Le droit de la famille. Une décennie d’effervescence législative”, (2003) 105 *R. du N.* 215; Brigitte LEFEBVRE, “Projet de Loi 84: Quelques considérations sur les nouvelles dispositions en matière de filiation et sur la notion de conjoint”, [2002] 2 *C.P. du N.* 3; Robert LECKEY, “Where the Parents Are of the Same Sex: Québec’s Reforms to Filiation”, (2009) 23 *Int’l J. L. Pol’y & Fam.* 62.

<sup>3</sup> Civil union spouses may be of the same sex (art. 521.1 C.C.Q.), as may married spouses (*Civil Marriage Act*, S.C. 2005, c. 33). Furthermore, where the context permits it, references to “spouses” includes *de facto* spouses, who may be of the same sex (*Interpretation Act*, R.S.Q., c. I-16, s. 61.1).

<sup>4</sup> Art. 538.2, para. 11 C.C.Q.

should be the legal “father,” whether declared as such on the act of birth, proven by uninterrupted possession of status, presumed on account of marriage or civil union to the child’s mother, or identified by a genetic sample in contested proceedings.

The new provisions have provoked debates, sometimes heated, on several levels. But even scholars who differ on the appropriateness of legislative alteration of filiation, as opposed to parental authority, may share concerns about the design choices made in 2002. The legislative drafters took as their point of departure the regime of filiation by blood. Conscious of lesbians’ history of encounters with a discriminatory medical profession in their efforts to avail themselves of assisted reproduction, the law makers sought to make possible parenting by female same-sex couples with minimal professional mediation<sup>5</sup>. Deferring to the “tradition consensualiste” of Québec civil law<sup>6</sup>, the drafters stipulated no formalities for the establishment of a parental project. Furthermore, by distinguishing medically assisted procreation from assisted procreation *tout court*, the drafters contemplated that genetic material might be donated without medical assistance. Indeed, the rules provide, exceptionally, that where a genetic donation is made by sexual intercourse, a bond of filiation may be established between the donor and the child during the twelve months after the latter’s birth<sup>7</sup>.

The decision to legislate the parental project as a consensual act, specifying no formality or publicity, has led to evidentiary disputes that turn on the intention of the adults involved in the conception of a child. The thrust of the reforms may have been to recognize parenting by lesbian couples. Some of the disputes, though, concern the putative parental projects of single women. A contentious question may be whether a child was born of the parental project of solely the mother, with a genetic donation via intercourse, or of procreative sexual relations subjected to the ordinary regime

<sup>5</sup> Important as it is, this paper does not explore the effect that the absolute nullity of surrogacy agreements (art. 541 C.C.Q.) has on the options of gay male couples for becoming parents. For the recent conflicting approaches to art. 541, see *infra* note 35.

<sup>6</sup> Jean-Louis BAUDOIN and Pierre-Gabriel JOBIN, *Les obligations*, 6th ed. by Pierre-Gabriel JOBIN with Nathalie VÉZINA, Cowansville, Yvon Blais, 2005, para. 387; Jean PINEAU, Danielle BURMAN and Serge GAUDET, *Théorie des obligations*, 4th ed. by Jean PINEAU and Serge GAUDET, Montréal, Éditions Thémis, 2001, paras. 23, 35-37.

<sup>7</sup> Art. 538.2, para. 2 C.C.Q.

of filiation by blood<sup>8</sup>. The Québec Court of Appeal has recently decided another such dispute<sup>9</sup>. That the mother, in the latter case, was deceased only exacerbated the messy question of one person's word against another's.

Should the legislature modify article 538 by making the parental project a formalistic act? Roy and Pratte, among others, have called for an amendment requiring a notarial act *en minute*<sup>10</sup>. Admittedly, such a turn to formalism appears to swim against the tide, it having been declared over two decades ago that “[l]a répudiation des formes est assurément une des caractéristiques maîtresses du droit contemporain”<sup>11</sup>. Yet such an enlargement of the notarial role in assisted procreation might be viewed as consistent with the profession's mission in facilitating social ordering and preventing disputes<sup>12</sup>. By involving a public officer<sup>13</sup>, such an amendment would arguably address some of the concerns that the reforms of 2002

<sup>8</sup> S.G. c. L.C., [2005] R.J.Q. 1719 (Sup. Ct.) (interim proceeding; dispute as to whether a parental project of two women aided by a genetic donor or a parental project of the birth mother and the biological father); M.G. c. M.-J.G., [2004] R.D.F. 888, para. 5 (Sup. Ct.) (interim proceeding; claim of a parental project on the basis that the female plaintiff had cohabited with the defendant and that they had discussed having a child); *Droit de la famille – 081450*, 2008 QCCS 2677, [2008] R.D.F. 482 (dispute as to whether the plaintiff was a donor by sexual intercourse, assisting the mother's unilateral parental project, or whether there was a joint intention to become parents).

<sup>9</sup> L.B. and E.B. (for X) v. G.N., C.A.M. 500-09-020457-107, 500-04-043477-067 (June 22, 2011), aff'g *Droit de la famille – 10190*, 2010 QCCS 348, [2010] R.D.F. 121. For a discussion of the difficulty posed by the absence of legislative measures regarding proof and the crucial importance of intent, see the appeal judgment at para. 64, Rochon J. A.

<sup>10</sup> Alain ROY, “Famille”, (2005) 107 *R. du N.* 1, 12-13; Marie PRATTE, “La filiation réinventée: L'enfant menacé?”, (2003) 33 *R.G.D.* 541, 565.

<sup>11</sup> Jean-François MONTREDON, *La désolennisation des libéralités*, Paris, L.G.D.J., 1989, para. 1. For a thoughtful elaboration of the importance of form in family law, see “Le fond et la forme au prisme du droit de la famille”, in Gérard CORNU, *L'art du droit en quête de sagesse*, Paris, Presses Universitaires de France, 1998, p. 147-54. But see, on the “renouveau du formalisme” in modern contract law, J. BAUDOIN and P.-G. JOBIN, *supra*, note 6, para. 392.

<sup>12</sup> Pierre NOREAU, *Droit préventif: Le droit au-delà de la loi*, Montréal, Éditions Thémis, 1993.

<sup>13</sup> Jean LAMBERT, “Le notariat, une vision d'avenir pour une profession millénaire”, (2003) 105 *R. du N.* 829, 832-33; Jean-Guy BELLEY, “Réflexion critique sur la culture notariale du contrat”, [1996] 1 *C.P. du N.* 101, paras. 33, 50.

privatized the institution of filiation<sup>14</sup>, corrupting it and instrumentalizing it for the interests of adults<sup>15</sup>.

This paper does not advocate unequivocally for an amendment requiring a notarial act for a parental project. It aims, rather, to prepare the terrain for the further debate that would appropriately precede what remains, ultimately, a political decision. The paper situates the parental project vis-à-vis the civil law of Québec, underscoring its innovative character. The parental project is a consensual act, but not a contract. The legislative drafters might fruitfully have drawn inspiration, not from the regime of filiation by blood, which stipulates no formalities, but from other resources in the general private law (I). Yet scholarly writing and the law reports are not the only sources relevant to any decision to alter the regime of filiation by assisted procreation. The scholarship informing law reform may benefit from the insights of other disciplines. In harmony with the call for the notarial profession to adopt a legal pluralist approach<sup>16</sup>, an operating assumption here is that the civil law of Québec stands to learn from the social science accounts of the “family practices”<sup>17</sup> of lesbian parents. The drafters’ aim to affirm the equality of same-sex couples as parents and to respond to their familial realities makes relevant the fit between the proposed formalities and social life<sup>18</sup>. The paper thus turns from the parental project as a deed in the sense of formalized instrument to the sense of deed as action, as concrete practices. Accounts from the social science literature suggest that the informal consensualism of article 538 draws little inspiration from the observed realities of lesbian parenthood (II). If most plainly relevant to notaries, law makers, and intending

<sup>14</sup> Benoît MOORE, “La filiation homosexuelle en droit québécois”, [2005] *Revue de la Recherche juridique* 1667, 1673.

<sup>15</sup> Suzanne PHILIPS-NOOTENS and Carmen LAVALLÉE, “De l’état inaliénable à l’instrumentalisation: la filiation en question”, in Pierre-Claude LAFOND and Brigitte LEFEBVRE (eds.), *L’union civile: nouveaux modèles de conjugalité et de parentalité au 21<sup>e</sup> siècle*, Cowansville, Éditions Yvon Blais, 2003, p. 337.

<sup>16</sup> Roderick A. MACDONALD, “Images du notariat et imagination du notaire” (Part I), [1994] 1 *C.P. du N.* 1, paras. 88-100.

<sup>17</sup> David H.J. MORGAN, *Family Connections: An Introduction to Family Studies*, Cambridge, Polity Press, 1996.

<sup>18</sup> See the concern expressed decades ago with the “décalage entre les lois et la réalité”: Paul-A. CRÉPEAU, “Préface: La renaissance du droit civil canadien”, in Jacques BUCHER and André MOREL (eds.), *Le droit dans la vie familiale: Livre du centenaire du Code civil*, t. 1, Montréal, Presses de l’Université de Montréal, 1970, p. xiii, at p. xv.

parents, the matters raised in this paper touch questions of wider application concerning the relation between law and social practices, the place of formalism in family law, and the extent to which treating different groups with equal dignity requires treatment to be identical or as nearly so as possible.

## I. The parental project and the civil law

The parental project is an innovation in the civil law. By legislative design, it is decidedly not a contract (A). Its inventiveness has left unresolved questions about a parental project's formation and termination. Instead of imitating the regime of filiation by blood, the drafters might profitably have borrowed from formalities deployed elsewhere in the private law, notably in the law of liberalities (B).

### A. A new juridical act

The parental project is novel lexically and conceptually. In the 1920s – perhaps in deference to the existing architecture of the Civil Code – the legislature had initially confided new rules on adoption to a standalone statute. In the case of same-sex parents in 2002, however, the legislature acted boldly, locating the new regime in the *Civil Code of Québec*. The ambition of the Civil Code is to present exhaustively the general corpus of the civil law; it “elaborates all those institutions, rules, and concepts that govern interpersonal relationships, the framework of property rights, and the ordinary modes by which such rights may be generated, transferred, or extinguished”<sup>19</sup>. With this mandate in sight, it becomes plain that the parental project does not inscribe itself easily in relation to established concepts and institutions.

Efforts to discern the meaning infused by the drafters into the text might sensibly start with the two language versions. By constitutional fiat, the English translation of the Civil Code, while undoubtedly less elegant, is fully as authoritative as the *version originale*, so reading both together is

<sup>19</sup> John E.C. BRIERLEY and Roderick A. MACDONALD (eds.), *Quebec Civil Law: An Introduction to Quebec Private Law*, Toronto, Emond Montgomery, 1993, para. 87.

appropriate<sup>20</sup>. At first blush, the lexical formulation of “parental project/*projet parental*” suggests the new arrival to be a species of the larger genus “project/*projet*.” In like manner, an installment sale (*la vente à tempérament*) instantiates the larger category of sale (*vente*), itself a kind of contract (*contrat*)<sup>21</sup>. Prior to the 2002 amendments, however, the *Civil Code of Québec* nowhere included a general concept signified simply as “project/*projet*” that the “parental project/*projet parental*” might exemplify<sup>22</sup>. Where the words “*projet*” or “project” appeared individually in the Civil Code, neither took the meaning intended in the reforms to filiation. Twice the French word “*projet*” appeared paired with the English “draft,” evidencing an intention to denote a preliminary or rough form of a document<sup>23</sup>. The pair “project/*projet*” occurred twice but never, *tout court*, in a definition of the base concept. Moreover, occurrences of project/*projet* did not gesture towards an individual or joint undertaking the existence of which is produced, like a contract’s, by sole will or consent<sup>24</sup>.

Trustworthy lexical sources beyond the four corners of the Civil Code also fail to shed light. Neither “*projet*” nor “project” appears in the respective language versions of the *Private Law Dictionary and Bilingual Lexicons: Obligations*<sup>25</sup>. “*Projet*” does appear in Cornu’s masterful *Vocabulaire juridique*. But it is there defined as “draft,” as in other instances in the *Civil*

<sup>20</sup> *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), s. 133, reprinted in R.S.C. 1985, app. II, no. 5; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; Michel BASTARACHE *et al.*, *The Law of Bilingual Interpretation*, Markham, LexisNexis, 2008, p. 18-19, 29.

<sup>21</sup> Arts. 1745ff., 1708 C.C.Q.

<sup>22</sup> The codal drafters do not always pair the same English translation with a French term, but the editors of a critical edition of the Civil Code regard this inconsistency as potentially problematic. Jean-Maurice BRISSON and Nicholas KASIRER, “Preface to the Original Critical Edition (1997)”, in Jean-Maurice BRISSON and Nicholas KASIRER (eds.), *Civil Code of Québec: A Critical Edition*, 18th ed., Cowansville, Éditions Yvon Blais, 2010, p. xxxiii, at p. xxxiv-xxxviii.

<sup>23</sup> Separating spouses are required to prepare a “draft agreement/*projet d’accord*” (art. 495 C.C.Q.); co-owners of condominiums are entitled to receive, in advance of a general meeting, any “draft amendment to the declaration/*projet de modification à la déclaration*” (art. 1087 C.C.Q.).

<sup>24</sup> The Civil Code regulates consent to be the subject of a “research project/*projet de recherche*” (art. 21 C.C.Q.) and sets out special rules relating to a “real estate development project/*projet immobilier*” in the context of the sale of immovables (art. 1788 C.C.Q.).

<sup>25</sup> QUEBEC RESEARCH CENTRE OF PRIVATE & COMPARATIVE LAW, *Private Law Dictionary and Bilingual Lexicons: Obligations*, Cowansville, Éditions Yvon Blais, 2003.

*Code of Québec*, unmistakably unlike its use in article 538<sup>26</sup>. More generally, “*projet*” may be, for Cornu, an “opération prévue mais non encore réalisée, programme à mettre en œuvre”<sup>27</sup>. However promising initially, this sense does not grasp that Québec’s regime generates enforceable obligations for those it identifies as parents. In addition, *de facto* spouses who had initially consented to a parental project but never declared parenthood, although they will not become parents, may be liable to the child and the mother<sup>28</sup>. In short, the verbal expression of the new chapter provides little basis for regarding the “parental project/*projet parental*” as piggybacking onto an existing legal concept. Taking a less literal approach, what antecedents and kin might it find in the civil law?

The Québec amendments gave rise, in the form of the parental project, to a new juridical act. A juridical act is a “[m]anifestation of intention of one or more persons in a manner and form designed to produce effects in law”<sup>29</sup>. The drafters did not, however, draw obviously on existing concepts or institutions set out by the Civil Code. The regime of obligations, of course, defines and regulates the contract<sup>30</sup>, the juridical act *par excellence*<sup>31</sup>. While the rules on the parental project hint tantalizingly of contract – its formation by the parties’ sole consent, the lexicon of “parties” and “third parties” – the regime does not characterize the new artifact as such. Indeed, a fundamental feature of a contract is missing: no party to a parental project obligates herself to one or several other persons to perform a prestation<sup>32</sup>. A parental project generates no obligation the execution of

<sup>26</sup> Gérard CORNU, *Vocabulaire juridique*, 8th ed., Paris, Presses Universitaires de France, 2007, s.v. “projet”, p. 730. The French word “*projet*” appears in *Black’s Law Dictionary*, providing its international law sense of a “draft of a proposed measure, treaty, or convention.” Bryan A. GARNER (ed.), *Black’s Law Dictionary*, 9th ed., St. Paul, West, 2009, s.v. “projet”, p. 1331.

<sup>27</sup> G. CORNU, *id.*, s.v. “projet”, p. 730.

<sup>28</sup> Art. 540 C.C.Q.

<sup>29</sup> QUEBEC RESEARCH CENTRE OF PRIVATE & COMPARATIVE LAW, *supra*, note 25, s.v. “juridical act”, p. 162 [reference omitted].

<sup>30</sup> Art. 1385 C.C.Q.

<sup>31</sup> J.-L. BAUDOIN and P.-G. JOBIN, *supra*, note 6, para. 44; J. PINEAU, D. BURMAN and S. GAUDET, *supra*, note 6, para. 21. Perhaps the parental project is appropriately characterized as an extrapatrimonial juridical act, along the lines sketched by Cécile LAZARUS, *Les actes juridiques extrapatrimoniaux: Une nouvelle catégorie juridique*, Aix-en-Provence, Presses Universitaires d’Aix-Marseille, 2009.

<sup>32</sup> Art. 1378, para. 1 C.C.Q.; J.-L. BAUDOIN and P.-G. JOBIN, *id.*, para. 48; see also Didier LUELLES and Benoît MOORE, *Droit des obligations*, Montréal, Éditions Thémis, 2006,

which one party can enforce against the other. The drafters thus abstained from invoking the general regime of contract to flesh out the sparse chapter on the parental project.

There are well-established and sensible reasons for a legislative reluctance to characterize the parental project as a contract. Despite the tradition of marriage contracts within the civil law<sup>33</sup>, public order is thought to protect the family as a zone unsusceptible to contractualization<sup>34</sup>. Sensitivity to contract is especially elevated when civil status is involved, as it is here with filiation in play. The legislative silence may therefore hint at discomfort provoked by the mingling of voluntarist agreements and filiation<sup>35</sup>. Moreover, the set of individuals associated with a parental project and their respective roles do not mirror those associated with a contract. A third party is extraneous to a contract, frequently oblivious to its existence<sup>36</sup>. In the case of a parental project, by contrast, a person is only a contributor of genetic material if he has knowledge of the parties' parental project and consents to assume that role<sup>37</sup>. It is thus difficult to regard a donor as one of the persons remaining "totalement étrangers" at the

---

paras. 123-26.

<sup>33</sup> See generally Alain ROY, *Le contrat de mariage réinventé: Perspectives socio-juridiques pour une réforme*, Montréal, Éditions Thémis, 2002.

<sup>34</sup> Dominique FENOUILLET, "La contractualisation de la famille?", in Brigitte BASDEVANT-GAUDEMET (ed.), *Contrat ou Institution: un enjeu de société*, Paris, L.G.D.J., 2004, p. 103. On the limits of the contractual characterization in some corners of French family law, despite the rhetoric of the "contractualisation des ruptures familiales," see Claire NEIRINCK and Maryline BRUGGEMAN, "Les aménagements consensuels que les couples appliquent à leur rupture sont-ils d'essence contractuelle?", (2008) 49 *C. de D.* 551, 552 and 560-69.

<sup>35</sup> The same concern underlies the declaration that surrogacy agreements are absolutely null (art. 541 C.C.Q.), however much readings of that declaration's import vary (compare *Adoption – 091*, 2009 QCCQ 628, [2009] R.J.Q. 445; *Adoption – 09184*, 2009 QCCQ 9058, [2009] R.J.Q. 2694; *Adoption – 09367*, 2009 QCCQ 16815, [2010] R.D.F. 387. Similarly, the scope of special consent to adoption is circumscribed (art. 555 C.C.Q.).

<sup>36</sup> QUEBEC RESEARCH CENTRE OF PRIVATE & COMPARATIVE LAW, *supra*, note 25, s.v. "third party", p. 303.

<sup>37</sup> *F.P. c. P.C.*, [2005] R.D.F. 268, para. 57, 60 (Sup. Ct.), Senécal J. See also *L.B. c. Li.Ba.*, 2006 QCCS 591, [2006] R.J.Q. 862, para. 111, aff'd (*sub nom. Droit de la famille – 07527*), 2007 QCCA 362, [2007] R.J.Q. 493; Jean PINEAU and Marie PRATTE, *La famille*, Montréal, Éditions Thémis, 2006, para. 423.

moment of a parental project's formation<sup>38</sup>. A parental project obviates the paternity that would otherwise arise, making it difficult to characterize a genetic donor as a third party to a contract. The difficulty arises from the orthodox view that a third party "échappe non seulement à une clause contractuelle lui imposant des obligations, mais aussi à une clause qui lui retire des droits"<sup>39</sup>. These understandable grounds for uneasiness about viewing the parental project as a contract do not, however, mitigate the difficulties with the regime.

## B. The resources of the general private law

The legislative reticence in defining the parental project has bequeathed a number of questions to jurists and participants in this new form of family life. By and large, the Civil Code's treatment of more established forms of social ordering (marriage, contract, gift, testament, usufruct) already answers these questions in the respective cases, supplemented by jurisprudence, doctrine, and practice. One such question is the revocability of consent, a matter not canvassed here: can one party to a parental project withdraw consent before the other party conceives via the genetic donation? Depending on the medical and other obstacles, achieving pregnancy may take years and it is foreseeable that one party to the parental project might wish to retract consent. However different the traditions of family law and the modes of legislative drafting, it is notable that recently amended legislation in the United Kingdom details the process for withdrawal of consent in cases of assisted conception involving lesbian couples<sup>40</sup>. Another issue, noted above, is the means of proving a parental project's existence and the identity of its parties.

Part of the problem may be that the drafters of the regime of the parental project attempted too literal a translation from the regime of fili-

<sup>38</sup> The expression is taking from a discussion of the relativity of contracts by J.-L. BAUDOUIN and P.-G. JOBIN, *supra*, note 6, para. 483.

<sup>39</sup> D. LLUELLES and B. MOORE, *supra*, note 32, para. 2255 [footnote omitted]. For a subtle discussion underscoring that the problem lies in determining "quels sont ces tiers à l'égard desquels un contrat conclu entre deux personnes ne produit pas d'effet", see J. PINEAU, D. BURMAN and S. GAUDET, *supra*, note 6, para. 288.

<sup>40</sup> *Human Fertilisation and Embryology Act 2008*, c. 22 (U.K.), s. 44(1)(c), amending the *Human Fertilisation and Embryology Act 1990*, c. 37 (U.K.), s. 14(6D). See Julie MCCANDLESS and Sally SHELDON, "The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form", (2010) 73 *Mod. L. Rev.* 175.

ation by blood<sup>41</sup>. Rules already regulating so-called “natural” conception and birth might not transfer easily to the ordering of assisted procreation. It is true that feminist epistemologists and anthropologists, among others, have deconstructed the nature/artifice dichotomy. The reality may be less “a crisp boundary between natural and unnatural reproduction” than a continuum of interventions in the procreative process<sup>42</sup>.

Yet, in legal terms, unmistakable differences persist between the different-sex couple conceiving without medical intervention and the same-sex couple, which will always require the genetic donation of a third party. The mere decision of two individuals of different sexes to try to conceive a child via sexual intercourse, or even their success in doing so, is not a juridical act. Such a decision is a fact to which the law is mostly indifferent: months (or in some cases, years) after the decision and the conception, the child’s filiation will be determined by the act of birth, the possession of status, a presumption of paternity, or genetic testing<sup>43</sup>. The point is not the absence of intention relative to brute fact. Declaration on the act of birth and the day-in, day-out conduct that gives rise to uninterrupted possession of status – what Cornu evocatively calls “grandir, vivre, vieillir ensemble”<sup>44</sup> – require intention, if manifested with varying measures of explicitness and formality. Indeed, the drafters’ clumsy naming of the “parental project” risks naturalizing the procreation of different-sex couples without an outside donation, implying that it proceeds absent intention and planning. For present purposes, the point is temporal: for the different-sex couple, no pre-conception moment (other than marriage or civil union, for the presumption of paternity) determines the child’s eventual filiation. Any pre-conception intention, if later contested, will

<sup>41</sup> Robert LECKEY, “Filiation and the Translation of Legal Concepts”, in Eleanor CASHIN RITAINE (ed.), *Legal Engineering and Comparative Law*, vol. 2, Geneva, Schulthess, 2009, p. 123.

<sup>42</sup> Emily JACKSON, *Regulating Reproduction: Law, Technology and Autonomy*, Oxford, Hart Publishing, 2001, p. 171.

<sup>43</sup> If birth is a juridical fact (J. PINEAU, D. BURMAN and S. GAUDET, *supra*, note 6, para. 20), pregnancy is arguably one too, in the sense of an “[o]ccurrence that is likely to entail legal consequences” (QUEBEC RESEARCH CENTRE OF PRIVATE & COMPARATIVE LAW, *supra*, note 25, s.v. “juridical fact”, p. 162; D. LLUELLES and B. MOORE, *supra*, note 32, para. 1307). But the mere decision of a man and a woman to attempt conception produces no legal effects.

<sup>44</sup> G. CORNU, *L’art du droit en quête de sagesse*, *supra*, note 11, p. 34.

prevail only if it finds confirmation in some later, ostensibly objective means of proof, such as a genetic sample.

In the case of the parental project, intention has a greater role and produces its legal effects earlier. Where, say, a lesbian couple procures a genetic donation in order to conceive, no genetic proof will later substantiate the non-birth mother's claim to maternity. Given the evidentiary questions that the parental project raises – ones of intention, which no DNA test can resolve – might not the drafters have cleaved too carefully to its source in translating rules to serve couples that are relevantly different? Should the drafters have borrowed from further afield in the resources of the general private law?

Private law is familiar with channeling expressions of intention in gratuitous and onerous settings. The authors of civil law doctrine suggest that the imposition of formalities, such as a requirement that gifts *inter vivos* be executed by notarial deed, can serve several functions<sup>45</sup>. One is to serve as evidence<sup>46</sup>. A second is to protect the interests of third parties<sup>47</sup>. A third is to ensure that the donor acts with full information. As is said in French matrimonial law – although the point does not enjoy unrestrained general application – complexity alone may justify requiring the involvement of a notary<sup>48</sup>. A fourth is to guarantee that the donor has spent the necessary time reflecting on the seriousness of the contemplated act. Especially where it is irrevocable, a legal disposition's gravity may militate for

<sup>45</sup> The *locus classicus* in the common law is Lon L. FULLER, "Consideration and Form", (1941) 41 *Colum. L. Rev.* 799. For insightful analysis of the place of formalities in connection with Quebec testamentary law under the new Code, see Nicholas KASIRER, "The 'Judicial Will' Architecturally Considered", (1996) 99 *R. du N.* 3. The point cannot be developed here, and it risks appearing exotically far from the civil law, but the transformative "status contract" discussed by Weber had at times a symbolic requirement consistent with the channelling function of formalities. Max WEBER, *Economy and Society: An Outline of Interpretive Sociology*, ed. by Guenther ROTH and Claus WIT- TICH, trans. by Ephraim FISCHOFF, Berkeley, University of California Press, vol. 2, p. 672.

<sup>46</sup> Hervé ROCH, *Traité de droit civil du Québec*, t. 5, Montréal, Wilson & Lafleur, 1953, p. 92.

<sup>47</sup> J.E.C. BRIERLEY and R.A. MACDONALD, *supra*, note 19, para. 381 (registration of a notarial form).

<sup>48</sup> Philippe MALAURIE and Laurent AYNÈS, *Les régimes matrimoniaux*, 3d ed., Paris, Defrénois, 2010, para. 210.

insisting that the donor have, at his or her side, “un conseiller averti”<sup>49</sup>. A fifth is to assure the freedom of the consent<sup>50</sup>.

Extracting these formalities from their ideological setting might appear risky. As a matter of private law history, formalities have functioned so as to protect the family patrimony and the interests of successors<sup>51</sup>. It might be said, further, and critically, that the close regulation of *inter vivos* gift reflects “a paternalistic assessment of the psychology of donors and donees”<sup>52</sup>. In many settings, the worry about the dispersal of the family patrimony beyond the legitimate lineage appears archaic. Yet the filial interests engaged by a dispute over a parental project inscribe themselves in close continuity with the interests in familial transmission animating the formalities mentioned above. Except in the cases of a donation made by sexual intercourse, the donor’s agreement to act as such is an irrevocable waiver of the parental status that would otherwise accrue. It is possible, then, to regard increased formalities for the parental project as continuous with other areas of the civil law. How would requiring formalities accord with accounts by non-jurists of the family practices of lesbian couples?

## II. Testing formalism against lesbian family practices

As a concern for the realities confronting lesbian couples in their efforts to raise children motivated the legislative drafters in Québec, it is fitting to consult the social science literature on such couples’ patterns and habits. Before proceeding, the modest ambitions of this paper’s survey of secondary literature on lesbian parenting must be signaled. It does not purport to be a systematic and exhaustive review. Nor does it undertake to adjudicate disagreements or assess different studies’ relative merits.

<sup>49</sup> Henri MAZEAUD, Léon MAZEAUD and Jean MAZEAUD, *Leçons de droit civil*, t. 4, v. 2, 3d ed. by A. BRETON, Paris, Montchrestien, 1980, para. 697; also H. ROCH, *supra*, note 46, p. 92. See further, on how formalism can allow the parties involved “de se conscientiser davantage au sérieux des engagements stipulés,” A. ROX, *Le contrat de mariage réinventé*, *supra*, note 33, p. 344.

<sup>50</sup> Germain BRIÈRE, *Les libéralités: donations, testaments, substitutions et fiducie*, 8th ed., Ottawa, Éditions de l’Université d’Ottawa, 1982, para. 149; also Philippe MALAURIE, *Les successions, les libéralités*, 3d ed., Paris, Defrénois, 2008, para. 297.

<sup>51</sup> H. MAZEAUD, L. MAZEAUD and J. MAZEAUD, *supra*, note 49, para. 959.

<sup>52</sup> J.E.C. BRIERLEY and R.A. MACDONALD, *supra*, note 19, para. 380.

Frankly, the literature reviewed here is subject to a number of criticisms. Many studies acknowledge the potentially unrepresentative character of their interview samples, given the difficulties of recruiting lesbian participants in homophobic or, at best, heterosexist societies. Sample sets – recruited often by snowball sampling, in which those interviewed are asked to suggest others, or by notices in the gay press – may over-represent white, educated, and comparatively affluent lesbians<sup>53</sup>. Unrepresentative sample pools may lead to the exaggerated prominence of purportedly radical, transgressive accounts of lesbian families<sup>54</sup>. Researchers also suggest that studies underplay the intersections of lesbian parenting with factors such as class, race, and culture<sup>55</sup>. The observation that social science studies are subject to the ideologies and biases that influence legal scholarship further informs this discussion<sup>56</sup>.

The research on lesbian parenting emphasizes the demanding and complicated process leading to lesbian couples' decision to conceive and bear a child (A). Once that decision is made, further negotiations bear on the decision to use an anonymous or a known donor, and in the latter case, to delineate the contours of that man's role in the life of the child (B). Overall, the research establishes that, outside the ambit of the Civil Code, lesbian "parental projects" reflect volition and foresight. Accordingly, the imposition of a formal requirement might be appropriate.

## A. Deciding to have a child

Lesbian couples' decision to become parents and their selection of the means to do so figure prominently in the literature. Because of the challenges in the process by which lesbians become mothers, all the women in Chabot and Ames' study had "discussed and planned every step of their

<sup>53</sup> See e.g. Karen C. KRANZ and Judith C. DANILUK, "Living Outside of the Box: Lesbian Couples with Children Conceived through the Use of Anonymous Donor Insemination", (2006) 18 *Journal of Feminist Family Therapy* 1.

<sup>54</sup> Jacqui GABB, "Critical Differentials: Querying the Incongruities within Research on Lesbian Parent Families", (2004) 7 *Sexualities* 167.

<sup>55</sup> Victoria CLARKE, "From Outsiders to Motherhood to Reinventing the Family: Constructions of Lesbian Parenting in the Psychological Literature – 1886-2006", (2008) 31 *Women's Studies International Forum* 118, 125-26.

<sup>56</sup> Susan B. BOYD, "Legal Regulation of Families in Changing Society", in Austin SARAT (ed.), *The Blackwell Companion to Law and Society*, Malden, Blackwell Publishing, 2004, p. 255, at p. 262.

journey to parenthood”<sup>57</sup>. Those researchers developed a seven stage decision-making model from the ten lesbian couples they interviewed. Their participants negotiated the following questions: Do we want to become parents? Where do we access information and support? How will we become parents? Who will be the biological mother? How do we decide on the donor (whether known or unknown)? How do we incorporate inclusive language (i.e., what do they call the family and the relationships in it)? And how do we negotiate parenthood within the larger heterocentric context? That complex decision-making process entails what Ryan-Flood calls “a radical rethinking of notions of parenting” at every step<sup>58</sup>. For some women, decision making must address the clash between a maternal identity and a lesbian identity<sup>59</sup>. The decision to become parents may figure centrally in the partners’ commitment to the relationship<sup>60</sup>. Indeed, having a child may prompt a process of coming out not only for lesbian couples, but also for their families of origin<sup>61</sup>. Studies repeatedly emphasize the decision-making process’s reflexive, deliberative character: lesbians must question issues that heterosexual women take for granted<sup>62</sup>.

<sup>57</sup> Jennifer M. CHABOT and Barbara D. AMES, “‘It Wasn’t ‘Let’s Get Pregnant and Go Do It’:’ Decision Making in Lesbian Couples Planning Motherhood via Donor Insemination”, (2004) 53 *Family Relations* 348, 350. See also P. BAETENS and A. BREWAEYS, “Lesbian Couples Requesting Donor Insemination: An Update of the Knowledge with Regard to Lesbian Mother Families”, (2001) 7 *Human Reproduction Update* 512; Annie LEBLOND DE BRUMATH, Danielle JULIEN, MéliSSa FORTIN and Christiane FORTIER, “Facteurs décisionnels reliés au statut biologique et au mode de procréation chez des futures mères lesbiennes”, (2006) 5 *Enfances, Familles, Générations* 1.

<sup>58</sup> Róisín RYAN-FLOOD, *Lesbian Motherhood: Gender, Families and Sexual Citizenship*, Basingstoke, Palgrave Macmillan, 2009, p. 74. See also Abbie E. GOLDBERG, *Lesbian and Gay Parents and Their Children: Research on the Family Life Cycle*, Washington, American Psychological Association, 2010, p. 54-72; Maureen SULLIVAN, *The Family of Women: Lesbian Mothers, Their Children, and the Undoing of Gender*, Berkeley, University of California Press, 2004, c. 2.

<sup>59</sup> Jacqui GABB, “Imagining the Queer Lesbian Family”, in Andrea O’REILLY (ed.), *Mother Outlaws*, Toronto, Women’s Press, 2004, p. 123.

<sup>60</sup> Susan E. DALTON and Denise D. BIELBY, “‘That’s Our Kind of Constellation’: Lesbian Mothers Negotiate Institutionalized Understandings of Gender within the Family”, (2000) 14 *Gender & Society* 36, 45-46.

<sup>61</sup> Kathryn ALMACK, “Display Work: Lesbian Parent Couples and Their Families of Origin Negotiating New Kin Relationships”, (2008) 42 *Sociology* 1183; see also Adital BEN-ARI and Tali LIVNI, “Motherhood Is Not a Given Thing: Experiences and Constructed Meanings of Biological and Nonbiological Mothers”, (2006) 54 *Sex Roles* 521.

<sup>62</sup> See e.g. Ruth McNAIR, Deborah DEMPSEY, Sarah WISE and Amaryl PERLESZ, “Lesbian Parenting”, (2002) 63 *Family Matters* 40; Lee CRESPI, “And Baby Makes Three: A

Lesbians' planning and decision-making process is often long, extending across years<sup>63</sup>.

Nevertheless, in some cases a benefit emerges from the lengthy and difficult decision-making process that lesbians undergo as a result of social, legal, and biological obstacles. For some lesbian mothers, the intensity of planning positions them as good mothers who planned their conceptions thoughtfully<sup>64</sup>. The character of lesbians' mothering decisions as more intentional than those of heterosexual women can thus be a source of pride<sup>65</sup>.

## B. Negotiating the donor's role

Opposite-sex couples in need of a sperm donation to conceive overwhelmingly prefer an anonymous donor. They seek a donor to remedy the medical defect of their otherwise fertile, intact family unit, playing the role that the husband or male partner would otherwise have played. Given those preferences – so deeply anchored as not even to appear to be preferences – there are limited choices regarding how to negotiate interaction with the donor. By contrast, lesbian couples are not remedying a medical

---

Dynamic Look at Development and Conflict in Lesbian Families”, (2001) 4 *Journal of Gay & Lesbian Psychotherapy* 7; Florencia HERRERA, “Tradition and Transgression: Lesbian Motherhood in Chile”, (2009) 6 *Sexuality Research & Social Policy* 35; Cyril DESJEUX, *Homosexualité et procréation, les prémices d'un matriarcat? Analyse stratégique du processus de décision d'avoir un enfant dans un couple homosexuel*, Paris, Harmattan, 2006; Catherine DONOVAN and Angelia R. WILSON, “Imagination and Integrity: Decision-making among Lesbian Couples to Use Medically Provided Donor Insemination”, (2008) 10 *Culture, Health & Sexuality* 649.

<sup>63</sup> See e.g. Gillian A. DUNNE, “Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship”, (2000) 14 *Gender & Society* 11; Michelle T. RENAUD, “We Are Mothers Too: Childbearing Experiences of Lesbian Families”, (2007) 36 *Journal of Obstetric, Gynecologic & Neonatal Nursing* 190.

<sup>64</sup> Margie RIPPER, “Lesbian Parenting through Donor Insemination: Implications for the Hetero-normative Family”, (2009) 5 *Gay & Lesbian Issues and Psychology Review* 81, 89.

<sup>65</sup> Nancy J. MEZEY, *New Choices, New Families: How Lesbians Decide about Motherhood*, Baltimore, Johns Hopkins University Press, 2008, p. 153. See also Jordan LEE, “‘This Is Normal for Us’: Resiliency and Resistance amongst Lesbian and Gay Parents”, (2009) 5 *Gay & Lesbian Issues and Psychology Review* 70, 78; Henry M.W. BOS, Frank VAN BALEN and Dymphna C. VAN DEN BOOM, “Planned Lesbian Families: Their Desire and Motivation to Have Children”, (2003) 18 *Human Reproduction* 2216.

imperfection in the couple and must confront a range of decisions regarding their choice of sperm donor. To be sure, opposite-sex couples could face the same choices if they wished. But they typically operate under the influence of a socially produced sense that there is no choice but anonymous sperm and thus no need to negotiate a relationship with the donor.

By contrast, lesbian couples are much likelier to use a known sperm donor<sup>66</sup>. The key rationale for using a known donor is the belief that children should be able to access knowledge about their genetic father. The desire that the father involve himself in the child's life and the relative ease of informal methods of insemination are other factors<sup>67</sup>.

Lesbians conceiving with a known donor may negotiate the donor-father's involvement in advance. Many authors signal planning, including in many cases a written agreement, as a way of minimizing risk with donor involvement<sup>68</sup>. Authors underscore the complex range of possible roles for a known donor: there may be a named donor with no contact; a known donor with contact; and full co-parenting. The category "donor with con-

<sup>66</sup> See e.g. A. LEBLOND DE BRUMATH, D. JULIEN, M. FORTIN and C. FORTIER, *supra*, note 57; Tor FOLGERØ, "Queer Nuclear Families? Reproducing and Transgressing Heteronormativity", (2008) 54 *Journal of Homosexuality* 124; Nanette GARTRELL, Jean HAMILTON, Amy BANKS, Dee MOSBACHER, Nancy REED, Caroline H. SPARKS and Holly BISHOP, "The National Lesbian Family Study: 1. Interviews with Prospective Mothers", (1996) 66 *American Journal of Orthopsychiatry* 272. A further distinction, irrelevant for present purposes, is that lesbians often prefer that their known donor be gay.

<sup>67</sup> C. DONOVAN and A.R. WILSON, *supra*, note 62, 655; Isabel CÔTÉ, "La lesboparentalité: subversion ou reproduction des normes?", (2009) 22 *Recherches féministes* 25, 28; Amy AGIGIAN, *Baby Steps: How Lesbian Alternative Insemination Is Changing the World*, Middletown, Wesleyan University Press, 2004, c. 6; Elena TOURONI and Adrian COYLE, "Decision-making in Planned Lesbian Parenting: An Interpretative Phenomenological Analysis", (2002) 12 *Journal of Community & Applied Social Psychology* 194, 200-201; Catherine DONOVAN, "Who Needs a father? Negotiating Biological Fatherhood in British Lesbian Families Using Self-Insemination", (2000) 3 *Sexualities* 149.

<sup>68</sup> Kathryn ALMACK, "Seeking Sperm: Accounts of Lesbian Couples' Reproductive Decision-making and Understandings of the Needs of the Child", (2006) 20 *Int'l J. L. Pol'y & Fam.* 1; Damian MCCANN and Howard DELMONTE, "Lesbian and Gay Parenting: Babes in Arms or Babes in the Woods?", (2005) 20 *Sexual and Relationship Therapy* 333; Valory MITCHELL and Robert-Jay GREEN, "Different Storks for Different Folks", (2007) 3 *Journal of GLBT Family Studies* 81; Fiona KELLY, "(Re)forming Parenthood: The Assignment of Legal Parentage within Planned Lesbian Families", (2009) 40 *Ottawa L. Rev.* 185.

tact” itself encapsulates a gamut of arrangements. Even the dichotomy known/unknown needs to be nuanced, as the donor may be known to some, but not all, of the following: the birth mother, the mother’s partner, the child, and the wider social network of family and friends<sup>69</sup>.

The complexity of the negotiations that would be necessary may lead lesbians to choose unknown donor insemination over use of a known donor<sup>70</sup>. It appears that many women would have preferred to use known donors, but did not want a third parent in their lives or the potential legal or social challenges to their parental rights, especially to those of the non-biological mother, at some future point<sup>71</sup>. The salience of such concerns depends on the law in effect in a given jurisdiction, and it may be viewed as less relevant to the situation in Québec since 2002.

The accounts of the intentional, drawn-out character of the planning of lesbians who conceive with donor sperm illustrate the oddness of the absence of formalities in the Québec regime. Opposite-sex couples who conceive children, it is true, need not formalize their consent to become parents in writing or by notarial act *en minute* (although presumptions of paternity arise only after the solemnization of adult conjugality). But, as noted already, intention is not crucial to the establishment of parental status, as it is with lesbians and assisted procreation<sup>72</sup>. Paternal intention may lead men to declare themselves voluntarily on birth registrations. But if they fail to do so, other mechanisms operate to establish paternity.

<sup>69</sup> Erica HAIMES and Kate WEINER, “Everybody’s Got a Dad...’: Issues for Lesbian Families in the Management of Donor Insemination”, (2000) 22 *Sociology of Health and Illness* 477, 483. See also Fiona NELSON, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families*, Toronto, University of Toronto Press, 1996, c. 3; Nanette GARTRELL, Carla RODAS, Amalia DECK, Heidi PEYSER and Amy BANKS, “The National Lesbian Family Study: 4. Interviews with the 10-year-old Children”, (2005) 75 *American Journal of Orthopsychiatry* 518; M. STEVENS, B. PERRY, A. BURSTON, S. GOLOMBOK and J. GOLDING, “Openness in Lesbian-Mother Families Regarding Mother’s Sexual Orientation and Child’s Conception by Donor Insemination”, (2003) 21 *Journal of Reproductive and Infant Psychology* 347.

<sup>70</sup> C. DONOVAN and A.R. WILSON, *supra*, note 62, 655.

<sup>71</sup> See e.g. Abbie E. GOLDBERG, “The Transition to Parenthood for Lesbian Couples”, (2006) 2 *Journal of GLBT Family Studies* 13, 26-27.

<sup>72</sup> See e.g. Susan B. BOYD, “Gendering Legal Parenthood: Bio-genetic ties, Intentionality and Responsibility”, (2007) 25 *Windsor Y.B. Access Just.* 55.

Under the Québec regime, solely the actors' mutual consent – a state of mind – converts the insemination of a woman, by whatever means, from ordinary progeniture to a genetic donation facilitating the carrying out of a parental project. The objective of permitting self-insemination outside medical establishments is understandable, given factors such as the lesser expense and the increased odds of achieving insemination via more direct methods using fresh sperm<sup>73</sup>. But it is precisely where the means of the donation is less formal – outside a medical clinic, whether by self- or partner-insemination or by sexual intercourse – that definitively establishing the intentions of those involved is most important. The informality or spontaneity of consent via a meeting of the minds, as envisaged by article 538, can generate avoidable evidentiary disputes.<sup>74</sup> The decision of the legislative drafters to permit parental projects created spontaneously or informally – by the mere exchange of consent – does not appear to keep faith with the self-consciously intentional, deliberative practices of lesbians who conceive children. There is little basis for desiring to harbour the mutual expectations of intending parents and a sperm donor in “le champs de l'implicite et des présupposés”<sup>75</sup>. Moreover, the complexity of issues relating to the character of a known donor's involvement in the life of the child hints that there is room constructively to discuss, negotiate, and formalize not only the status of donor, but also other expectations about the family life that the individuals involved will shape together. Might it be wise to commit to paper not only a parental project, but also a “charte de vie parentale”?<sup>76</sup> Such avenues call into question the professional aid appropriate; it may be that a family therapist has as much to contribute as a notary, if not more. Might not such a contract favour, to

<sup>73</sup> See e.g. A.E. GOLDBERG, “The Transition to Parenthood for Lesbian Couples,” *supra*, note 71, 26ff.

<sup>74</sup> Maurice TANCELIN, *Des obligations en droit mixte du Québec*, 7th ed., Montréal, Wilson & Lafleur, 2009, para. 135, frames the point nicely: “[O]n sait que consensualisme n'est pas synonyme de délivrance de toute expression de forme. La volonté n'est prise en considération par le droit que si elle se manifeste extérieurement, de façon quelconque” [footnote omitted].

<sup>75</sup> A. ROY, *Le contrat de mariage réinventé*, *supra*, note 33, p. 179.

<sup>76</sup> For a rich discussion of marriage contracts and cohabitation agreements that sees their potential reaching far beyond the anticipatory treatment of the patrimonial effects of relationship breakdown, see Alain Roy, “La charte de vie commune ou l'émergence d'une pratique reflexive du contrat conjugal”, (2007) 41 R.J.T. 399.

use the term privileged by psychotherapists, the “harmonie relationnelle” of the adults involved?<sup>77</sup>

\*  
\*   \*   \*

This paper has explored the call for an amendment requiring formalism in the establishment of a parental project under Québec’s regime of filiation by assisted procreation. Neither its surveys of the private law nor of the empirical accounts of lesbian parenting has raised an insuperable objection to such an amendment. Indeed, each of the paper’s parts provides support for such a change. Yet recognizing the limited use of the insights collected here is crucial.

Whether seen as compelling or as a stretch, the analogies with regimes elsewhere in the codified *ius commune* are not determinative; *a priori* reasoning within private law as a self-contained system provides no answer<sup>78</sup>. Nor, empirically, do the raw data of evidentiary disputes in the law reports resolve the matter. In many other contexts, legislatures tolerate disputes over consensually concluded contracts without imposing the prophylactic of formalism. Might filiation differ in this respect from the general law of obligations, given the pre-eminence of certainty and stability in matters of civil status?<sup>79</sup> It might be supposed so. Yet the Québec legislature has retained uninterrupted possession of status as a secondary proof of filiation, a hint that its policy on filiation does not favour formalism to the exclusion of the potential unruliness of witnesses’ testimony. For its part, the social science literature cannot dictate an answer either. Legal pluralists acknowledge the effects of multiple normative orders. But their acknowledgement does not prescribe the measure in which one normative

<sup>77</sup> Alain ROY and Violaine LEMAY, *Le contrat conjugal: Pour l’amour ou pour la guerre?*, Montréal, Éditions Thémis, 2009, 54-56.

<sup>78</sup> The leading exemplar of such a formalist view of private law is Ernest J. WEINRIB, *The Idea of Private Law*, Cambridge, Harvard University Press, 1995. For discussion of how Weinrib’s formalism – far from being apolitically neutral and self-contained – privileges and enshrines a particular ideology, see Michel ROSENFELD, *Just Interpretations: Law between Ethics and Politics*, Berkeley, University of California Press, 1998, p. 49.

<sup>79</sup> See e.g. the Court of Appeal’s firm application of the irrebuttable presumption in art. 530 C.C.Q. favouring a filiation proven by the act of birth and confirmed by uninterrupted possession of status: *Droit de la famille – 09358*, 2009 QCCA 332, [2009] R.D.F. 37, leave to appeal to S.C.C. refused (*sub nom. G.R. v. I.B.*), [2009] 2 S.C.R. vi.

order should borrow from another, nor the means of distilling formal rule from informal practice<sup>80</sup>. Any insights emerging from a study of social science accounts of the parenting practices of same-sex couples cannot, then, be directly transposed into a legislative blueprint.

Ultimately, the appropriateness of amending article 538 so as to require a notarial act remains a political judgment. That judgment would involve a calculation as to whether fresh rules of form would, all things considered, advance the pursuit of legislative purpose and policy. Legislators would appropriately consider whether the judicial role in adjudicating disputes as to the existence and contours of parental projects – one that an intensified reliance on the bright-line measure of a notarial act would presumably diminish – injects judicial oversight into the regime in a positive way. Unlike the regime of adoption, for which the general provision asserts that “[n]o adoption may take place except in the interest of the child,”<sup>81</sup> the regime on filiation of children born of assisted procreation has no such statement. It might be thought, as with filiation by blood, that there is little room for a discretionary consideration of the best interests of the child, and that the judge must straightforwardly apply the enacted rules<sup>82</sup>. Yet it is possible to regard an evidentiary dispute under article 538 as offering a judge the discretion – however limited – to do what she thinks best for the child<sup>83</sup>. It might be added that a scheme that makes litigation more likely will tend to advantage individuals better-resourced than those with whom they dispute. A further response is that it was precisely the aim to spare same-sex couples the burden of persuading a judge that their fili-

<sup>80</sup> On the loss of faith that the social sciences would yield prescriptions for law reform, see Austin SARAT, “Vitality amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship”, in A. SARAT, *supra*, note 56, p. 1.

<sup>81</sup> Art. 543, para. 1 C.C.Q.

<sup>82</sup> J. PINEAU and M. PRATTE, *supra*, note 37, p. 597, para. 1950, write: “L’intérêt de l’enfant, qui est à la fois, pour le législateur, source d’inspiration et, pour le tribunal, norme d’appréciation, ne permet pas toutefois au tribunal, siégeant en matière de filiation, de contourner ou de moduler les dispositions du Code civil.” See, similarly, Michel TÉTRAULT, *Droit de la famille*, 3d ed., Cowansville, Éditions Yvon Blais, 2005, p. 1093. But for the remarkable refusal by a Superior Court judge to confirm the paternity of a man who was unquestionably the genetic father of the child in question, see *Droit de la famille – 10910*, 2010 QCCS 1691 (“Le droit à la filiation appartient au premier chef à l’enfant. C’est d’abord et avant tout à l’enfant qu’il faut penser en telle matière”: *id.*, at para. 53); *rev’d*, *Droit de la famille – 11394*, 2011 QCCA 319, [2011] R.J.Q. 321.

<sup>83</sup> Judicial appreciation of the evidence of uninterrupted possession of status is likely, similarly, not to be an entirely mechanical process.

ation advances the child's interests that underlay the decision to establish extra-judicial means for establishing filiation, outside the regime of adoption<sup>84</sup>. However relevant such considerations might be, the traditional doctrinal approach to filiation as a syllogistic matter of hierarchically ordered proofs provides few resources for airing them.

The political assessment of the possible amendment would also need to gauge the extent to which prospective parents might experience or reasonably perceive an obligatory recourse to a notary as burdensome, financially or otherwise<sup>85</sup>. Might a mandatory rendez-vous with a notary expose prospective parents to homophobic or heterosexist encounters? Market forces would predictably induce some notaries in Québec's larger urban centres to intensify their specialization in the formalization of parental projects. But would lesbian couples in the further-flung regions find welcoming and informed practitioners? With no disrespect to the notarial profession, the question must be raised, especially in the light of the objections to marrying same-sex couples filed in other provinces by officers licensed to perform civil marriages<sup>86</sup>. That example provides confirmation, were any needed, that legislative pen strokes do not change overnight the hearts and minds of those who carry out the law.

Political decision makers would undoubtedly bear other factors in mind, too. A legal sociologist has cautioned against the "fétichisme de la loi", reminding us that family law has never mirrored all social practices and it never can<sup>87</sup>. Law makers would do well to remember that many

<sup>84</sup> For emphasis on the legislative choice made in Quebec to favour birth registration, see Alain ROY, "La conjointe de la mère doit-elle adopter l'enfant issu d'une procréation médicalement assistée?", (2003) 105 *R. du N.* 119. Compare Nancy D. POLIKOFF, "A Mother Should Not Have to Adopt her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century", (2009) 5 *Stanford Journal of Civil Rights and Civil Liberties* 201.

<sup>85</sup> For cautions about the burdens of the notarized act *en minute*, see J.-G. BELLEY, *supra*, note 13, paras. 23-24.

<sup>86</sup> *Re Saskatchewan Marriages Commissioners*, 2011 SKCA 3, 366 Sask. R. 48; *Nichols v. M.J.*, 2009 SKQB 299, 339 Sask. R. 35; Bruce MACDOUGALL, "Refusing to Officiate at Same-Sex Civil Marriages", (2006) 69 *Sask. L. Rev.* 351

<sup>87</sup> Pierre NOREAU, "Notions juridiques et réalité sociale: Un éternel divorce ou un divorce nécessaire? – Le cas du droit de la famille", (1999) 33 *R.J.T.* 307, 323. See also Pierre LEGRAND, "*Antiqui juris civilis fabulas*", (1995) 45 *U.T.L.J.* 311, 355 ("the code inevitably distorts or conceals the real world: family law is totally unlike the family" [footnote omitted]).

kinds of prudent conduct are best left unlegislated. Indeed, couples keen to order their filial affairs do not require legislative permission for recourse to a writing or a notarial act<sup>88</sup>. Would an amendment to article 538 be yet another instance of the “legislative inflation” rightly decried by Carbonnier?<sup>89</sup>

Beyond the important question of article 538, the disputes and discussions arising from Québec’s pioneering regime of filiation by assisted procreation may stimulate broader reflections. Speaking of the decision to stipulate no formalities for creation or proof of a parental project, one scholar of Québec civil law has said that the legislature acted “[p]ar naïveté, optimisme ou négligence”<sup>90</sup>. Another, more charitable reading would hypothesize that the drafters wished to pursue equality for lesbian couples and for their children by following as closely as possible the regime applicable to opposite-sex couples<sup>91</sup>. The worry, explored by this paper, that a too-literal copying of the regime of filiation by blood might ill serve those for whom the new regime was primarily created evokes the larger concerns of thoughtful feminist scholars about equality and law reform<sup>92</sup>. It might be a fair reading of the law-reform literature to say that commentators call for legislatures to address the lived experiences of diverse family forms more often than they set out concrete alternatives to the imitation of existing, potentially inapplicable, regimes.

<sup>88</sup> On the potential for notaries as architects of private social order to work in the interstices of the form and substance imposed by the civil code, see R.A. MACDONALD, *supra*, note 16, paras. 124-26. On facultative recourse to notarial or other forms, see M. TANCELIN, *supra*, note 74, para. 280.

<sup>89</sup> Jean CARBONNIER, *Droit et passion du droit sous la Ve République*, Paris, Flammarion, 1996, p. 107-14.

<sup>90</sup> M. PRATTE, *supra*, note 10, 565.

<sup>91</sup> Marie-France BUREAU, *Le droit de la filiation entre ciel et terre: Étude du discours juridique québécois*, Cowansville, Éditions Yvon Blais, 2009, p. 197.

<sup>92</sup> See e.g. Alison DIDUCK, “If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved’: Law, Identity and Parenthood”, (2007) 19 *Child and Family Law Quarterly* 458; Rosemary HUNTER (ed.), *Rethinking Equality Projects in Law: Feminist Challenges*, Oxford, Hart, 2008. On the limits of marriage as a model for regulating other adult intimacies, see Lisa GLENNON, “The Limitations of Equality Discourses on the Contours of Intimate Obligations”, in Julie WALLBANK, Shazia CHOUDHRY and Jonathan HERRING (eds.), *Rights, Gender and Family Law*, Abingdon, Routledge-Cavendish, 2009, p. 169.

The legislature of Québec may tinker with its path-breaking regime or it may leave it to other participants in legal order (or disorder) to adjust their conduct to the provisions as currently drafted. In the meantime, the problem of channeling parental intention may be taken as a signpost on the unfinished journey towards an appreciation that manifold forms of family may find justice and equal respect in sensitively different treatment: equality in family law need not mean sameness.

—

|

|

—

—

|

|

—