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Mothers, Other Mothers, and Others

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Introduction

My title derives its inspiration in part from the end-of-day watch sounded for my daughter by another child at her day-care centre when I arrived to pick her up: ‘...your morn's here-the other one.’ As I think back to that moment more than half a decade ago, I remember with fondness the ease with which my daughter's little friends were able to assimilate that she didn't have a daddy, but rather two mommies—even the competitive little girl who said, 'Oh yeah, well I have about 10 mommies.'

Too, I recall a yet earlier conversation with one of my feminist intellectual heroes (who was then on the cusp of a post-modern turn). I shared with my colleague that I found it interesting yet odd that I, a lawyer turned legal academic, did not have what I regarded as a legal relationship with the new baby in my life. My colleague responded that perhaps that was a good thing, perhaps that was better; after all, why would I want to, need to, acquiesce to law's power to define and regulate. To be frank, as unsettled as I was by the contradictory nature of my own position, I was troubled by her response. I muttered my well-worn rejoinder that I thought legal relations and regulation were more complicated than that.

In the years following this conversation, as Brenda Cossman (1994) has noted elsewhere, brave lesbians and gay men are now taking their lives to court to challenge and resist homophobic discrimination. A community of people who scarcely, if ever, experienced the law as a shield has taken it up as a sword to advance and vindicate equality claims. To even the most casual observer, the successes and near misses of lesbian and gay litigants and law reformers illustrate that a significant social and political shift has been achieved over the last decade. In this shift, lesbians and gay men have savoured victories as often as they have endured defeats. To be sure, not every
lesbian litigant would embrace the characterization of 'success' or 'victory'. In some of the litigation where lesbian former partners have squared off against each other, one lesbian's victory has been another lesbian's loss. Even more amazing, out lesbian and gay lawyers are appearing as counsel in some of these cases. Of this phenomenon, Laura Benkov has suggested that 'the past and present are colliding in the courtroom' (1994: 37). These are interesting times in which to be a student of law, gender relations, and social change. There are, nonetheless, notes of caution to be sounded at the prospect of litigating one's way to social transformation. I count myself numbered among those who are dubious about the nature and endurance of the successes that can be experienced in the courtroom (Gavigan, 1992; see also Fudge, 1991; Glasbeek, 1989; Fudge and Glasbeek, 1992).

In this chapter, I consider what is meant when we think of law as a 'gendering strategy' (Smart, 1992) in relation to lesbian parents and the varied relations and encounters with law that lesbians with children have. I identify and engage critically with two themes in lesbian legal scholarship: (1) that lesbians are 'outside' the law, and (2) that lesbian mothers are mothers just like other mothers. I examine four different forms of lesbian child custody litigation to illustrate that the characterization of 'inside/outside' the law does not fully capture the complexity of lesbians in relation to the law, as well as to illustrate the complexity (and not infrequently the fragility) of lesbian relationships to children in their lives. In this chapter, then, I hope to illustrate the importance of theorizing Jaw when theorizing its contribution to gender relations, and lesbian engagement with both.

Theme 1: Lesbians Inside/Outside Law?

At the outset, I concede that I find troubling many themes in lesbian writing and scholarship in relation to law, and here I include my own modest contribution to the literature. One then k in lesbian writing about law is that lesbians are 'outside' the law (Arnsp, 1995; Robson, 1992). The evocative cri de cœur of the prominent American lesbian essayist, Minnie Bruce Pratt -how I love is outside the Jaw' (1991: 228; cited by Arnsp, 1995: 378)-is powerful, haunting, almost irresistible. My response (rather too cryptic, I now see) has been to assert: 'Lesbians do not live outside the law in a kind of legal limbo, nor do they exist in a legal vacuum. They shape and are shaped by the legal and social relations in which they live' (Gavigan, 1995a: 103).

In this chapter, I hope to illustrate that both positions need to be revisited, rethought. After all, lesbians who have been married, lesbians who have had children with men, and lesbians who have given birth to children or who have adopted children these lesbians are not 'outside the Jaw'. They can't 'opt out' (Brophy and Smart, 1985: 1). They live in relation to law; even when they leave the marriages, their legal relationships do not end. Rather than have her children dragged through an ugly custody battle at the instance of their father (with her mother as a character witness for him). Minnie Bruce Pratt (1991:
I could have stolen them and run away to a place where no one knew them, no one knew me, hidden them, and tried to find work under some other name than my own. I could not justify taking them from all their kin, or their father in this way. Instead, from this marriage I carried away my clothes, my books, some kitchen utensils, two cats. I also carried away the conviction that I had been thrust out into a place of terrible loss by laws laid down by men. In my grief, and in my ignorance of the past of others, I felt that no one had sustained such a loss before...I became obsessed with justice. (Ibid., 44-S)

When Minnie Bruce Pratt made the excruciating decision not to challenge her husband's assertion of custody of their sons, she had been snared already in the complex sticky web of family and law that touches every married woman and mother.

But for some lesbians, it may be possible to say: 'How I love (and whom I love) is outside the law.' And here, I am thinking of some of the cases involving American lesbians who have been told by former partners or their families, and then by the courts, that they are not parents to the children they have been raising. In legal terms, these lesbians, and some others who have attempted to adopt their partners' children, are told that they do not have 'standing'-no legal interest in or right to assert in relation to the children. They are not mothers; they are not parents. Their relationships do not amount to parental or familial relations. But, as I will illustrate below, even this is subject to challenge and change; the law here is uneven.

Another implicit theme in feminist legal literature suggests that lesbians have been constructed as the archetypical bad mothers of legal discourse, and as a result, always at risk in the face of a disapproving legal system (e.g., Arnup, 1989, 1995). In her recent explication of the shifting nature of maternalist ideology in law, Susan Boyd has carefully analysed how three important 'access' issues in child custody litigation have been articulated. And while the issue of sexual orientation in access is not central to her piece, Boyd intimates that law's fear of single mothers means that lesbians can anticipate 'harsher evaluations' by judges (1996a: 504). However, while the obsessive fury of husbands often seems insatiable, recent experiences of lesbians in Canadian courtrooms suggest less predictable, less certain results.

It seems to me that we can no longer assert generally or with confidence that lesbians are in or out of the law or on the wrong side of the legal tracks; it is important to identify, illustrate, and analyse the varied and changing, indeed, contradictory ways in which the law relates to lesbians and lesbians to the law. Important shifts, and the not infrequent victory, however partial, fragile, and costly it may be, need to be acknowledged (and understood). Some of the cases I discuss below are illustrative of these shifts and contradictions.
**Theme U: Lesbians 'Unmodified'—Mothers or Parents?**

One question that has vexed me before is: 'What makes a woman a mother?' (Gavigan, 1995a: 107). Here I modify it to ask: 'What makes a lesbian a mother?' Are lesbians 'mothers just like others' (Arnup, 1989)? Always? The commentary on the earliest reported lesbian custody cases stressed, in the face of patriarchal wrath and judicial apprehension, that lesbian mothers were not 'demons but mothers, just like others'. The importance of this contribution cannot be overstated: Arnup broke lesbian ground in feminist legal literature at a time when few scholars and lawyers could bring themselves to say the word 'lesbian' out loud. However, new and emerging forms of litigation indicate that many lesbian mothers are not like other mothers: there are no fathers or husbands, no lesbian mothers being aspersed because of their sexual orientation, but rather two women who have come together or who have come apart.

But what does it mean to have two mothers? The language of 'mother' is seldom unmodified: birth mother, adoptive mother, real mother, bad mother, good mother, lesbian mother... The term 'mother' implicitly invites invocation of the term 'father', as if this dyad is natural and inevitable that a child must have one of each. Lesbian couples involved in parenting and child-rearing themselves seem to cede some primacy to the (birth/natural/real) mother: the non-birth/social' mother may be called the co-mother (Williams, 1995: 109), the other mother (Adams, 1995; Nelson, 1996: 85), the second mother (Fleming, 1995), the co-mom (Czyson, 1995), step-parent (Rounthwaite and Wynne, 1995: 87), or stepmother (Nelson, 1996:84). Where a child was born or adopted into a lesbian relationship, the women seem to regard themselves as mothers and other mothers. When the child comes with the mother from a previous, usually straight, relationship, the other woman may become 'co-parent' or 'co-mom'. The age and acceptance of the child and the nature of the father's involvement may also shape the lesbian co-parent's relationship with the child or children (see, e.g., Rounthwaite and Wynne, 1995). A recent case in Ontario (Buist v. Greaves, 1997), which I will discuss below, has pushed this issue one step further, by testing the meaning of 'mother' in the Children's Law Reform Act. ¹

**Engendering Law**

**Law as a Gendering Strategy**

In the inaugural issue of the journal *Social and Legal Studies*, Carol Smart (1992) argued that feminist socio-legal scholars ought to shift their inquiry from earlier modes and levels of analysis to think now of law as gendered (rather than male or sexist). This analytic distinction is important, she urged, because 'the idea of it as gendered allows us to think of [law] in terms of processes which will work in a variety of ways and in which there is no relentless assumption that whatever it does exploits women and serves men' (1992: 33; emphasis added). It is more complicated than that. This has long been a
theme in Smart's work (1981, 1985), and her insights have been important and influential for many of us in Canada. In this chapter, I take up Smart's invitation to examine 'How does gender work in law and how does law work to produce gender' and to think of law as a 'gendering strategy' (1992: 35). This form of inquiry, combined with Smart's appreciation of the uneven nature and development of legal regulation (Smart, 1986) and her injunction against feminist instrumentalist analyses, is clearly a fruitful way to proceed.

One of Jaw's contributions to gender relations, Smart argued, is the 'woman of Legal Discourse': the 'gendered subject position which legal discourse brings into being' (1992: 34). It is here where my departure from Smart begins to form. Smart is careful to attempt to avoid ascribing (to borrow fromCain, 1994: 44) 'causal primacy' to legal discourse: she characterizes law as 'partial author' (1992: 39). Nonetheless, her illustrative exemplar (the bad mother) belies her own critique of less sophisticated forms of feminist legal analysis.

The category of bad mother, per Smart, came into being with the enactment of draconian criminal legislation that captured 'lewd women' whose newborn infants were found dead. These apparently reluctant mothers were presumed by operation of this statute to have murdered their newborn infants unless they could produce two witnesses to provide evidence to the contrary (21Jae.I c27 (1603)). This statute was repealed in 1803 by the same statute (Lord Ellenborough's Act, 43 Geo.III (1803)) that made abortion at any stage of pregnancy a statutory felony, thus capturing women, married or otherwise, who were trying to avoid motherhood (Gavigan, 1984). Smart (1992: 38) delineates pieces of legislation that not only 'constructed a category of dangerous motherhood' but also widened 'the net of law ... at precisely the same time as it made it increasingly difficult to avoid unmarried pregnancy and childbirth.' There are a number of difficulties with Smart's analysis, not the least of which is the uneasy fit her discursive exemplar, the bad mother, has with her theoretical imperative. In other words, Smart's explication of the sixteenth-, eighteenth, and nineteenth-century statutes does not illuminate legal 'processes which ... work in a variety of ways and in which there is no relentless assumption that whatever [law] does exploits women and serves men' (ibid., 33). In fact, a broader and closer analysis of the 'dangerous' mothers of infanticide law reveals that this 'legal category' in practice was always unstable and imperfectly implemented: juries often refused to convict young women indicted and many nineteenth-century judges expressed sympathy for them (Backhouse, 1984b; Gavigan, 1984). Medico-legal experts devised 'scientific' tests to determine whether or not the infant, whose birth had been concealed and whose death was alleged to have been caused by maternal murder, had breathed or not-if not, the unmarried woman was not caught by the statute (Gavigan, 1984). Leaving aside my own view that a category of (bad) Woman of legal discourse might better be illustrated by the experience of unmarried women under the English Poor Law (Thane, 1978) or by the women who were convicted of petit treason when they killed their husbands (and who experienced scant judicial or
public mercy when they were burned at the stake) (Gavigan, 1989-90). I do have a deeper theoretical concern: Smart examines only one level of law (legislation), defines it as 'legal discourse', and thus imposes closure, offering but a partial image of that of which law is but a partial author.

This observation of the contradictory images of women in legal and medicolegal discourses, even in the same area of law, is not novel. In her early work on the legal construction of women's sexuality, Susan Edwards (1981) illustrated quite contradictory images of female sexuality in sexual offences: that of female sexual passivity in sexual offence legislation and female sexual precipitation in the legal process. Even in this manifestly gendered area of criminal law, there is no one Woman in the legal discourse.

Thus, I am concerned that the much criticized 'Woman' of conventional feminist discourse has been replaced by Smart's 'Woman of legal discourse', notwithstanding her own disclaimer: 'It is this Woman of legal discourse that feminism must continue to deconstruct but without creating a normative Woman who reimposes a homogeneity which is all too often cast in our own privileged, white likeness' (Smart, 1992: 39).

While I accept her admonition, I find Smart's notion of legal discourse to be too discursively unidirectional and her Woman of legal discourse to be discursively unidimensional (and relentlessly exploited as a heterosexual woman). Constituted as she is by {legal} discourse, she has neither experience nor agency: she has neither breath nor breadth. In the film A Simple Wish, Ruby Dee's character was rendered cartoonishly unidimensional by the flick of a hand of Kathleen Turner's wicked fairy godmother. Smart's Woman of legal discourse similarly owes her flattened fate to the something that has been done to her in the 'Toon Town' of legal discourse.

Again to be clear, I accept much of Smart's theoretical contribution. An attempt to identify, appreciate and illustrate the complex, uneven, contradictory, and materially significant nature of law and of family, and of gender inequalities, informs my work (Gavigan, 1992, 1993). In particular, I continue to be interested in identifying the images of women in legal discourses and practices. These images, including the images of lesbians, are as uneven, incomplete, complex, and contradictory as the law itself. In my interrogation of the various lesbian parenting cases, will I find the Lesbian of legal discourse? Is there a gendered subject position of lesbian or lesbian parent constituted by law? I hope to illustrate, with the aid of Smart's theoretical prescription (if not her illustration), legal relations and legal processes that 'work in a variety of ways and in which there is no relentless assumption that whatever Jaw does exploits' lesbians.

Law as Practice, Process, and Institution

The discourse of law does not correspond with everyday thought except in those areas of life such as the stock exchange where the legal form has constituted what is everyday. (Cain, 1994: 40-1)
Access to justice may be defined most narrowly as access to the courts. The words uttered in judgment by a court are the product of litigation. The cost of access to justice through litigation is prohibitive to all but the most financially secure litigant. Family law, as traditionally practised, is costly to private litigants and legal aid plans alike. Unlike criminal defence work, family law is ‘paper-intensive’ and thus expensive. This may explain in part what Brenda Cossman and Carol Rogerson (1997: 785) found in their recent study:

With the exception of child protection cases, the majority of family law cases are not litigated to a resolution. Anecdotally, it is said that between 90 and 95 percent of family law cases settle at some point in the process prior to a trial—whether by an agreement between the parties negotiated by their lawyers without recourse to the courts, or by minutes of settlement incorporated into a consent order after litigation has been commenced, in some cases prior to the hearing of the first motion or in others after the first motions, or after a settlement or pre-trial conference.

Access to the courts via litigation is also a question of access to resources, which, for many women, are diminishing with the evisceration of legal aid plans. Thus, we have a fraction of private family law cases actually litigated and resulting in a judicial pronouncement, and fewer still reported. The cases, reported or not, that go to trial are those that defy (or in which at least one party defies) settlement.

Susan Boyd has noted with concern that one problem with legal academic research focusing on reported cases in family law is that most reported cases involve white people. Boyd (1996a: 498) considers that perhaps this may derive in part from the fact that ‘white people may feel more comfortable than people of colour resorting to the court system to resolve family disputes.’ Yet, surely few litigants go willingly or happily to court and fewer still savour any measure of comfort from the process. Who has the resources to participate in the legal process, who takes whom to court, and who accepts the legitimacy of judicial determinations seem more relevant here. In this process, gender, race, and class, power and money, and not infrequently our old friend the state are implicated. For instance, in April 1997, family court judges reported to the Ontario Legal Aid Review that fully 50 per cent of litigation in matters of child support and child protection is instituted by the state (Ontario Legal Aid Review, 1, 1997: 801). And, as Minnie Bruce Pratt (1991: 44) learned. one can experience legal ‘process’ without ever going to court:

I was judged with finality. Without my climbing the steps of the courtrooms of Cumberland County, I was sentenced. Without facing the judge since my lawyer feared that ‘calling attention to my lesbian identity’ would mean that I would never see my children again, I was declared dirty, polluted, unholy. I was not to have a home with my children again. I did not die, but the agony was as bitter as death. . . .
At the heart of this is the very nature of an adversarial legal system in which (formally equal) litigants commence their actions and define their issues—where these litigants want to win. The courtroom is a site less of principle than of tactics, where perceived weaknesses in either party are exploited by the other. In all of this, the influential role of lawyers as litigators cannot be overstated. The courtroom is the home playing field not only of judges, but of legal advocates, whose practice it is to translate and transform social and personal struggles and issues into legal discourse (Cain, 1994; Glasbeek, 1989). It is a lawyer who advises the lesbian litigant not to use the word 'lesbian' in her affidavit, and it surely is a lawyer who advises an avenging renegade husband to sprinkle liberally the word 'lesbian' throughout his own affidavit. Just add 'lesbian', stir, and hope for the best. It is the lawyer who advises the lesbian mother how 'out' to be or not be if she wants to win. And thus, it is often the lawyer who lacks the courage to 'raise fearlessly every issue' on behalf of the lesbian litigant or who advises on matters about which she or he is less than expert.

Considered in this light, it is as much a cause for concern as for celebration that the 'past and present' collide in the courtroom—a forum in which the perspectives and experience of past and present are selected, constructed, tailored, emphasized, and ignored at the instance of the contesting litigants in their efforts to persuade a trial judge or appellate panel of the 'rightness' of their position. But, as been argued elsewhere (see, e.g., Greenwood and Young, 1976; Thompson, 1975; Hay, 1975; Smart, 1981; Gavigan, 1988, 1992; Chunn and Gavigan, 1988), and as I have argued above and hope to illustrate below, the law is filled with contradictions; it is neither unidimensional nor monolithic.

Lesbians and Their (Legal) Relations

Lesbians find themselves in four legal contexts in family court. These four contexts are not finite or exhaustive. Indeed, at the risk of appearing to invoke an essentialist image of lesbians, I am inclined to the view that the range of contexts is perilously close to infinite given the complexity and diversity of political and interpersonal possibilities that characterize lesbian lives.

Lesbians in (Heterosexual) Family Court

Lesbian and gay custody cases in which straight (former) spouses use sexual orientation as a weapon and in evoke dominant notions of appropriate parenting reveal as much about the social meaning attached to biological and social parenting as they do about the wrath of the 'straight spouse spurned'. The use of 'lesbian' and/or 'sexual orientation' as a weapon hearkens back to an earlier legal era when 'fault' was an expressly relevant factor in matrimonial causes, such as divorce. In divorce proceedings, evidence of matrimonial 'misconduct' or the commission of a 'matrimonial offence' could establish grounds for divorce; this evidence was also relevant with respect to collateral issues, such
as support and custody. A wife who had deserted her husband or who had committed adultery was not entitled to support. Until 1968, a wife's homosexuality in and of itself could not support a husband's divorce petition; however, it could be drawn in under the rubric of cruelty. When the federal Divorce Act was enacted in 1968, the grounds for divorce were broadened considerably. Many matrimonial 'offences' committed since the celebration of a marriage (including having 'engaged in a homosexual act') were articulated in s. 3 to support a divorce petition, and even the 'marriage breakdown' provision entrenched the significance of fault: the person who deserted the marriage had to wait five years before being able to petition for divorce-s. 4(1)(e)(ii); the deserted spouse could petition after three years-s. 4(1)(e)(i). In 1985 the Divorce Act was amended to eliminate many of the fault-based grounds and to limit evidence of (bad) conduct, except where relevant to that person's suitability for custody of children. Despite this attempt at formal inhibition of allegations of (mis)conduct, some lawyers and their clients continue to be of the view that they must 'make her look like a tramp' (or worse) in divorce and custody proceedings.

Susan Boyd has ably illustrated that judicial assumptions about normal families and lifestyles are firmly rooted. The English case, C. v. C., upon which she comments, involved custody litigation over a seven-year-old daughter of whom the mother had been the principal parent and caregiver in the first six years of the child's life. After the parents separated, the mother became involved in two lesbian relationships, the second of which was more significant and lasting. The father remarried, and in his bid for custody argued that he offered a stable, heterosexual nuclear family and a bigger house. Each parent was found by the trial judge to have a loving relationship with their daughter, and she was happy in both homes. The trial judge indicated, says Boyd, 'if he could choose between an exclusively heterosexual lifestyle and a lesbian one, he would favour the "normal"' (1992: 278). But given the close bond between the mother and child, and the fact that the child would inevitably learn that her mother was a lesbian, the trial judge awarded custody to the mother and access to the father. On appeal, the Court of Appeal allowed the father's appeal and ordered a new hearing, which ultimately again favoured the mother. Boyd draws out the English judges' uncritical reliance on their subjective experience and beliefs and she is not comforted by their recitation of the 'now routine' declaration that the mother's lesbian relationship was not conclusive in deciding the appeal.

C. v. C. illustrates the context in which lesbian mothers most often (to date) find themselves in court defending a custody application by a normal, remarried ex-husband or (less typically in Canada) by the child's grandparents. As recently as July 1992, the British Columbia Supreme Court released a judgment in a case (N. v. N.) in which a father relied on the fact of the mother's lesbian relationship with an RCMP constable to support his ultimately unsuccessful bid for custody of their four children. Both parents had been devout members of
the Salvation Army, and while the trial judge was not certain of the precise reason for Mrs N's 'lapse of faith', the inference drawn by her husband implicated her sexual identity. The trial judge, while not unsympathetic to Mr N. noted that his 'steadfast and unrelenting reference to the gospels had just the opposite effect on Mrs. N than what he had hoped. Mrs. N established a relationship with another woman' (1992: 3).

The cases involving lesbians and gay men coming out of straight relationships reveal much about the gendered nature of parenting. For instance, in Canada the struggles of gay men in relation to their children tend to manifest themselves in reported cases in which a gay father has separated from his wife and mother of their children, having wrestled with the discovery and/or acceptance (after marriage) of his sexual orientation. Generally, the legal issue here concerns not custody of the children, but rather his right to access to them. and more specifically, whether he can have overnight access (see, e.g., W. v. W., 1985; D. P.-B. v. T. P.-B., 1988; Saunders v. Saunders, 1988; Terrzpleman v. Templeman, 1986). Can he have them sleep in the same home where he sleeps? Can he have his lover sleep in the house, in his room, in his bed, when his children are visiting? Can he defeat the assumption that overnight access in these circumstances exposes his children to the 'harmful effects of his lifestyle' (W. v. W., 1985), and where the merits and presumed 'stability of a sexually orthodox environment' (S. (J.J.) v. S. (G.E.), 1989) are preferred without question, challenge, or explanation.

Often, the wife's pain at the rejection she perceives and the disruption she has experienced is palpable (e.g., Martini v. Martini, 1987), but occasionally the courts offer us a glimpse of the wider familial dimensions. In a 1989 decision of the Newfoundland Supreme Court, in which, as a result of the separation, the wife and children became economically dependent on her parents and lived in their home, the court expressed a particular concern:

immediate overnight access may have a negative affect on the best interest of the children in this particular case. The maternal grandparents have openly expressed to the children their abhorrence of their father's homosexual lifestyle. The mother is economically dependent on her parents and she and the children have no choice but to reside with them at the present time. I feel a reasonable time should be given for the grand parents to get used to the idea that the father will have overnight access and hopefully this will give the mother an opportunity to find alternative living arrangements. (A.E. v. G.E., 1989: 144)

Husbands, too, continue to hurl the 'lesbian' epithet, both real and imagined, at their wives; but they do so with less confidence of vindication by the judiciary. One husband in Sault Ste Marie (Tomanev v. Tomanev, 1993) inferred that his wife's refusal to be a 'traditional wife' was conclusive evidence of both her lesbianism and her mental illness. The court disagreed and the wife was awarded custody of the couple's two children. Another suspi-
cious husband insisted that his wife could be on the way to initiating a lesbian relationship with their five-year-old daughter (*Korniakov v. Korniakov*, 1997). Judge Main in the Ontario Court, Provincial Division, held that Mr Korniakov was incorrect in his conclusion. Custody of the couple's two children was awarded to the mother.

In 1996, the Ontario Court, General Division, was the site of a custody application involving two girls, aged 12 and 13, who had been in their father's custody for 11 years, pursuant to a separation agreement with their mother (*Quellet v. Quellet*, 1997). The father's current partner had been a 'mother figure' for the last eight years. After the separation, the mother had two short-lived relationships, which produced two more children, and at the time of the court hearing, in 1996, she had embarked on her second lesbian relationship. The girls expressed a preference to live with their mother (although one of them was nervous about what her friends and others would say about her mother being a lesbian). The mother applied for custody. At the hearing, the mother and the maternal grandparents commended the father's care of the children and his ability to facilitate access. The mother won custody, with generous access to the father. The parties were to work out the details of access between themselves and were told to return to court in a year if they could not work out an agreement. With respect to the one daughter's anxiety about her mother's sexual orientation, the court noted, 'There was a need, at the present time, for support and therapy, if necessary to cope with society's sometimes uneducated reflection upon their mother's sexual orientation' (1997 WDLF 092).

This case buried in the *Weekly Digests of Family Law*, is interesting. Here, we have an almost perfect father who, with his new wife, has raised two girls for many years. Their mother has had two other children in the meantime and is at the beginning of her second lesbian relationship. And still, the court awarded her custody of the children. Clearly, the age and expressed preference of the daughters carried weight. But we may be able to infer that the father did not make an issue of the mother's lifestyle or sexual orientation, and did not ask the court to either. The positions taken by the parties often shape, if not determine, the tone and tenor of a judge's judgment.

The wider familial dimensions in a British Columbia adoption case may open yet another window on the limits of acceptance of sexual orientation in the wider community: here a young lesbian mother was not forced into litigation by her child's father; she did not lose custody of her child to an angry father. This woman, a single parent, was pressured by her own parents to give up her child for adoption because of their insistence that as a lesbian she could not raise a child (*Adams v. Woodbury*, 1986). Some six weeks later, having been through counselling, the young mother decided that being a lesbian did not preclude being a parent; she attempted unsuccessfully to regain custody of her daughter—over the vigorous objections not of her child's adoptive parents but of her own parents.

Some of these cases involving the judicial treatment of lesbians and gay men
who leave straight marriages or who run afoul of parents' expectations illustrate what others have noted elsewhere: lesbian and gay parents are at risk in the courtroom if they do not conform to dominant notions of appropriate gay sexual behaviour: quiet and apolitical. But these cases also illustrate the gendered nature of post-separation parenting: for gay fathers, as with most fathers, access is their legal issue. Their sexual orientation, as raised by their spouses, parents, and in-laws, may be constructed in a way that shapes the kind of access arrangements they may have. With respect to lesbians, custody of their children continues to be contested and litigated at the instance of the men who have been left. And, to borrow from Shakespeare, hell frequently hath no fury like a straight spouse spurned. Yet we also see judges declining to acquiesce to the husbands and a shift in which judges now not only say that the mother's sexual orientation is not determinative of the issue in custody, but some of them actually seem to mean it. The fact that they have to say it at all, of course, is due to the fact that someone has taken the lesbian mother to court, has refused to settle, and has litigated the issue. The shift? Litigating husbands can no longer be supremely confident of winning.

Lesbians Take Each Other To Family Court: Lesbian Mothers and Other Mothers

Not every lesbian relationship lasts forever. Some even unravel with pain, rejection, and recrimination. Some lesbians have resisted the label 'spouse' in order to avoid responsibility for the children of the relationship. This was the case in a British Columbia case, Anderson v. Luoma (see Andrews, 1995; Arnup, 1997; Gavigan, 1995) in which Arlene Luoma successfully eschewed any responsibility for the children who had referred to her as 'their Arlene'. The legal significance of this case has always been limited, as it was decided under a particular definition in a piece of BC legislation. More recently, the Supreme Court of Canada, in M. v. H. (1999) held that the heterosexual definition of spouse (for the purpose of spousal support) in the Ontario legislation violated M's equality rights under the Canadian Charter of Rights and Freedoms. Arlene Luoma may well be grateful that she left Penny Anderson where and when she did!

In many provinces, including Ontario, a parent is defined in family law legislation to include someone who has demonstrated a settled intention to treat a child as a child of his or her own family (i.e., 'social parents'). In Ontario's Children's Law Reform Act, a parent or any person may apply for custody or access to a child—neutral phrase, 'any person', helping grandparents and lesbian social parents alike. The significance of the gender-neutrality, and indeed 'familial-neutrality', of these family law provisions should not be underestimated or misunderstood. The legislation does not restrict standing in child custody cases to parents and thus allows 'third parties' to be heard. This apparently arcane legal point is a matter of some consequence to lesbian social parents who do not have a biological relationship to a child they may be parenting with a biological parent.
In Ontario, recently, a lesbian couple who had separated litigated many issues as a result of their unravelled relationship (Buist v. Greaves, 1997). One of the contested issues between them involved custody of a four-year-old boy conceived by alternative insemination during the course of their relationship. The biological mother had received an offer of employment in another province and she proposed to take the little boy with her. Her former partner sought to prevent her from taking the boy with her. One interesting aspect of this case is that the social parent asked for a declaration, under s. 4 of the Children's Law Reform Act, that she, too, was the mother of the child. While she did not want to displace the biological mother, she sought to have her own relationship to the child recognized as that of 'mother' as well. In declining to make the order, the trial judge had this to say:

There is no doubt that the relationship . . . is very close; however, [he] does not consider her his mother. Ms Greaves is his mother. He calls her 'mama' while he calls Ms Buist 'gaga' which is short for Peggy. He was given Ms G's last name at birth. (1997 OJ No 2646 at para 35)

While on the facts of this case, the trial judge may well have come to a conventional and defensible conclusion on the issues of custody (to the biological mother), access (to the social parent), and child support (a modest sum to be paid by Buist), her route to that conclusion, including her identification of these indicia of 'mother', is troubling. The appellation of parents in lesbian households may bear little resemblance to or may not share the same meaning as in households where the parents are referred to as 'Mommy' and 'Daddy'. Similarly, the fact that a child is given the last name of one parent ought not in and of itself, be conclusive of anything. If it is, every mother whose child bears the surname of its father has cause for concern.

The gender- and familial-neutral language of the Ontario legislation allows lesbians who are not biological parents to assert claims with respect to the children in their lives. And, while Buist v. Greaves offers an illustration of the difficulty a lesbian social parent has in asserting an equal claim to motherhood, she nonetheless has standing to be considered as a child's parent. Neither outside law nor instances of the quintessential bad woman/mother of legal discourse, these lesbian cases suggest that finer, more nuanced analytic tools need to be deployed to explicate the lesbian victories and lesbian defeats experienced here.

Other Mothers and Others: Surviving Lesbian (Social) Parents Meet Others in Family Court

Lesbian parenting cases, combining as they do birth and adoption, fostering and social parenting, and multiple possibilities for family forms, also involve risks and chances and heartbreak. It is tempting to liken lesbian social parents
to tightrope artists who work without a net; a delicate balancing act is required, and sometimes everything falls.

In the Michigan case, *McGiffin v. Overton & Porter*, a lesbian social parent was told by an appellate court that she did not have standing under the state's child custody legislation to apply for custody of two boys she had helped to raise for eight years. Her life partner, their biological mother, died in January 1995. Just prior to her death, the deceased mother had executed a will naming her partner the guardian of the children. The biological mother indicated that she did not want their biological father to have custody because he had established no relationship with them. He was also $20,000 behind in child support at the time of her death. Upon receiving notice of the surviving partner's application to be appointed the children's guardian, the father moved swiftly: he obtained *ex parte* orders for custody of each of the boys, and at the end of February he collected them from school and had them in his custody. Despite the intervention of a children's law clinic urging that the boys be returned to the home they had known for the last eight years, the Michigan appeal court told Carol Porter that she did not have standing to apply for custody of the boys. She would have to recommence her application to be named their guardian (a difficult process, notwithstanding the testamentary instrument, because the biological father could claim a more direct relationship).

In another American case, this one in New York, custody proceedings involved what the court characterized as 'a unique set of facts' (*In the Matter of the Guardianship of Astonn H.*, 1995). Astonn’s mother, Margo, had died a month after he was born, never having left the hospital after his birth. Astonn, a baby with many special health-care needs, was released from hospital into the care of Margo's life partner, Sofia. Sofia applied to be appointed Astonn's guardian 10 days after her partner's death. As it happened, Margo had been married to, but separated from, the father of her older daughter (who was in the de facto custody of her husband's mother). The paternal grandmother applied for custody of Astonn, even though her son was not Astonn's biological father. In support of her claim, the (not quite) paternal grandmother argued that the half-siblings should be raised together, and further that as she, Astonn's half-sister, and Astonn shared a common racial heritage, her home was the more appropriate for him. The court observed:

> In the instant proceeding the court is presented with an extraordinary combination of circumstances that must be weighed in determining who would be the best caregiver for this child. The importance of race of the caregiver, the significance of a party's physical custody of the subject child's half sibling and the lesbian relationship between a party and the deceased biological mother, including plans they made regarding the child are circumstances unique to this proceeding that the court must consider. (1995 WL)

Sofia, the surviving lesbian social parent, was named the child's guardian and
awarded custody, with access to the grandmother and assurances that he and his sister would be raised as closely together as possible.

These cases suggest that biological ties between child and parent or caregiver pose the most difficult hurdle facing a lesbian parent. This hurdle is insurmountable in the absence of familial-neutral legislation (such as Ontario’s children’s legislation). Clearly, these (aspirant) lesbian mothers are not mothers just like others. While Carol Porter found herself outside Michigan’s child custody law, this relegation was neither necessary nor inevitable (as the experience in Ontario law suggests).

"Playing a Different Game on the 01.d. Court": Lesbian Couple Adoptions

In this last section, I want to examine a 1995 decision of the Ontario Court, Provincial Division, Re K., which has been followed by the Ontario Court, General Division, in Re C.(E.G.)/(No. 1) and Re C.(E.G.)/(No. 2) (1995) and in several unreported lower court decisions. Effectively, lesbian adoption amounts to "playing a different game on the old court" (Cain, 1994: 42), for the fact of adoption can establish legal parenthood for both partners of a lesbian couple.

In Ontario, in the aftermath of the defeat of Bill 167 and, in particular, in response to the last ditch eleventh-hour compromise proposed by the Attorney-General (to provide that gay and lesbian couples would not be able to adopt children) (see Urse! 1995), four lesbian couples made joint applications to adopt the children they were raising together. In each of the four cases, the biological mother consented to the application by the ‘social parent’. However, the only way they could make a joint application was to challenge the heterosexual definition of spouse incorporated in Ontario’s Child and Family Services Act, as only spouses are allowed by that legislation to make a joint application to adopt. Once the ‘husband and wife’ dyad was struck, the lesbians had then to establish themselves as both spouses and parents.

This they did in admirable fashion. A courageous piece of litigation produced a courageous judgment and complete vindication of the position of the lesbians before the court:

When one reflects on the seemingly limitless parade of neglected, abandoned and abused children who appear in our courts in protection cases daily, all of whom have been in the care of heterosexual parents in a ‘traditional’ family structure, the suggestion that it might not ever be in the best interests of loving, caring and committed parents, who might happen to be lesbian or gay, is nothing short of ludicrous. (per Nevins J in Re K. at 708)

The lesbian adoption cases are interesting because they have been test cases in the truest sense of the term. They have been litigated by parties who have not been hurled into court by an outraged former spouse or parent. Rather, they have been marshalled with care and, while there have been many defeats (e.g.,
Camilla, N.Y. 1994; Dana, N.Y. 1995), the litigation has also produced some startling judicial pronouncements. In a 1993 lesbian adoption case in New Jersey, where a lesbian couple had been in a committed relationship for 10 years, the biological mother of the child was an executive vice president for a large communications company, the household income was in the low six figures, and the extended families of both women were described as supportive and involved in the four year old child's life, the trial judge concluded:

This case arises at a time of great change and a time of recognition that, while the families of the past may have seemed simple formations repeated with uniformity (the so-called 'traditional family') families have always been complex, multifaceted, and often idealized. This court recognizes that families differ in both size and shape within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit. This court finds that the family before it is providing a secure, stable, and nurturing environment for the child. This is to be commended. J.M.G. [the adoptive parent] is one of the two cornerstones of this supportive home, and beyond all other issues it is upon this factor that this court primarily relies in granting this petition for adoption. (per Freedman P.J.S.C., In the Matter of the Adoption of a Child by J.M.G., 1993)

With respect to the issue of homophobia in the broader community, this judge observed:

if there is ever any harassment or community disapproval, this court should have no role in supporting or tacitly approving such behavior. The court's recognition of this family unit through the adoption can serve as a step in the path towards which strong, loving families of all varieties deserve. (Ibid.)

The next year, in another lesbian adoption case, a New York judge addressed the issue of different family forms:

This Court is aware that these cases present family units many in our society believe to be outside the mainstream of American family life. The reality, however, is that most children today do not live in so-called 'traditional' 1950 television situation comedy type families with a stay at home mother and a father who works from 9:00 to 5:00... It is unrealistic to pretend that children can only be successfully raised in an idealized concept of family, the product of nostalgia for a time Jong past. The family environments presented in these adoption cases are warm, loving and supportive, well suited for the nurturance of children. The Court is less concerned for the welfare of these adoptive children than for many of the children of heterosexual parents 

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find themselves before the Court. (per Sciolino J., In the Matter of the Adoption of Caitlin and Another (Adoption No. 1); In the Matter of the Adoption of Adam and Another (Adoption No. 2), N.Y. Fam. Ct, Monroe County, 1994)

In these cases, however, it is not enough for the lesbian social parents to be 'parents'. In order to make a joint application, and thereby preserve the biological mother's tie to the child(ren), they must also be spouses in Ontario, and indeed in every province other than British Columbia. 13

Thus, as profound as the challenge of lesbian couple adoptions is, it is clear that striking down the opposite sex requirement alone does not, cannot, address the constraints and familial assumptions embedded in the adoption legislation in Ontario. For the lesbian parents to be full parents, they had to be spouses, same-sex spouses to be sure, but spouses nonetheless. Perhaps then, there is after all a (new) lesbian of legal discourse: the good spouse.

Conclusion

In this paper, I have attempted to illustrate the challenges experienced and posed by lesbians who parent. There is no one kind of lesbian custody case, and no simple or easily predictable judicial response. This also illustrates the complex and contradictory nature of law-as discourse and practice—and its uneven contribution to gender relations. I have sought to illustrate that legal practice, legal and non-legal actors, and legal processes have to be factored into any analysis of law as a gendering strategy. In many provinces, including Ontario, a parent is defined to include social parents (i.e., someone who has demonstrated a settled intention to treat a child as a child of his or her own family). In Ontario, a parent or any person may apply for custody or access to a child—the neutral phrase, 'any person', helping grandparents and lesbian social parents alike. The significance of gender-neutrality, and indeed familial-neutrality, to these family law provisions should not be underestimated or misunderstood. Unlike the experience of some lesbian social parents in the United States, lesbian partners and social parents in Canada get into the front door of the courtroom and are not denied standing, custody, or access simply because they are lesbian. I am inclined to think that, strategically, the better way for the lesbian social parents to proceed is not to press for recognition as 'mother' but rather to continue to push for legislation that has opened up the possibility for recognition of the importance of the social nature of parenting. Feminists, lesbians, and mothers ought to move away from the ideological (and patriarchal) appeal of 'mother', loosen its grip, and continue to breathe lesbian content into the 'person' and 'parent' of family law legislation.

While it is enormously satisfying to see and hear the gnashing of teeth of the self-styled pro-family right at the thought of lesbian legal victories, lesbian adoptions, and the increasing acceptance of lesbian families, it is important
that we interrogate and re-examine our places in and positions on family law, especially when we (at least some of us) win our cases. This may require some rethinking of the place of gender-neutrality in the gendering of justice.

Notes

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1. R.S.O. 1990, c. C12, s. 4.

2. For instance, a lesbian parent of my acquaintance spent over $35,000 in 1988-9 in a divorce in which her right to custody of their two sons was challenged by her husband. More recently, she has spent a further $20,000 responding to his application for child support for the one child of the marriage who continues to reside with him on a full-time basis, as well as a bid for custody of and support for the other boy (now aged 16) who resides with him on a part-time basis. Although she won handily at trial (including $8,000 in her court costs), her husband appealed to the Divisional Court, where again she won so handily her lawyer was not called upon. He lost again; she was awarded a further $2,000 in costs. His annual income (as a chartered accountant) is easily twice hers (as a school teacher).


7. See also Katherine Arnup's thorough reviews (1989, 1995) of the early cases. For more recent Canadian cases, see Elliott v. Elliott (1987) B.C.J. No. 43; N. v. N. [1992] B.C.J. No. 1507; Re Barkley and Barkley 28 O.R. (2d) 136 (Ont.); Daller v. Daller (1988) O.J. No. 2116 (Ont. S.C.). A Saskatchewan custody case in which sexual orientation was an express non-issue involved a father who had left the marriage for a male lover; subsequent to the separation, the mother became involved in a lesbian relationship. Hence, as both parents were gay or lesbian and involved in ongoing
relationships, sexual orientation was not an issue for Barclay J. Robertson (1991) S.J. No. SIS.


9. Family Law Act, R.S.O. 1990, c. F 3, s. 1. The Child and Family Services Act, R.S.O. 1990, c. C II, has even broader definitions of parent for the purposes of both child protection (s. 37) and adoption (s. 137).


11. In January 1996, I was told by a social worker employed by the Metropolitan Toronto Children’s Aid Society that she had seen a number of lesbian adoption cases. This social worker was responsible for obtaining the 'consents' of children over the age of seven to the proposed adoptions.


13. In the province of British Columbia, The Adoption Act of 1995 allows for 'one adult or two adults jointly' to apply to the court to adopt a child.