

Unraveling Surrogacy in Ontario, Canada:
An Ethnographic Inquiry of the Influence of Canada's *Assisted Human Reproduction Act*
(2004) on Surrogacy Contracts, Parentage Laws, and Gay Fatherhood

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Abstract

Unraveling Surrogacy in Ontario, Canada:
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Shireen Kashmeri

This thesis examines the influence of a variety of legal and social factors in surrogacy. I examine the scope and influence of the Canadian federal law known as the *Assisted Human Reproduction Act* (2004) on assisted human reproduction, which elides commonly held views on commodification and surrogacy. Next I turn to narratives of formal and informal contractual exchanges in surrogacy. I also look at the influence of legal kinship practices on surrogacy alongside multiple conceptions of parentage. Finally, I discuss two cases of gay surrogacy that conform and contest gendered assumptions of parenthood. "Unraveling Surrogacy" is a small-scale and qualitative ethnographic study spotlighting the narratives of six core participants, and based on a range of data sources that include governmental witness testimony, federal reports on assisted human reproduction and legal cases of parentage.

Acknowledgements

This thesis would have been impossible to complete without the help of many people. First and foremost, I want to thank the interviewees (both on and off the record) who generously shared their accounts of this highly personal and emotional subject. I also owe a great debt to parenting activists and educators from the LGBTQ (lesbian, gay, bisexual, transgender, and queer) community in Toronto who allowed me to attend two “maybe-baby” groups, shared contacts, and facilitated my understanding of how same-sex intended parents experience third party reproduction.

My debt of gratitude to my supervisor, Dr. Chantal Collard, is very great and hard to express in words; she has provided unparalleled support and nurturance of my academic endeavors since my first Master’s course with her. I am also grateful to Dr. Vered Amit’s interest and critique of my research. I am thankful to Dr. Sally Cole for her guidance and great encouragement during the writing process.

I owe a great deal to my friends and colleagues who contributed in incalculable ways. Robert Parungao together with Jasmine Stuart served as full-time cheerleaders of the research and thesis. Robert’s important contribution also included reading and responding to several chapter drafts. My discussions (and arguments!) with Michaela Knot helped to clarify my thinking on surrogacy and kept me moving forward. In addition, my academic colleagues, Amanda Dies, Elena Papadakis, Jeremy Fewster, and Johanne Angeli, provided supportive and helpful criticism in the initial write-up of the thesis. Nevertheless, any remaining faults in the thesis are solely my own.

A Word from the Author

Before continuing to the introduction a few words of caution are necessary. I have tried to present my interviewees in a fair and favorable light, but **the thesis may not necessarily reflect their perceptions or views**. Unfortunately, due to time constraints, it was virtually impossible to complete wholly collaborative research. The thesis considers only my observations and conclusions on the interviewee's experiences. Moreover, my thesis is admittedly a small-scale and qualitative account of third party reproduction that requires more substantiation by further quantitative and qualitative research. Finally, my hope is the thesis prompts more thoughtful regulation of third party reproduction in Canada.

Table of Contents

Chapter I: Introduction

Chapter II: Methodology – Shifting the Context of Surrogacy from the Clinic to the Law

Chapter III: Deconstructing Commodification in Surrogacy

Chapter IV: The Surrogacy Contract: Examining the “Contract Talk” of Formal and Informal Contractual Exchanges

Chapter V: Establishing Parentage: Legal Configurations of Kinship

Chapter VI: Queering Surrogacy: Gay Fathers as “Moral Pioneers” in the context of Assisted Human Reproduction

Chapter VII: Conclusion

Appendix A: Selected Excerpt of the *Assisted Human Reproduction Act* (2004)

Bibliography

Introduction

In 2003, Ontario Superior Court Judge Kiteley J. presided over a declaration of parentage. The court was called in to decide among four possible parents who would become the legal parents of twins born from a gestational surrogacy arrangement (also known as gestational carriage). In the end, the genetic parents L.H. and G.H., with the support of the birth mother and her husband, were declared the sole legal parents.

However, Judge Kiteley J remarked:

This issue of gestational carriage agreements (and indeed traditional surrogacy agreements) is an emerging matter of public policy ... A roadmap is necessary so that the genetic parents and the “birth mother” and her spouse if there is one, know what to expect in the conclusion of the legal process. It is in the public interest that the roadmap be available for those considering such a procedure. It is equally as important that the public have the opportunity to know and understand how these issues are resolved.¹

This thesis is an effort to map the inclusion of third parties, persons who contribute their gestation, egg or sperm, in the process of procreation in Ontario, Canada. My specific focus is surrogacy, an arrangement with purported biblical origins,² whose modern incarnation works in tandem with new reproductive technologies (NRTs). Surrogacy entered the public consciousness in the 1980s with the American court battle over *Baby M*.³ But in Canada the issue of surrogacy emerges more often as the subject of governmental policy rather than public controversy.

Canadian social trends of marriage and families are an important backdrop to surrogacy. A Statistics Canada overview (2007) of family and households suggests

¹J.R. v. L.H. [2002] OTC 764; OJ no 3998 (Sup. Ct. J.), paragraph 29.

² Most point to the Book of Genesis, where Rachel commanded Jacob to use her maid as a surrogate; and Abraham and Sarah engaged maid Hagar to conceive Ishmael.

³ The Baby M case took place in the 1980s; it involved a custody battle between a New Jersey traditional surrogate, Mary Beth Whitehead, and biological father, William Stern. Eventually, the judge awarded Baby Melissa to Stern and gave Whitehead visitation rights.

Canadians live in an era where conjugal life has changed; less people marry, and more of these unions end in divorce.⁴ Same sex marriage is legal. Yet cohabitation is more common, and children born outside of a marriage are no longer considered illegitimate. The nuclear family seems more elusive, and yet diverse family formations abound with blended families and single parent households. And now that reproduction can be separated from sex, and may include third parties, new questions arise.

Some of these questions form the crux of this thesis: how do practices of third party reproduction, especially surrogacy, blend commerce and kinship? Moreover, how does the law (federal and provincial) acknowledge these arrangements and regulate them? And how does third party reproduction proceed for gay men who choose to use surrogacy and egg donation to become fathers? This chapter introduces the practice of surrogacy, provides an overview of the relevant literature and a brief summary of the research.

The Basics of Surrogacy Practice

In theory, surrogacy involves a simple premise, a woman gives birth to a baby that she will not parent; but in practice surrogacy is loosely divided into two forms. The first is termed genetic or traditional surrogacy and the second is known as gestational surrogacy. In the first form, the surrogate gestates her own inseminated eggs and the resulting child is genetically related to her. This kind of surrogacy often occurs privately as it may not require much reproductive technology. In contrast, gestational surrogacy requires specialized professional assistance and so the thesis primarily deals with this practice. The arrangement is complicated in a variety of ways. First, the gestational

⁴ See also Lance W. Roberts, et al., 2005 that describes similar social trends regarding marriage and family in chapter 3.3 Matrimonial Models. Campbell D. Barrett (2006) also briefly introduces same-sex marriage in Canada alongside the movement for same-sex marriage in America.

surrogate is implanted in a clinic with an *in vitro* created embryo. The embryo may be created with the reproductive materials of donors or the intended parents, or a mix between the two. In either case, the pregnancy occurs with high levels of medical intervention. Second, by occurring under the care of medical personnel, gestational surrogacy is more easily regulated. This thesis is primarily concerned with the process of gestational surrogacy in the particular local context of Ontario, Canada.

In Canada, practices of surrogacy necessarily span two governmental jurisdictions. The recent federal law known as the *Assisted Human Reproduction Act* (2004) has shaped commercial aspects of the arrangement. This law is concerned with the health and safety of women and children and the commoditization and commercialization of reproductive capacities. The latter concern that women will “rent” their wombs for money led to federal legislation criminalizing compensation or “consideration” for surrogacy. The strong desire to keep money and motherhood separate has complicated surrogacy in Canada because expenses are permitted and compensation is criminalized. Yet the strategy to legalize a kind of altruistic surrogacy (with paid expenses) has displaced, not eliminated, commercialization and commoditization. At the provincial level, since children born in and out of wedlock are considered equal, family law statutes impact the recognition of new family formations created from surrogacy and between same-sex couples. These two legal contexts influence how intended parents and third parties and professionals participate in third party reproduction.

Situating the Study in Contemporary Kinship Studies

This study is based on previous research in contemporary kinship studies. “Contemporary kinship” is generally characterized, in the words of anthropologist

Michael Peletz, by "... themes of contradiction, paradox, and ambivalence" (Peletz, 1995:360). Kinship studies or new kinship studies (Franklin and McKinnon, 2001) in this vein aim to "... understand concrete, variably positioned social actors, the contexts in which they organize themselves and their resources, and the ways they create meaning and order in their lives" (Peletz, 1995:360). Kinship studies related to reproductive technologies examine the tensions around family relations (especially parent-child relations) produced by the use of new reproductive and genetic technologies, which are resolved by a variety of strategies and tactics. Ultimately, in contemporary kinship studies, "kinship" is an expansive and diffuse conceptual notion that becomes a window on the cultural ideas influencing human relations.

One of the most well-known anthropologists to take up kinship as a "cultural system" was David Schneider. This is evident from his monograph (1980[1968]) on American kinship which he classifies as a system of symbols. American kinship is summarized by two symbolic orders of blood and conduct (or law) (Schneider, 1980[1968]:27). For instance, a child is symbolic of the love between two parents and also joins two domains of kinship: "blood" and "law" (Schneider, 1980[1968]:51). More importantly, a cultural constructionist approach to kinship paved the way for Schneider to take a radical position: kinship is a "vacuous analytical category" (Schneider, 1984:185). This assessment did not eliminate kinship research, but instead resulted in new investigations on the significance of biology and nature in social life, reproduction, and family ties.

Feminist anthropologists in particular drew on Schneider to question other dimensions seen as natural or biological. They criticized the assumption that gender and

gender divisions are solely based on natural biological differences between men and women (Yanagisako and Collier, 1987). Jane Collier and Sylvia Yanagisako neatly summarize the articulation between kinship and gender studies in this way: “the attempt to separate the study of gender categories from the biological facts to which they are seen to be universally connected mirrors the attempt of kinship theorists reviewed by Schneider (1984) to separate the study of kinship from the same biological facts” (Yanagisako and Collier, 1987:29-30). The important observation is that social inequalities may be justified by drawing on ideas of nature and biology. This line of thought is further developed by Yanagisako and Carol Delaney (1995) who noted that “differences” of sexuality, race, and class, social categories defining identity, may be “naturalized” to conceal power relations.

Marilyn Strathern’s monographs, *After Nature* (1992a) and *Reproducing the Future* (1992b), also contributed to new analysis on kinship. This famed British anthropologist theorized on the social effects of reproductive technology in transforming kinship into a hybrid of nature and culture (1992b:16-17). She also observed that in an enterprise culture the choice to use reproductive technologies becomes prescriptive and “enterprises-up kinship” (1992b:37). Another important theorist of contemporary kinship is Janet Carsten, her analysis of trends in kinship studies (2004, 2007) and her introduction of the term “relatedness” (1999), illustrate the expansive analytical dimensions of kinship in a post-Schneiderian era.

Contemporary anthropological examinations of new reproductive technologies (NRTs) and kinship in “western” contexts illustrate further that kinship is an ambivalent and shifting category, closely related to cultural and social contexts. The consistent

finding by anthropologists studying egg donation (Bestard, 2004; Orobeting and Salazar, 2005), surrogacy (Ragoné, 1994, 1999, 2000; Roberts, 1998; Goslinga-Roy, 2000; Collard and Delaisi, 2007a, 2007b), and lay and governmental views of reproductive technology (Edwards, 1999; Hirsh, 1999; and Franklin, 1999) suggest persons engage in a cultural “bricolage” or negotiation, integrating new meanings of kinship parallel to traditional ideas of family relations based on “blood” and “law.” In these studies, “kinship does not reflect biogenetic links; it is a way to think biogenetic and other links into the context of human relations” (Bestard, 2004:261). For people utilizing third parties and reproductive technology, the creation of kinship or family also involves “strategic naturalization” consisting of a “... mixed bag of everyday and more formal strategies for naturalizing and socializing particular traits, substances, precedents, and behaviours” (Thompson, 2005:145).

Many anthropologists studying in this vein of research also take a relativist stance regarding reproductive technologies. They show that third parties (like surrogates and egg donors) may engage in reproductive arrangements with multiple motives, both altruistic and self-interested (Ragoné, 1994, 1999; Orobeting and Salazar, 2005). Some American anthropological accounts of surrogacy show keenly that surrogates live these arrangements on their own terms and with a certain sense of empowerment (Roberts, 1998, Goslinga-Roy, 2000). Moreover, these arrangements can also be understood by childless couples to satisfy traditional or conservative notions of family (Ragoné, 1994). The social “bricolage” in these arrangements may also be configured by circumventing the national laws of countries (Collard and Delaisi de Parseval, 2007a:31). Other studies on reproductive and genetic technologies by Rayna Rapp (1999) on amniocentesis in a

New York clinic and Sarah Franklin (1997, 2005) on in vitro fertilization (IVF) and preimplantation genetic diagnosis in England show that these technologies lead to new dilemmas of choice and new ways to act as a parent.

More recent scholarship has also examined sperm donation (Tober, 2002) and egg donation (Konrad, 1998; 2005). There exist cross-cultural studies of reproductive technologies and surrogacy by Marcia Inhorn (2006), Elly Teman (2003), and Susan Martha Kahn (1998, 2002) that have added to the breadth of new kinship studies. Their studies show that religious convictions also influence the use of reproductive technology.

Further literature contributing to new studies of kinship includes studies on gay and lesbian kinship (Lewin, 1993; Weston, 1991, 1995; Hayden, 1995). Here a nature-culture dichotomy unsettles heteronormative assumptions about “natural families” or the idea that heterosexual couples, and the nuclear family is the norm. Weston (1991) questioned the biological base of reproduction by problematizing the association of “straight: gay, families by blood: families by choice.” Sameness and difference between heterosexual and homosexual parents are also reconfigured in studies of lesbian motherhood (Lewin, 1993; Hayden 1995). The influence of family law (that presumes a heterosexual union) on lesbian motherhood illustrates further dimensions of biology and sociality (Dalton, 2000). Procreation by gay and lesbians is also affected by the expansion of fertility treatment and sperm banks that results greater degrees of medicalization in “queer reproduction” (Mamo, 2007).

In comparison, French studies on same-sex parenting or *l'homoparentalité* (Cadoret, 2000, 2002) present the diversity of same-sex family forms as a co-production of both the reproductive technologies (artificial insemination, egg donation and

surrogacy) and legal and social conventions, such as adoption and co-parenting arrangements (between lesbian and gay parents). French sociologist Florence Weber's (2005) study establishes that social and legal conventions result in parenthood typologies based on three elements: blood, name and in practice. This leads to particular parentage paradoxes, where a child may end up with too many fathers or none at all. French psychologist and anthropologist Geneviève Delaisi de Parceval (2008) most recently observed that splitting parenthood in this manner results in diverse social dynamics between the intended parents (heterosexual and homosexual) and the third parties who help them reproduce.

Summary

The thesis is divided between four subjects. First, I examine the implicit premise in the federal legislation that assisted human reproduction turns reproductive capacities into commodities. This is also evident by the criminalization of the compensation for third party reproduction. This regulation is at odds with many individual understandings of the term "commodification" and paradoxically may result in unintended commodification.

A second subject is surrogacy contracts, and the formal and informal contractual exchanges that structure surrogacy. The surrogacy contract is often assumed to be a tangible example of the commodification of reproductive capacities. However, "contract talk" on surrogacy does not reflect commodification, but rather introduces distinct norms and values. Surrogacy contracts in practice also require distinct relations trust suggesting that surrogacy cannot be solely understood as a measure of commodification.

A third subject is the variety of legal and non-legal conceptions of parentage. I summarize three recent cases from Ontario courts of declarations of parentage that show the variety of ways parental rights are accorded based on different “markers of parentage” such as genetic and biological ties or social parenting. These varieties of legal parentage operate alongside multiple conceptions of parentage and a range of kinship inclusions and exclusions. Conceptions of parentage influence surrogacy practices when certain types of surrogacy are excluded over others. For example, traditional surrogacy is largely avoided for legal reasons, the risk of competing parentage claims, and emotional considerations of the genetic tie between the surrogate and the child. This demonstrates that surrogacy arrangements are highly localized and influenced by both provincial family law and preexisting cases and multiple (personal) conceptions of parentage.

Finally, the fourth subject is gay surrogacy or the advent of gay fatherhood through surrogacy. Here I examine two cases of gay surrogacy to show some of the distinct dimensions involved when men reproduce with third parties. These cases suggest a range of inclusion and exclusion. For instance, the context of gay surrogacy stems from an inclusive Canadian social policy context that affirms the rights of gay, lesbian, bisexual, transgender and queer persons. Yet gay surrogacy is financially exclusive with high costs due to the medical intervention and the participation of third parties.

Thus, my study of surrogacy in Ontario, Canada is an entry into a particular kind of social world where reproduction and sex are decoupled and new family formations are shaped by kinship, commerce, and the law. Ultimately, this thesis shows the legal responses and social negotiations of reproductive arrangements outside of the family are highly complex and often contradictory.

Chapter II: Methodology – Shifting the Context of Surrogacy from the Clinic to Law

In this chapter, I will discuss my methodology and the particular challenges and strategies that shaped my research conducted over the summer and fall of 2007 in Toronto, Ontario. My research on surrogacy did not occur in the context of a clinic. Instead I was inspired by both “multi-sited ethnography” (Marcus, 1995), and the view of anthropologist Sarah Franklin and sociologist Celia Roberts (2006) who studied pre-implantation genetic diagnosis (PGD) in England. In their estimation one of the social consequences of new reproductive and genetic technologies are “new genetic choices and decisions” articulated in a range of languages.

... it is important to document and analyze the many languages in which new genetic choices and decisions are currently being negotiated. These languages include those of clinicians, scientists, patients, policy makers, parliamentarians, journalists, academics, activists, and lobbyists ... Since choices and decisions *are* being made, we might as well learn what we can about them by documenting and analyzing the languages, concepts, principles, emotions and experiences that give them shape” (Franklin and Roberts, 2006:77, emphasis in the original).

A focus on “new genetic decisions and choices” allowed me to track the social significance of surrogacy beyond the clinic to lawyers, surrogates and gay fathers while examining the impact of the law (both federal and provincial). This resulted in a distinctive picture of assisted human reproduction technologies in Ontario, Canada. This range of perspectives, especially the inclusion of lawyers, proved an apt approach in a province where the legal community has always been at the forefront of dealing with new reproductive technologies.⁵

⁵ Consider for instance the 1986 Ontario Law Commission that recommended legalizing commercial surrogacy by making surrogacy contracts subject to judicial review.

Turning Fieldwork Challenges into Research Strategies

The twin challenges of my research, the issues of access and participant recruitment, also generated insights even as they broadened my research focus. For instance, one of the consequences of the federal legislation known as the *Assisted Human Reproduction Act* (2004) is that third party agencies are no longer legal (since 2004). This eliminated a point of access to potential research participants. I also chose not to conduct a clinical ethnography, since surrogacy is not usually a frequent occurrence at fertility clinics. Instead, I turned to an alternative means for meeting surrogates and joined an online surrogacy message board. I also looked to other public sources on surrogacy, such as court cases, the federal legislation, provincial family law, commission reports, witness testimony at Standing Commissions, and media articles. Besides turning to public records and online ethnography, I also broadened the scope of the research to complementary aspects of surrogacy, such as lesbian, gay, bisexual, transgender and queer (LGBTQ)⁶ use of third party reproduction. This led to some participant-observation and resulted in a small sample of six interviews. In the end, I believe the diversity of these sources parallels the complexity of this topic, and since the majority of the data stems from the context of Ontario, my hope is that it spurs further research on assisted human reproduction in Canada.

Legal Ambiguity and Online Research

The criminalization of compensation for surrogacy in Canada also contributed to the challenge of conducting ethnographic research. Surrogates were not easy to find and

⁶ Through out the thesis I have tried to adopt this inclusive naming strategy prevalent in gay and lesbian literature. At times I vary this naming by switching to GLBTQ or gay, lesbian, bisexual, transgender and queer. This is not a typographical error, but a conscious, inclusive naming practice.

were often reluctant to speak on record. One vocal and longtime surrogate, Fern, who later became one of my key interviewees, gave her own interpretation of this difficulty:

Canadian surrogates don't want to talk because they're being paid. If they talk, there'll be a record of them some where and they're afraid it'll get back to the couple that's paying them. Because the couple could end up in prison. Most of them have signed a contract saying they won't talk to anybody. I remember when a couple tried to throw that into my contract and I was pretty quick with that – you ain't going to gag me!

This is a plausible hypothesis, and coupled with my time constraints could very well explain my difficulties finding participants. For this reason I incorporated online ethnography into the research. Online surrogacy communities are safe spaces for women to explore their surrogate experiences and find advice and support regarding the arrangement. They are also integral to Canadians choosing third party arrangements, since third party agencies can no longer legally bring a surrogate and intended parents together for a fee. The online surrogacy community immersed me in the world of surrogacy and allowed me to find two key interviewees who were interviewed by telephone.

The online component of my research also originates from previous research conducted on a surrogacy message board site.⁷ In the thesis, I refer to the site as the surrogacy message board. This message board contains over fifty-five general categories that hold multiple posts (a main issue or question) with many threads (individual replies). This site was selected because the administrators and members were familiar with my work, and I was familiar with the specific language, acronyms, and ways of conducting myself necessary to participate in the community. This allowed me to post my own threads, such as a call for participation in my study and an online query regarding the

⁷ My study, conducted for a fieldwork methods course, examined discourses of medicalization in surrogate's posts on this online message board.

Assisted Human Reproduction Act (2004). I relied primarily on the Canadian and non-traditional family categories. These categories also functioned similar to archives, since I was able to review posts going back at least three years to 2004, just after the legislation became law.

Though my research is not strictly focused on computer-mediated-communications (CMC), I was highly mindful of ethical considerations raised by CMC researchers Christina Allen and Storm A. King writing in *Information Society* (1996). Their adaptation of ethical principles from anthropology and psychology respectively guides my conduct and I will not reveal the true name of the site in an effort to protect it from increased online traffic. Before re-joining the site, I also sought permission to join the surrogacy site, and identified my research status in all my messages to members. To respect the privacy of these members I do not mention their user names in the thesis, which are distinctive enough to identify them using a search engine. Moreover, I sought informed consent from all members whose communications I wanted to quote in the final thesis. These research measures may seem extreme; however, it parallels my views that online message boards are communities of real people who become members for their own reasons.

I triangulated the issues arising from the online surrogacy world with interview data by conducting interviews with a variety of different participants involved in third party reproduction. For instance, I interviewed one fertility doctor and one fertility nurse off the record. I also spoke with two infertility advocates, two same-sex parenting advocates, along with one lesbian mother and her daughter, and one potential surrogate (she had not found intended parents). The core of my ethnography stems from

unstructured and semi-structured recorded interviews with six participants selected by snowball sampling. I prepared standardized questions, but interviewees were free to discuss whatever they wanted. Participant observation also occurred when I attended two “maybe-baby” group sessions, support groups for lesbian and gay men considering becoming parents. I attended the first session of a lesbian intended mothers group, and I spoke on a panel for gay men considering surrogacy in the Fall of 2007.

Third Party Reproduction in the LGBTQ Community

Another dimension of my research involves examining third party reproduction from the vantage point of lesbian, gay, bisexual, transgender, queer (LGBTQ) intended parents. Originally I thought of changing the entire direction of the research toward lesbian mothers using donor sperm or gay fathers who have used surrogacy. However, the lack of time hindered my ability to gain the acceptance and trust needed to conduct research within the LGBTQ community. Moreover, I naively misjudged the perception of my presence in gay and lesbian “maybe-baby” groups. The legitimacy of my access was questioned because I was not a same-sex parent, nor was I part of the LGBTQ community. The number of gay fathers involved in surrogacy was also far smaller than I anticipated, therefore more difficult to find. Nevertheless, two parenting educator activists generously shared their perspectives on third party reproduction and the effects of the federal legislation for the LGBTQ community. They directed me to the lawyers who work with same-sex parents to protect their parenthood rights and navigate third party reproduction. By presenting at a panel for “maybe-baby” group directed at gay men, I was able to meet another key interviewee, Len, who shared his surrogacy

experience. The experience of same-sex parents is another avenue to examine both the impact of the law and also the social significance of surrogacy.

Finally, my original intent also involved comparing the experiences of surrogates and gay fathers in Ontario with their counterparts in Quebec. At the time, I was commuting between Toronto and Montreal, and I hoped a comparative study would expand my sample size. This research strategy failed but remained instructive on several counts. I was forced to recognize the influence of provincial law in encouraging third party reproduction. Ontario's legal milieu is more encouraging of surrogacy than Quebec. This meant recruiting research participants in Quebec proved to be even more difficult than in Ontario. Quebec also presented new varieties of reproductive tourism and legal parentage. This meant surrogacy and third party reproduction does occur in Quebec in ways that even more difficult to ascertain. My time constraints coupled with the complexity of practice in Quebec, closed this research path.

Positioning

Even though my research occurred at "home" in a "western" context, my positioning (Abu-Lughod, 1991) also contributed to the research in unexpected ways. A lawyer I interviewed, Amanda, explains why she is less inclined to speak with those who have a "personal bias" against reproductive technology:

I think what you'll find in this area is that everybody has a personal bias. I asked you on the phone what your bias was because I didn't want to waste any time ... I was interviewed by [a Journalist] a number of years ago. And I remember it was summer and I was off on holiday. And I actually left the lake to come inside and talk to her ... At the end I said to her, 'Sue do you have children?' She said, 'No, I've gone through this and there was nothing they could do for me (and it was before there was any third party reproductive stuff)' and I knew it was going to be a bitter, scathing article and it was. So people have their bias and they carry it with them.

Amanda's narrative suggests success or failure with reproductive technologies shapes "personal bias."⁸ It was significant to me that my position on the assisted human reproduction also encouraged research participants' willingness to be interviewed. My strong reservations towards parts of the *Assisted Human Reproduction Act* (2004) facilitated more openness with interviewees regarding third party reproduction in Canada.⁹ Furthermore, this stance meant that I often spoke with like-minded participants.

My approach to the research might have been affected by having never experienced pregnancy. However, when I mentioned this concern to key interviewee and surrogate Fern, she observed pregnancy and child rearing *did not necessarily* lead to sympathy for surrogacy. She drew on her experience with extended family, aunts and uncles who are parents, to illustrate this point:

... when I said 'my couple [the intended parents] they can't have kids ...' I can't begin to tell you how many of them went 'oh, my god ... my life without kids! Oh my god how amazing that would have been!' These are the people who are supposed to be sympathetic! They have no idea. Their life would not be amazing. My aunt still says all the time 'I can't believe you carried babies for somebody else. Oh, my god they [the intended parents] should have been like really enjoying having a childfree life.' This is someone who had baby after baby after baby. You can't sympathize.

This remark suggests that personal experience with pregnancy and children may *also* result in biases against third party reproduction. Fern notes that having children did not mean that her relatives supported her decision to be a surrogate. This suggests a complex association exists for researchers between the impact of personal experience and their perspectives of third party reproduction, which is further explored in the thesis and in previous literature on surrogacy (Roberts, 1998; Goslinga-Roy, 2000). Finally, the small

⁸ In fact, personal conceptions also structure both surrogates and intended parents' third party arrangements. This is especially noticeable when I discuss multiple conceptions of parentage.

⁹ My relationship with interviewees was also marked by my slight personal connection to assisted human reproduction, my mother previously worked for a sperm donor distributor.

and highly knowledgeable community of medical, mental health and legal professionals, third party surrogacy consultants, surrogacy, egg and sperm donors, along with lay persons also affected my research. This increased the need to protect the research participant's identity. Pseudonyms are used throughout the thesis and personally identifying information (where possible) has been modified to protect participants.

Introducing the Participants of the Study

My first participant, Casey, was an enthusiastic first time gestational surrogate from an American state. She responded to one of my posts on the surrogacy message board. Why include an American surrogate on a study around Canadian legislation? Her story of surrogacy involved two intended fathers (IFs). I was particularly captivated by the way she stated they were “three peas in a pod” though they were matched through a clinic. As well the trio traveled up to a fertility clinic in Canada suggesting the federal legislation may create reverse fertility tourism, meaning fertility services in Canada are relatively lower priced to clinical services in the United States.

The second participant, Fern, is what I would call an “expert” surrogate after completing eight embryo “transfers” in Canada, when embryos created from the parent's gametes and implanted into the surrogate's uterus. As of yet she has only successfully carried to term twins for an American couple. Her history with surrogacy has been featured in the media on numerous occasions, and she also offers advice to surrogates and intended parents online. However, as opposed to Casey who is happy to work with IFs, Fern chooses not to work with gay men, and also couples whose embryos are created with donor gametes. Her views on the legislation were forceful; she found the federal

legislation's criminalization of commercial surrogacy problematic and ineffectual in regulating third party reproduction.

Len is a highly educated and articulate professional who decided to have a child without a partner through surrogacy. He used an American egg donor and a Canadian surrogate after posting several ads on online surrogacy sites. His daughter Sophie was born a year ago. He maintains contact with the surrogate mother, but not the egg donor. He provides detailed testimony on the process of becoming a father through surrogacy, and the various legal, medical and social issues involved in third party reproduction with the egg donor and surrogate. Most importantly, Len illustrates the perseverance required to become a father in this way.

Cameron is both a father by surrogacy, and a lawyer who has participated in surrogacy contracting. He and his partner John are the fathers to twins born from a third party reproduction arrangement. In comparison to Len's third party reproduction, Cameron and his partner went to one clinic in Ontario, employed an anonymous egg donor and maintain faint ties with the surrogate. At times, Cameron has also served as the lawyer representing surrogates in surrogacy contractual exchanges.

Elena is a lawyer who provides legal representation for egg donors, and intended parents who seek a "declaration of parentage." This declaration ensures only the names of the intended parents (either heterosexual or homosexual) appear on the birth certificate, and excludes the surrogate or the egg donor from parentage. This declaration is stronger than a guardianship order, and extends complete parenting rights and responsibilities. Elena has also interviewed surrogate mothers for her legal practice, and written about the

legislation and its impact on the LGBTQ community. Her personal experience with third party reproduction includes the conception of her children with donor sperm.

Amanda is an established lawyer who specializes in third party reproduction. She does not have personal experience with this kind of reproduction but provided legal counsel to some of the first fertility clinics in Ontario. She tends to provide legal counsel for the intended parents (both heterosexual and same-sex) in surrogacy contractual exchanges and has extensive knowledge with third party reproduction in general.

In summary, my ethnographic inquiry is derived from a range of data sources, with online ethnography specifically used to triangulate interview data. My positioning and stakes in third party reproduction were remarked upon by many interviewees, and interviews were set up through personal recommendations by participants. Interview data is particularly significant because it facilitated the collection of narratives that make up the core of this thesis. An emphasis on narratives expresses one of the tenets of anthropological and qualitative research to present “thick description” (Geertz, 1975) of third party reproduction in Ontario, Canada.

Chapter III: Deconstructing Commodification in Surrogacy

The commercialization of the human reproductive capacity is not in keeping with Canadian values. Canadians feel strongly that human life is a gift which should not be bought and sold, or treated like a consumer commodity (Health Canada, 2007:3)

One of the most controversial aspects of surrogacy is the exchange of money for reproduction, or in the words of Health Canada “the commercialization of human reproductive capacities.” Yet this statement raises more questions than it answers. What is meant by “commercialization,” “Canadian values,” and “human reproductive capacity”? Leaving aside the vague language, this statement raises one of the fundamental concerns of surrogacy: where is the line drawn between people and things? Is money corrupting? Does a surrogate’s compensation make her the equivalent to an object, thus akin to a slave?

In this chapter, I examine the long history of Canadian policy on assisted human reproduction that has led to the current federal legislation known as the *Assisted Human Reproduction Act* (AHRA). In this subsection I also introduce further statements regarding commodification – from a 2001 Commission Report, the 2004 AHRA, and also three personal statements on commodification from witnesses testifying before the Senate Commission on assisted human reproduction. Next, I summarize some of the theoretical discussions on commoditization and commodification from anthropologists, sociologists, legal academics, among others. I end by examining the multiple conceptions of commodification offered in my own interviews. This chapter is a preliminary examination of the AHRA’s concerns of commodification and the unintended influenced on “Canadian” instances of surrogacy.

The Origins of AHRA and Legislating Commodification/Commercialization

In Canada, the federal legislation, Bill C-6 or the *Assisted Human Reproduction Act* (AHRA) takes a strong stance against commodification, a concern retained from earlier policy history. The development of regulations on reproductive technology spans fifteen years of commissions and standing committees, reports, and various bills.

The first of these efforts was the *Royal Commission on New Reproductive and Genetic Technologies* that ran from 1989 to 1993 and polled over 40,000 stakeholder groups at a cost of approximately \$28,000,000 (Haase, 2004:58). Its final report, *Proceed with Care* (1993), advocated banning surrogacy and gamete donation based on concerns of commodification (Haase, 2004:58; Mykitiuk, et al. 2007:71). However, no legislation was produced, and in 1995 the Canadian government declared a voluntary moratorium on several practices including commercial surrogacy and gamete donation, a move that garnered little compliance (Haase, 2004:57). Finally, in 1996 the parliament introduced Bill C-47, the *Human Reproductive and Genetic Technologies Act*. But this failed to become law in 1997 and led to the dissolution of parliament (Hébert, et al., 2002). Three years later, in 2001, the Standing Committee on Health reviewed *Proposals for Legislation Governing Assisted Human Reproduction* (Hébert, et al., 2002:2); and wrote a report called, *Assisted Human Reproduction: Building Families* (2001). This report took a much tougher stance against surrogacy, but many of their recommendations were ignored in the next legislation put forward (Bill C-13). Finally, on March 29th 2004 the *Assisted Human Reproduction Act* (AHRA), also known as Bill C-6 (a modified version of Bill C-13) became law.

Before turning to the current federal legislation's implicit negative assumptions regarding reproductive technologies, commodification, and third party reproduction, I examine to the commission report, *Assisted Human Reproduction: Building Families* (2001). The 2001 recommendations were not adopted in the AHRA. My aim is to compare only the *conceptual associations* made between surrogacy and commodification in the 2001 Report versus the AHRA.¹⁰ Hence, a brief comparison between the recommendations in the 2001 Report and the current law better contextualizes the AHRA's commodification concerns.

In the 2001 commission report, *Assisted Human Reproduction: Building Families*, the association between commodification and reproductive technology is explicit. This report condemns both commercial and altruistic surrogacy, and in comparison to the current federal law, the 2001 report condemns expenses and compensation to lawyers, and psychologists involved in surrogacy. In essence, the 2001 report suggests that third party reproduction should be similar to adoption. This means that commissioning couples "who aspire to add a child to their family through surrogacy must be subject to the same scrutiny as individuals who seek to adopt a child" (2001:13). In contrast to the AHRA, the 2001 commission report articulates strong objections to surrogacy:

... Commercial surrogacy treats children as objects and treats the reproductive capacity of women as an economic activity. Non-commercial (altruistic) surrogacy arrangements can also be socially harmful for the resulting child and place the health of women at risk. The Committee agrees with the prohibition on surrogacy for commercial gain and also feels that surrogacy for non-commercial reasons should be discouraged but not criminalized. There should be a prohibition against any form of consideration, incentive or compensation, financial or otherwise, being offered or provided to any party involved, directly or indirectly, in any surrogacy arrangement. This must

¹⁰ The Health Canada consultation document on expenditures (2007), highlighted at the beginning of this chapter also makes short remarks about the AHRA's stance against commercialization. However, the 2001 Commission report provides extensive statements against commercial surrogacy.

include those parties who provide professional medical, legal, and psychological services (2001:12).

Commercial surrogacy in this estimation is inherently commodifying, collapsing children and women's reproductive capacity in things and labour respectively. However, money is not the sole reason surrogacy "should be discouraged but not criminalized," because any form of surrogacy, paid or altruistic, is seen as harmful to children and women. Finally, the Commission Report also recommends criminalizing payments made to fertility professionals. The comparison to the AHRA is conspicuous at this point, for though the AHRA does acknowledge concerns for the health and well-being of women and children, in its regulations, altruistic surrogacy remains legal, and expenses are permitted.

Furthermore, the 2001 recommendations could have drastically altered the entire practice of fertility medicine, and third party reproduction if they had become law. The intended parents and surrogates engaging in these arrangements would receive no support from fertility clinicians, lawyers, and psychologists making gestational surrogacy, one of the less problematic types of surrogacy in terms of parentage, virtually impossible. Most significantly, these recommendations would have drastically curtailed the fertility industry by criminalizing the services of professionals. It is unsurprising then that the creation of Bill C-56 (also known as Bill-13) and the final legislation Bill C-6 or the *Assisted Human Reproduction Act* (2004) ; ignored these recommendations. Moreover, though I find the regulations of the AHRA are also problematic, in comparison to the 2001 Report, the current law is comparatively moderate.

Though 2001 Report provides an interest counterpoint, I turn now to the current legislation known as Bill C-6 (or the AHRA). In particular, I focus solely on the conceptual association between reproductive technology, commodification and third

party reproduction.¹¹ The AHRA articulates particular concerns that reproductive technologies may do harm by commodifying human reproductive capacities. This can be seen from the outset by drawing on several of the AHRA's guiding principles from section 2 (see Appendix A for a complete list of the principles):

2(a) the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;

[...]

(c) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies.

[...]

(f) Trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends, raise health and ethical concerns that justify their prohibition (AHRA, 2004:4-5).

The principles of the AHRA suggest many norms and values that do not correlate with the current record of reproductive technologies in Canada. For instance, these principles state reproductive technologies are dangerous for women and child's health and well being. However, reproductive technologies are medically supervised by professionally accredited doctors and nurses and have been present for decades in Canada and worldwide. It is uncertain why reproductive technology in contrast to other medical technologies creates more concerns that require regulations. Moreover, there exists mandatory counselling for those participating in third party reproduction and often clinics require a legal contract between the surrogate and intended parents. Both of these practices seem to have helped decrease the possibility of exploitation, since few media reports on surrogacy exploitation in Canada exist. In sum, the range of professionals

¹¹ The legislation is divided into three sections: a preamble of guiding principles, and two sections on prohibited and regulated activities. The act has also led to the creation of a regulatory body, Assisted Human Reproduction Canada (AHRC), and it regulates all assisted human reproduction technologies. This includes stem cell research and the use of embryos for scientific research, and gamete donation.

involved in reproductive technologies problematizes the concerns for women's and children's health and well-being. These principles ignore the norms and values established in fertility medicine, and the self-regulation of reproductive technologies already present in clinics. Most alarming, is the legislation's stance that women are more vulnerable and thus require "more protection" because of their reproductive capacities. It is also uncertain why the commercial aspect of reproductive technologies may lead to one gender being in need of more protection than the other. Unfortunately, the AHRA's guiding principles makes implicit assumptions about third party reproduction that seem highly misleading.

The regulation of assisted human reproduction is particularly confusing when examined alongside surrogacy or gamete donation. The federal legislation implicitly divides these two aspects of third party reproduction into commercial and non-commercial categories (Norris, 2006:4). Most problematic is the way the AHRA complicates how these practices proceed by criminalizing compensation beyond expenses. Commercial surrogacy and gamete donation are prohibited in sections six and seven of the AHRA.

6. (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.
- (2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.
- (3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.
- (4) No person shall counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that the female person is under 21 years of age.
- (5) This section does not affect the validity under provincial law of any agreement under which a person agrees to be a surrogate mother.

7. (1) No person shall purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor.
- (2) No person shall (a) purchase, offer to purchase or advertise for the purchase of an in vitro embryo; or (b) sell, offer for sale or advertise for sale an in vitro embryo (AHRA, 2004: 6-7).

In this excerpt of the legislation, important guidelines are established that affect surrogacy. The first is that “consideration” or money will not be paid to a surrogate. Moreover, third parties coordinating surrogacy arrangements are outlawed, the legal age to be a surrogate is twenty-one or older, and provincial jurisdiction over surrogacy contracts is acknowledged. The practices that operate concurrently with surrogacy, egg and sperm donation, such as third party agencies, are also seen as commoditizing.

Moreover, the legislation does not make a distinction between genetic or traditional surrogacy and gestational surrogacy but distinguishes only between commercial and altruistic surrogacy. This is problematic because either type of arrangement leads to unique consequences, and possibly different forms of commodification. For instance, traditional surrogacy may take place with little commodification but raise issues of parentage. In comparison, gestational surrogacy requires much medical intervention; the further effort required to complete this pregnancy makes the criminalization of compensation questionable.

Additionally, the AHRA’s differentiation between commercial and altruistic surrogacy is problematic. Section 12 of the AHRA allows surrogate mothers to be reimbursed for their expenses, including lost employment wages:

12. (1) No person shall, except in accordance with the regulations and a licence, (a) reimburse a donor for an expenditure incurred in the course of donating sperm or an ovum; (b) reimburse any person for an expenditure incurred in the maintenance or transport of an in vitro embryo; or (c) reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.

(2) No person shall reimburse an expenditure referred to in subsection (1) unless a receipt is provided to that person for the expenditure.

(3) No person shall reimburse a surrogate mother for a loss of work-related income incurred during her pregnancy, unless (a) a qualified medical practitioner certifies, in writing, that continuing to work may pose a risk to her health or that of the embryo or foetus; and (b) the reimbursement is made in accordance with the regulations and a licence (AHRA, 2004:8).

The legislation thus permits a particular kind of surrogacy; one that seems altruistic even though expenses are allowable. At the time of printing, four years after the AHRA became law, the regulation of licenses is non-existent and the limits of allowable expenses are unknown, even though a medical practitioner must certify the payment for work-loss expenses. However, the failure to abide by these guidelines may result in criminal penalties:

60. A person who contravenes any of sections 5 to 9 is guilty of an offence and (a) is liable, on conviction on indictment, to a fine not exceeding \$500,000 or to imprisonment for a term not exceeding ten years, or to both; or (b) is liable, on summary conviction, to a fine not exceeding \$250,000 or to imprisonment for a term not exceeding four years, or to both (AHRA, 2004:29).

The criminalization of commercial surrogacy results in heavy penalties of both half a million dollar fines and a prison sentence of ten years. Though this excerpt is not clear who would be the recipient of the punishment, many of the participants I spoke to suggested that it was the intended parents who would suffer the penalties not the surrogate.¹² The consequences in light of the vague guidelines and uncertain monitoring seem extreme.

¹² Collard and Delaisi de Parseval (2007b) found in their study, when French heterosexual couples participate in surrogacy arrangements, the social or intended mother is more often affected by French regulations against third party reproduction. It is her parental claims that are often ignored by the French State.

Clearly, the position against surrogacy in the AHRA is toned down in comparison with the 2001 Committee Report. The federal government takes a distinctly middle position between outright criminalization of surrogacy (commercial or altruistic) and the total legalization of surrogacy and compensation. The legislation ignores how payments for surrogacy and egg and sperm donation may be considered potentially liberating. It also overlooks that “altruistic” third party reproduction is a poor protection against exploitation, since family obligations may put pressure on women and men to participate in these arrangements (Ruparella, 2007).

Another way to examine the issue of compensation and expenses is to revisit witness testimony at the 2004 Senate Standing Committee on Social Affairs and Science and Technology after the legislation was tabled in the Canadian Parliament. In the following analysis I highlight the testimony of one anti-surrogacy advocate as well as two of the witnesses supportive of the arrangement to show further criticism of the *Assisted Human Reproduction Act* (AHRA). All three testimonies show how both anti-surrogacy and pro-surrogacy positions rally around the issue of compensation and expenses.

For anti-surrogacy advocates, such as past member of the 1995 Advisory Committee on Reproductive and Genetic Technologies, Phyllis Creighton, the legalization of expenses is ineffective in protecting women and children from commodification and commercialization. Creighton points out the AHRA ignores the 2001 Committee Report, and argues that the legislation “opens the back door” to compensation for surrogacy (Senate Committee, 2004:11). She asks the Senate Standing Committee, “What will count as expenses? A weasel word” (Senate Committee,

2004:11). In her estimation the dignity of women and children will not be sufficiently protected, but the slim protection offered by the AHRA is better than none at all.

Payment for pregnancy would commodify it as a reproductive service and thereby diminish its dignity. Neither is such practice conducive to the equality and dignity of women [...] I am distressed at these and other defects in the bill. Yet I believe that Canadians and especially women and children, need this bill to be passed for the protection of their health, dignity, and rights [...] In my opinion, the trouble with this bill is that it lacks real moral imagination, as does the existing practice of surrogacy (Senate Committee, 2004, 2:11-12).

In Creighton's assessment the AHRA will not be effective because the legislation ignores the recommendations set out in both the 2001 Committee Report and by the 1995 Advisory Counsel. In particular, the legalization of expenses is the equivalent of payment. Nevertheless, Creighton suggests that this must be passed to protect women from the dangers of reproductive technologies. Her anti-surrogacy position is summarized by the last line; surrogacy in her estimation "lacks moral imagination." The further irony is that pro-surrogacy witnesses in the 2004 Standing Committee review of Bill C-6 (or the AHRA) also take issue with the issue of compensation.

The two pro-surrogacy witnesses suggested that the legislation is problematic because compensation is criminalized. The first witness, Joanne Wright, suggests compensation for surrogacy is never enough, while the second, Shirley Solomon suggests that criminalizing compensation will dramatically limit access to third party reproduction arrangements.

The statement by Joanne Wright, a past surrogate and owner of a third party agency, Canadian Surrogacy Options (CSO), which connects surrogates and childless couples, remarks that a surrogate's sacrifices are invaluable and deserve compensation in addition to expenses.

A gestational carrier willingly puts her emotions, hormones, body, intimacy with her husband and her active lifestyle with her children second in order to carry a baby for someone else. She has the potential risk of losing her reproductive organs, other gestational and delivery complications, possible transfusions and, yes, perhaps even her life, to help a couple achieve their dream. She does this knowingly and accepts this risk. The compensation that a gestational carrier receives, if you break it down, works out to be about \$2.50 an hour. Does this sound like a lot of money to entice someone to do this? (Senate Committee, 2004, 2:7).

In this statement, Wright suggests compensation is not reflective of a surrogate's sacrifices. The compensation a surrogate receives is lower than minimum wage; however, Wright does not link surrogacy with exploitation. The wide-ranging sacrifices are made "knowingly" and include a surrogate's body and emotions, her sexual intimacy with her husband and "active lifestyle." This suggests commercial surrogacy is also a gift to the infertile couples.¹³

In the following statement, Shirley Solomon also opposes the legislation's criminalization of compensation. She provided witness testimony as the mother of a daughter who required surrogacy to have a child. Similar to Wright, she believes compensation should be legalized along with expenses. However, her castigation of the legislation is much more far ranging and severe. Not only is Solomon critical of criminalization because it is "naïve" to expect surrogates to participate in these extensive arrangements, but the government's legislation shows a "big brother quality," since it controls and limits childless couples' choices. Moreover, Solomon feels childless couples desperate to overcome infertility will practice surrogacy outside of the law or "underground." She decries the legislation further for criminalizing a practice that punishes these couples so heavily for the "desire to have a baby."

¹³ See Ragoné (1998) for the same language noted in the case of American surrogates.

This bill must be amended to allow fair, reasonable and regulated compensation in addition to receiptable expenses. It is totally unrealistic to expect a surrogate to go through pre-pregnancy treatments, nine months of labour and delivery without being fairly compensated to do so. To believe that a stranger will do this for altruistic reasons is naive in the extreme [...]

More important than all of this is the fact that, when it comes down to it, government does not have the right to play God, but that is precisely what this government is attempting to do with Bill C-6. What right does the state have to intrude in this highly personal and private decision? There is an extremist, big brother quality about this bill that I find reprehensible.

It will not stop infertile couples like Stephanie and David from wanting to have children. If this bill becomes law, these desperate couples will either go to the United States, with its largely unregulated environment, where donors and surrogates demand often-exorbitant fees, or they will go underground in Canada, even if it means breaking the law.

Bill C-6 will turn people like my daughter and her husband and countless other decent people who are here in support of what we are talking about today into criminals. They will have penalties normally reserved for second-degree murderers. Imagine sentencing my daughter to 10 years in prison for the crime of wanting to have a baby (Senate Committee, 2004, 2:14).

Solomon's connection between the ability to compensate and the access of childless couples to surrogacy suggests the larger significance of the AHRA's regulations. She remarks that if couples cannot pay surrogates more than their expenses fewer surrogates can participate in these arrangements. Solomon's testimony is also interesting because it invokes and flips popular associations, instead of scientists "playing god" it is the government intruding on the childless couples' right to a family. Solomon's view of altruistic surrogacy has been suggested in a CBC article (2007) describing journalist Kelly Ryan's investigation of assisted human reproduction after the AHRA. Ryan observes Canadian couples are traveling to more liberal countries where they can pay surrogates and egg donors.

In summation, the federal legislation's regulations contain interesting assumptions on the line dividing persons and things (or property). The contradictory significance of these regulations is also suggested by the three witness testimonies. Briefly, this includes Creighton's typical anti-surrogacy testimony that finds any financial exchange corrupts the human dignity of children born from surrogacy arrangements, and motherhood itself. In comparison, pro-surrogacy testimony from Wright and Solomon suggest that the criminalization of compensation diminishes the "choice" of surrogates and intended parents to engage in surrogacy arrangements.

Theorizing about Persons and Things

The legislation takes a strong stance against commodification and commercialization but fails to define either term. In this sub-section I turn to scholarly understandings of commodification and commoditization to problematize the federal legislation's criminalization of compensation for reproductive capacities. The process of turning "persons into things" (Kopytoff, 1986) has several different names. It is called commoditization (Appadurai, 1986, Kopytoff, 1986, 2004) and commodification (Ertman and Williams, 2005; Radin, 2005). Both terms refer to the process of compensating for human body parts or labour, however, Kopytoff (1986) emphasizes that the process is structured by notions of culture. The term commercialization is also associated with commodification. The standard Webster definition of "commercialization" is "(1a) to manage on a business basis for profit, (2) to exploit for profit, (3) to debase in quality for more profit." All of these different terms are used to qualify the process of persons and property participating together in a commercial market.

Moreover, commoditization, commodification, and commercialization contain undertones of what Kopytoff has called a “moral economy” (1986:64). He noted specifically when human body parts became commodified, in the case of blood, organ, ova and sperm, along with surrogacy, the fine line between persons and things became hotly debated (1986: 86-87). Other anthropologists, such as Nancy Scheper-Hughes (2002) and Leslie Sharp (2000, 2007) have also examined the process of commodification in terms of organ donation. Scheper-Hughes has written extensively about the ethics of organs commodification, especially taking a stance against “organ selling” by socially disadvantaged persons to more affluent persons in need of kidney transplants, which results in “new forms of late modern cannibalism” (2002:1). Sharp (2000) has reviewed the articulation between the process of commodification and theories of the body in anthropology. Her most recent analysis (2007) of organ transplantation also underscores ideas of commodification, but also that donated organs may lead to feelings of kinship. In general, the problematization of commodification is often fruitful in exposing “western” cultural ideas of the constitution of persons and things.

Another direction in anthropological literature is the examination of motherhood and consumption to expose the social significance of persons and things (Taylor, 2004). Motherhood is supposed to be antithetical to the logic of the marketplace, but mothers are persons too, and cannot abdicate their role as producers and consumers in a capitalist economy. Examining tensions at the intersection of cultural ideals of motherhood and consumption reveals further (sometimes contradictory) cultural insights, such as “the strength of anti-consumerist values in Western culture” (Kopytoff, 2004:275). The

particular case of “selling reproductive capacities” in surrogacy expands “western” notions of motherhood, consumption/production, while demonstrating that ideas of “relatedness” (Carsten, 2000) are grounded in cultural values. Cross-cultural instances suggest relationships between persons and things are not always estranged nor exploitive (Strathern and Stewart, 2000). The moral economy separating motherhood and consumption comes to the fore in laws on surrogacy, egg and sperm donation. The understandings of consumption and reproduction suggest different values, or in the words of anthropologist Marit Melhuus, different “procreative imaginings” (2007). For instance, she notes Norwegian legislators restrict reproductive gamete donation and third party reproduction, because this is thought to be eugenic in nature (Melhuus, 2007:43).

A variety of “feminist” thinkers (in particular see Corea, 1985, 1987; Raymond, 1993; more recently Katz Rothman, 1994, 2004) have examined how reproductive technologies may dehumanize women by turning their “reproductive capacities” into commodities. However, it is difficult to characterize “feminist” literature because often surrogacy and reproductive technology may galvanize both radical *and* liberal feminists and at the same time as conservative thinkers (Markens, 2007). For example, self-titled radical feminist Janice Raymond describes reproductive technology as “violence against women” (1993: ixx). In comparison, Lawyer Lori B. Andrews (considered a more liberal feminist) argues too much legal regulation of surrogacy turns “... *all* women into reproductive vessels, without their consent, by providing government oversight for women’s decisions and creating a disparate legal category for gestation” (1988:179). In

this sense there is no single “feminist” characterization on whether surrogacy and reproductive technologies result in commodification.¹⁴

Other researchers suggest examinations of commodification might start from the position that reproductive technology is not *necessarily* exploitive. In this line of thought, anthropologists Eric Hoeyer (2007) and Charis Thompson (2005) move the discussion of commodification (in reference to human body parts and reproductive technology) forward. Hoeyer argues persuasively that what he calls the “commodification hypothesis” must be extended because it closes down analysis without examining the “intricacies of the exchange” (2007:344). Thompson’s (2005) study of assisted reproduction technologies in America suggests commodification leads to a different kind of capitalism. She compares and contrasts the “Capitalist Modes of Production” with “Biomedical Modes of Reproduction” (see her chart, 2005:249). Commodities in the Biomedical mode of Reproduction move beyond “the Lukacsian or Marxist fetishistic commodities” (Thompson, 2005:257), and are “constitutively reproductive, lifesaving or giving, and promissory” (Thompson, 2005: 257). They help people who could never before become parents have children. These “commodities” also become part of “chains of custody and kinds of biological relatedness ... which can and do go wrong, get contested, and get broken” (Thompson, 2005:258). Ultimately, these observations relate to a theoretical model Thompson calls “ontological choreography” (2005:204). This model suggests reproductive technologies allow people and things to interact in ways that lead to both objectification and agency (Thompson, 2005:189).

¹⁴ Thompson (2005) provides a good review of diverse feminist literature which she divides into two phases. The first phase takes a strong stance against reproductive technologies, while the second or later phase of writing offers a more complex picture of reproductive technologies.

The complexity of commodification is also signaled by legal academic Margaret Jane Radin (2005) and more recently Canadian feminist ethicist Carolyn McLeod (2007) who speak of “the double bind” (Radin 2005:87; McLeod, 2007:266). The double bind is the way a woman’s personal integrity is *both* compromised and affirmed when she sells her reproductive capacities. For instance, selling ova or providing gestational surrogacy may demean a woman’s “dignity” (McLeod, 2007:259); however, criminalization limits her autonomy and her rights. Radin acknowledges that “To resolve the double bind we have to investigate particular problems separately” (2005:86), suggesting that commodification must be examined on a case-by-case basis.

Finally, to move forward discussions of commodification it is also useful to mention anthropologist Marilyn Strathern’s body of work, especially her most recent monograph *Kinship, Law and the Unexpected* (2005). This work reaches no simple or single conclusion regarding the social effects of reproductive technology and third party reproduction arrangements. Instead, Strathern suggests kinship and property are analogies that may collapse into each other (2005:75). Corrine Hayden (2007) also echoes the link between kinship and property is theoretically productive for anthropologists. This allows scholars to “leap across domains” connecting ideas of kinship with such topics as DNA and biological patents (Hayden, 2007:339). Thinking about persons and things, especially in the context of reproductive technology and kinship, cannot be solely equated to commodification, but may lead to broad examinations of the way nature and culture are co-produced.

Paradoxically, academic analysis in Canada has largely avoided deconstructing assumptions of commodification and women’s autonomy in the *Assisted Human*

Reproduction Act (AHRA). A recent exception comes from Canadian ethicists Timothy Caulfield and Tania Bubela (2007) who observe that stem cell research has been severely curtailed in order to protect women and children from commodification. After reviewing the 2001 Standing Committee of Health testimonies they found that the fears of commoditization were combined with a moral stance on the inviolability of the human embryo, a stance they find unacceptable in a pluralistic Canadian society (Caulfield and Bubela, 2007: 59). I also agree with their finding that while "... the term *commodification* emerges throughout the process, its meaning is never clear and it is used to support diverse agendas" (Caulfield and Bubela, 2007:58, emphasis in the original).

In response to these conclusions, legal academic Roxanne Mykitiuk, Dr. Jeffery Nisker (past chair of Canada's Advisory Committee on Reproductive and Genetic Technology), and ethicist Robyn Bluhm contend that fears of commodification originate not with stem cell research but rather with the 1993 Royal Commission on New Reproductive Technologies (2007:71). They also argue that the AHRA does not ban stem cell research if one *chooses* to complete human Somatic Cell Nuclear Transfer into non-human oocytes (Mykitiuk, et al. 2007:71). Their disconcerting recommendation for Health Canada to conduct further public consultations belies the long history of policy development on assisted human reproduction in Canada that has not led to timely or effective regulations.

Another Canadian scholar, Samantha King, views the federal legislation as taking the positive step of limiting "the kinds of choices available to infertile couples that have most troubled feminist critics over the past two decades – most notably commercial surrogacy" (King, 2007:617). However, King argues that the government's legislation

does little to address the root of reproductive commodification: the fertility sector's seizure of "... the language of 'choice' in order to sell their products" (King, 2007:617). In other words, the federal legislation cannot stem the politics of "life itself" (Rose, 2006) related to reproductive and genetic technologies. However, based on Caulfield and Bubela (2007), a much simpler and more meaningful question remains unanswered: whose "diverse agendas" (2007: 58) *are* promoted when the federal government takes a stance against reproductive commodification and commercialization?

Multiple Understandings of Commodification

To move beyond the theoretical arguments complicating commodification and commercialization, I turn to the multiple understandings of commodification appearing in my interviews. From this standpoint surrogacy is not a dehumanizing and commodifying process, but becomes "an important avenue through which people seek to act meaningfully in the world, not merely to secure basic needs but also to achieve self-respect, social identity, and other important goals" (Taylor, 2004:8). The multiple understandings of commodification also extend previous analysis by Ragoné (1994, 1999) on surrogates' assorted motives for participating in these arrangements.

The multiple conceptions of commodification show the particular ways both money and motherhood are understood in these arrangements. I begin by examining the unintended effects of the federal legislation that may intensify commodification. Next, I turn to Fern's conceptions of exploitation and commodification in gay surrogacy and surrogacy in non-western contexts. Finally, I end by examining narratives of compensation and gift giving to show the range of meanings associated with surrogacy.

Unintended Commodification

Surrogates were not the only participants who held multiple conceptions of commodification. Almost all the participants I spoke with took issue with the criminalization of compensation for surrogacy and third party reproduction, and found fault with the AHRA's connection between commodification and third party reproduction. In particular, lawyer Elena and surrogate Fern suggested that the AHRA's regulations against commodification had the unintended effect of *increasing commodification*.

In Elena's following narrative the criminalization of compensation has led to further "commercialization of reproductive capacities." This occurs because now Canadians are turning to American agencies where surrogates and gamete donors are paid. In essence, this suggests the AHRA has made some women's commoditization more acceptable than others, while increasing the business of American fertility agencies.

See the legislation wanted to ensure that there wasn't commercialization of reproductive capacities but what's actually happened is it's gotten worse. Before the legislation I don't think there was a problem that needed to be fixed. I think the clinics needed to be regulated but I didn't think we were seeing a commercialization. Yes, we were seeing people paid for time and expenses for going through the procedure more than we can now with the legislation. But you didn't see the kind of commercialization that was happening in the States in this area. And now ... Canadians are using American resources to have their families. So they'll use a surrogate here and an egg donor from the States and question whether that contradicts the legislation or not, just because the egg donors are paid through an agency in the States ... I'm not sure that that means that the couple aren't making that payment here. You know, it's a grey area ...

Elena observes that the AHRA regulations mean more Canadian childless couples and same-sex intended parents will travel to the United States; this may result in further commercialization to meet their demands. It is not certain if this travel for reproductive

services contravenes the legislation. Ironically, the AHRA regulations turn certain parts of assisted human reproduction into a “grey area.”

The media has taken special note of Canadians’ travel for reproductive services, a phenomenon also known as “reproductive tourism” (Pennings, 2004). Early in my fieldwork several media reports and editorials emerged about third party reproduction “going underground” (CBC, 2007) and “Our Bioethical Hypocrisy” (National Post editorial; 2007). The main critique was that Canadian regulations have simply exported certain aspects of these arrangements to the United States instead of regulating third party reproduction itself.

Another media report by Globe and Mail reporter Mary Gazze reports that foreign intended parents choose Canadian surrogates to bear their children because the AHRA has kept the cost of surrogacy artificially low by criminalizing compensation. She also describes how childless couples and surrogates may contravene the legislation by “... dishing out more than expenses, and at least some surrogates are pocketing that extra money ... [since] penalties are not being enforced until a new agency, Assisted Human Reproduction Canada, sorts out the details in the next few months” (2007:A12). Gazze’s article recognizes that the Internet encourages third party reproduction when “... posts on infertility messages boards tell surrogates looking to receive more than their expenses to use cash, the online payment system, Pay pal, or offshore bank accounts” (2007:A12). This illustrates that Canadian federal regulations may be unintentionally encouraging the very commodification it wants to discourage.

I turn to Fern’s description of an ectopic (surrogate) pregnancy to illustrate that the AHRA might result in greater commodification. During an ectopic pregnancy the

fertilized egg does not attach to the uterus, which results in a potentially life threatening miscarriage. Fortunately, Fern survived her ectopic pregnancy, though she was hospitalized and lost one of her fallopian tubes. The intended parents did not compensate for her absence from work or provide any childcare services (she has two children). In Fern's narrative the absence of compensation for these losses appears to result in further commodification or exploitation. In comparison, if she had worked with an American surrogacy agency she could have received "a loss of organ fee."

I had the transfer [of the couple's embryo into her womb] and the next thing I know, after I thought I was pregnant, I started bleeding and the clinic's like you're miscarrying! And then a week after ... I was in the hospital ... unconscious and I ended up losing 6 weeks of work, and I couldn't even feed myself ... my family pretty much had to move into my house cook and clean and do everything for me ... take care of my kids. [I] miss[ed] ... my son's birthday ... I didn't get a cent! Not a cent! Didn't qualify for EI [employment insurance], nothing. NOTHING! And the government thinks that's right? ... And this couple they weren't allowed to pay me ... If I had been in the US, this couple would have paid me, get this, 5000 dollars for losing one of my tubes, because you would have gotten a loss of organ fee. They would've paid for each day of lost work. They would've paid for all my childcare and my house sitting which was my parents and everything. All would've been paid for. But the Canadian government thinks that's wrong. So I guess I'm just supposed to put myself on a sacrificial table ... And just rent out my uterus for nothing, I guess! That's what really angers me ...

This narrative is chilling because it illustrates that the criminalization of commercial surrogacy may result in exploitation. In this case, because compensation is not legal, Fern was not paid for the costs of losing one of her fallopian tubes. Moreover, Fern's evaluation that the AHRA forces her to put herself "on a sacrificial table" or "rent out" her "uterus for nothing" suggest the legislation may result in further commodification. A serious unintended consequence of the AHRA is that surrogates may support intended parents' third party reproduction arrangement to the detriment of themselves (Canadian Bar Association, 2007).

After relating the story of her ectopic pregnancy, Fern remarked that the government would probably blame her for this experience, and ignore that AHRA contributed to the situation. The following narrative illustrates Fern's view of surrogacy. This arrangement is similar to a child care service, akin to "babysitting" and therefore deserving of compensation. This conception of surrogacy also lies behind her explicit statement "nobody does anything for free."

The government's response would be you wanted to do it. You wanted to do it and those are the risk you take. I've always seen surrogacy like babysitting ... you would never take your kid to a sitter and expect her to watch them for free. Would you? Nobody does anything for free. You don't do things for free.

The AHRA assumed exploitation and commodification meant being paid for gestation, but the direct opposite position is taken in Fern's narrative. In Fern's perspective, surrogacy is a service similar to childcare. In this case, the commodification in surrogacy is similar to the commodification of more usual forms of employment.¹⁵

In the next narrative, Fern highlights the physical effort required in a surrogacy arrangement and suggests compensation "evens out the relationship" between the surrogate and intended parents. A surrogate deserves compensation after undergoing a cesarean section (that results in a scar), and looking "five months pregnant" when she will not be parenting the baby. Fern emphasizes that compensation is for these efforts and not for the baby.

... I've always felt that it evens out the relationship. When you come home from a hospital with no baby. And you look like you're still five months pregnant. And you're going to bleed for about six weeks and you can't have sex. You can't do anything. Especially if you've had a c-section [cesarean], you're going to feel like shit for at least six weeks. You're gonna have a scar. And they're enjoying the new baby and you're walking around like a hippo!

¹⁵ This does not mean that surrogacy is considered only a job; instead surrogates often develop strong ties with the intended parents and often feel surrogacy is a calling. See Ragoné (1994) and Teman (2003) for further illustration these rationalizations.

It's nice to know you have a little bit of extra money so that your family can do whatever it is you want to do. You're not bringing home a baby at the end. The government thinks what you did should be your payment. But they don't get it – it doesn't work like that! You can't associate paying for baby and paying for time! They can't, they just don't see ... the separation. They just see it as paying for baby.

This narrative demonstrates a central conceptual divergence from the AHRA. The AHRA's guiding principles and its criminalization of compensation suggest that compensation makes both reproductive capacities (male or female) and babies into commodities. While the federal legislation does not make clear how commodification harms the health and wellbeing of women, men and child, those actively involved in third party reproduction view compensation as solely for their contribution to the arrangement, not for the baby, nor does being paid for their "reproductive capacities" diminish their humanity.

Fern's next narrative indicates that compensation is also for her family and acknowledges their role in the surrogacy arrangement. In the following narrative she explains compensation is especially important for a surrogate's husband and elucidates many of the adjustments required by a surrogate's husband during a surrogate pregnancy. A husband's assistance involves more direct efforts such as providing fertility medication, and also standing in for his wife in the household.

I've always said compensation is for the husbands. Because let me tell you when you're throwing up and your husband's giving you a shot, and you're too sick to make dinner, and you're too sick to have sex, and you're too sick to go work and the bank account is getting lower, and lower. And the husband's having to work and make meals and take care of the kids and watch his sick wife whittle away in bed. Let me tell you they're a lot happier when they see a check for a thousand bucks going into the bank account for your time and travel.

This dialogue is at once instructive and troubling. It could be easily taken out of context and used against Fern as an illustration of her own commercialization. It is important to reiterate that Fern's narrative entails a different conception of compensation. The payment to a surrogate is not for her baby, but her time, and her family's efforts.

Expanding Commodification and Drawing Moral Boundaries

Surrogates and others who participate in these arrangements do have concerns regarding commercialization and commoditization. Fern was one of the most forthright interviewees about concerns of commodification and commercialization. She was particularly critical of two kinds of arrangements: gay surrogacy and surrogacy in India. However, unlike the AHRA's assumption that reproductive technologies are the source of commercialization and commoditization, in Fern's narratives this is determined by the potential strength of social ties between the intended parents and the surrogate. This suggests that concerns of commodification and commercialization in surrogacy arrangements may be highly specific and contingent on individual contexts.

In the following narrative, Fern demonstrates a kind of unease with gay surrogacy. This uncertainty stems from the assumption that surrogacy is an easy commercial arrangement for gay men. She suggests gay men "just call an agency, pay money, get some woman to have a baby for them." This intimates that gay men do not have a relationship with the surrogate, they simply "pick up the baby and feed them formula and off they go." My observations on gay surrogacy take the opposite position; however, in the following narrative Fern suggests a conservative position on gay surrogacy.

But I don't like it when they [gay men] feel that they can just call an agency, pay money, get some woman to have a baby for them and pick up the baby

and feed them formula and off they go ... I dunno, I think there's something special between a mother and a baby ... there's so many people that will attack me and go, 'well, look at all the single women that are having babies! And look at all the men that are fathers and their wives have died.' To me those are special circumstances.

[...]

You know what it is? It's the money! There's a lot of money involved with men especially in the US. There are whole agencies that cater to these men. And these women are paid a great deal of money. That's what concerns me. It would concern me if they did it for free as well. But still, I mean to me, it's just ... It's almost like purchasing a car.

In this narrative Fern indicates the commercialization of gay surrogacy by mentioning the “agencies that cater to these men.” However, the high cost of this surrogacy arrangement *and* no compensation are equally disconcerting. Finally, her concern for commercialization and commodification is most evident with the characterization of gay surrogacy as “... almost like purchasing a car.” This might be a shocking statement since Fern has already expressed opposition to the criminalization of compensation. However, this shows the possibility of maintaining multiple conceptions of commodification and commercialization.

Fern's conception of commodification is also nurtured by her perception of parentage. In her view, arrangements requiring donor gametes are problematic, because it results in too many possible parents. Fern also objects to gay surrogacy because this arrangement requires donor eggs.

To me it's different when you have ... [a heterosexual couple] ... with my first surrogacy it was her egg, his sperm. Their baby. You know what I mean? That kind of surrogacy is different ... than two gay men going to an agency, some of them use an egg donor, there's so many parties involved.

While gay surrogacy does require both an egg donor and a surrogate mother, and the costs for both are prohibitive, this narrative shows that understandings of what is commercial are flexible and may shift alongside personal beliefs of parentage.

At another point in the interview Fern and I discussed the advent of surrogacy in India. Oprah Winfrey's popular talk show had recently showcased Caucasian American couples traveling to India to complete surrogacy arrangements. I remarked to Fern that many surrogates on the online surrogacy message board discussed Indian surrogates with trepidation and feared that this surrogacy might taint the surrogacies they provided in North America. In one post, a member posted a picture of a common urban Indian slum with the question "Would you want to have your baby here?!" Other members picked up on the discrimination inherent in this message and pointed out that American cities also had slums.

As our conversation progressed, Fern also expresses another interpretation of commodification. In the following narrative she suggests surrogacy in India is exploitive because it is unlikely Indian surrogates and foreign intended parents will develop a close relationship. Fern also mentions asking intended parents that she knows about Indian surrogacy; an option they reject because it would preclude involvement in the pregnancy. For instance, North American intended parents would not be able to attend all of the ultrasound appointments occurring in India. For this reason Fern seems suspicious of the intended parents who choose surrogates in India, and questions why would "want their baby halfway across the world." She also suggests Indian surrogates' milieu might be disadvantageous to the baby.

Shireen: Well, I've been hearing about India ...

Fern: Oh, don't even go there. I know. I saw some of the responses on the boards. I think Maclean's did a big article. They made it sound like there's a lot of this going on ... I don't wanna even guess. I'm sure there's hardly any cases really. I can't see it being that popular. I mean would you want your genetic baby over in India? All the couples I talked to when I brought this up with them, they're like 'I wouldn't want my baby that far away.' ... I would

say most, 99% of intended parents, they want to be at the first ultrasound, they want to be at every doctor's appointment. I don't know any couple that would want their baby halfway across the world, in some third world country, and some woman who has poor medical care, probably doesn't eat that well, the way, you know, we do over here, and in some area where ... there's all kinds of problems over there! I mean why would they want their baby over there? I would not want my first baby over there! [...]

After this conversation Fern tempered her views of Indian surrogates, but made clear statements suggesting Indian surrogacy is commodification and exploitation. Fern does not condemn Indian surrogates who “probably ... do it for the right reasons” to “help” a family have baby. Her main contention is the likelihood the relationship between an Indian surrogate and the intended parents would be distant. Fern feared Indian surrogates would never “see those babies” or have contact by pictures or letters, because Indian surrogates are solely confined to the clinic.

Oh, I know the difference [in prices for surrogacy in North America versus India]. [But] the flights would add up... I question which people ... [go to India for surrogacy]. I don't think those people value those women at all. They simply see them as a means to an end. I see it as preying on economically disadvantaged people. I mean a lot of those women probably do do it for the right reasons. They do want to help the couple. But none of those people [surrogate mothers] are ever going to see those babies. They're not going to have a relationship with any of those parents. That's what concerns me. I know there's letters and pictures getting sent back and forth ... That's different. But I don't think that's going on. Most of them don't even know who she is. It's all done through their little clinics or whatever, right? 'Cause I read the articles and I know about the ... they were profiling the one girl and she said she was carrying the baby for some foreign couple. Didn't know who they were. See that's using.

Fern's response illustrates another conception of commodification and commercialization. She makes strong arguments against Indian surrogacy by stating intended parents are “preying on economically disadvantaged people.” Fern's foremost concern is the diminished social ties between Indian surrogates and intended parents will lead to exploitation. This is another dimension of collaborative reproduction ignored by

the legislation. Fern's multiple conceptions of commodification are highly individualized and marked by moral values. Overall, this illustrates how different surrogacy arrangements may still be considered commodification or commercialization.

Beyond Commodification

The motives of the surrogates I interviewed often had little association with compensation. In the following narratives I illustrate that surrogates speak of these arrangements as meaningful collaborative projects between herself and the intended parents (and at times with her whole family). I also highlight these arrangements are considered a calling, undertaken in response to family history, or progressive political principles. These narratives illustrate that surrogacy arrangements involve more than just the consideration of compensation. Certain dimensions of surrogacy are "beyond commodification" and this contests the federal legislation's assumptions of commodification in the "trade in reproductive capacities" (AHRA, 2004:4-5).

Gestational surrogate, Casey, a first time American surrogate for two intended fathers illustrates that surrogacy arrangements may be experienced by the whole family as a highly collaborative project. Our first interview was held by phone while she was in Canada for the implantation of embryos with her two intended fathers. Even by telephone her enthusiasm for her intended fathers and her surrogacy journey was unmistakable. She began the conversation with an exciting account of her travel up from the US, the thoughtful personalized gifts placed in the hotel room by the intended fathers and the fun activities they enjoyed during the trip. She joked about their fears of the embryo falling out after the implantation and how they drove back to the hotel cautiously.

In our second interview, Casey spoke more intensely about the significance of the intended father's gift giving. This is evident in the following narrative where she recounts a special dinner assembling both intended fathers and her family. The two gay men made a "wonderful speech" recognizing that the arrangement would impact the whole family and gave gifts to the children. This was deeply touching and meaningful to Casey.

...they had us to dinner ... and we brought the kids and that was the one [dinner] that really touched the kids 'cause they're [the intended fathers are] very attentive. They really pay attention well and they bought a gift for everybody. And they said it was a symbolic gift so to speak ... Before they gave the kids their gifts they gave this wonderful, little speech about the surrogacy and what I'm doing for them and what it means to them.

[...]

They realize it is going to involve the family and that, you know, if I'm not feeling well depending on what arises ... I'm going to be relying more on them to help out and they wanted the kids to know how much they really appreciated the sacrifices that the family was going to have to make and for the help they were going to be giving.

[...]

They gave each of the kids a gift ... It was like the perfect gift for each kid. It was ... they really paid attention to and heard not just listened to what my kids were saying ... They get down on their level and they ask thoughtful questions ... Everybody's commented on it. My 10 year old is like 'wow'! He's even like 'I really appreciate you listening and talking to me like that!' The way they've accepted my family and my children and my husband, it just blows my mind, when you're going through a surrogacy.

The depth of relations between Casey and her intended fathers is obvious from this account. Her comment "they've accepted my family and my children and my husband" emphasizes the positive collaboration possible in third party reproduction. Yet in the following comments Casey also acknowledges this is distinctive and highly personal. She refers to another surrogate who has intended parents who are less collaborative.

I talked to another surrogate and her IPs [intended parents] have never even met her kids. They're focused on her, and that's where their concern and interest lies. They're your kids, it's your family, it's your personal thing, we're only interested in dealing with the surrogacy aspect.

Casey went on in the conversation to further emphasize the collaboration required by the whole family in her surrogacy arrangement. A surrogate arrangement is not something the children or her husband can avoid or “sit out.” The sensitivity of the intended fathers in “incorporating that into our journey” illustrates how the arrangement may be lived as extremely cooperative experience. Casey’s following narrative expresses great enthusiasm for a truly collaborative surrogacy arrangement.

And to me if you have a family, or a significant other, you know everybody’s involved. Nobody has a choice to sit out on this one – ‘Oh, yeah Mom you’re going to be the surrogate but yeah I don’t wanna have anything to do with it ... I don’t want to see it, I don’t want to hear it, I don’t want to deal with it.’ You know it just doesn’t work that way. They [the intended fathers] have really focused on that and incorporated that into our journey. Which then again just makes them like the world’s bestest IFs ever again!

Casey’s accounts of gift-giving and collaboration are particularly helpful in problematizing the federal legislation’s stance on commodification and commercialization. The view of surrogacy as *just* a consumer commodity; a simple exchange of a woman’s reproductive capacity for compensation also becomes untenable in further narratives.

Next I turn to statements by Fern, Casey and Lois to show that monetary compensation is not the sole reason for engaging in these arrangements. The following three statements represent some of the reasons why women decide to become surrogates along with compensation. The variety of motives is highly distinctive and personal. I begin with Fern’s view that surrogacy is “more like a calling.” This is a fairly conservative and standard rationale, highly reminiscent of Ragoné’s (1994) research with traditional American surrogates. Surrogates often define themselves by their ability to carry a child and express great pleasure in being pregnant. In the following statement

Fern draws a parallel between being a surrogate and other professions. Moreover, she observes not everyone will complete a surrogacy for compensation.

I've always felt like it was more like a calling, just something you wanted to do. Like why are you in journalism? Why do people do the things they do? Obviously they're just going down that path. Most people who do surrogacy do more than one. They obviously enjoy doing it. And there's people who do it for no money, right?

The impression that surrogacy is a “calling” emphasizes that a surrogate’s engagement may be considered a choice and is framed as a special ability, not by the need for income. For some surrogates compensation is an extra inducement alongside the personal rewards of the arrangement. This becomes even more evident in the following statements by Casey and Lois. In particular, in surrogacy for gay men, surrogates may associate their personal reward with a family history of a gay or lesbian parent, relative or friend, and progressive political principles.

For Casey, the personal rewards of surrogacy influenced her motives. In our interview, Casey originally spoke of considering an altruistic surrogacy until she turned to a surrogacy agency. Moreover, Casey’s family history, which included a single, childless gay uncle, directed her choice to work with intended fathers. She felt this uncle would have made a wonderful parent, and her rejection of gay intended fathers would have been a slight against him.

Yeah, if I said no [to working with gay intended fathers] wouldn't that make me a hypocrite? I mean ... if I said no I won't work with a gay couple that'd be like saying that my uncle [John] being [gay] is insignificant, doesn't matter, he's not worth that extra thought ... that'd be like, John is like, the godfather of so many kids and he's incredible with kids and it'd be like saying John doesn't deserve to have kids because he is gay, I'd be a hypocrite ...

Another surrogate from my previous research on surrogacy from an online message board also spoke of the personal satisfaction in working with gay men. Lois, an experienced

American gestational surrogate, answered one of my posts asking why women decide to become surrogates. Lois's motives involve both a love of being pregnant and her contribution to overcoming "the social injustices of gay rights." Lois remarks gay or lesbian celebrities can easily adopt, but for the everyday gay man surrogacy more easily circumvents a difficult adoption process.

DH [dear husband] and I have completed our family but I was disappointed at never having the opportunity to be pregnant again. At the same time, I was becoming increasingly disillusioned with, what I feel are, the social injustices of gay rights. Yes, gay celebrities are able to adopt but for the average joe/josephine, most states have slammed the door on gay parental rights. With surrogacy, I can help create a family for a person who otherwise would have no way of fulfilling their dream of parenthood, AND experience pregnancy again for myself ... well, I only needed to know where to sign up!

The narratives of Fern, Casey and Lois suggest the desire to become a surrogate is complex and multifaceted, and cannot be solely attributed to compensation. Casey's narrative on the relationship between her intended fathers and her family also illustrates the dimensions of surrogacy that are unrelated to compensation or commodification. Yet surrogacy motives are also highly varied, individual and are cast in terms of surrogates' identity, personal family history and political views.

These narratives of surrogacy motivation lead to several implications when they are weighed against the AHRA's association between commodification and third party reproduction. First, the acceptance that women choose to engage in surrogacy for reasons "beyond commodification" could change the tenor of assisted human reproduction regulations. A second implication is that instead of just legalizing altruistic surrogacy, the federal government could introduce regulations that assume commercial third party reproduction *may* protect against possible exploitation. This might encourage third party agencies to manage the logics and coordination of the arrangement, including

compensation, and leave the surrogate and the intended parents “room” to focus primarily on their relationship and the process.

This chapter briefly examines those conceptions of commodification and commercialization result in diverse understandings of surrogacy. The *Assisted Human Reproduction Act* (AHRA) and the 2001 Committee Report tends to characterize surrogacy as highly commodifying and dangerous to the health and wellbeing of women and children with little explanation regarding this association. In practice, many different and contesting views of commodification and commercialization are possible. The AHRA may be seen as unintentionally encouraging further commodification and commercialization by shifting third party reproduction to the United States while attracting foreign intended parents with an eye to the low cost of surrogacy in Canada. Surrogates may also define commoditization and commercialization differently by drawing on different attributes of the arrangement. For Fern surrogacy is often framed as commercialization when the relationship between surrogate and intended parents is distant. However, further research on the variety of commodification and commercialization conceptions and practices is necessary to establish more relevant guidelines. The next chapter continues to examine the particular blend of commercialization and kinship at work in surrogacy by examining the role surrogacy contracts in the practice of third party reproduction.

Chapter IV: The Surrogacy Contract: Examining the “Contract Talk” of Formal and Informal Contractual Exchanges

In the last chapter I examined the Canadian federal law as it relates to surrogacy. In this chapter I examine surrogacy contracts to move beyond the limited assumptions on commodification and commercialization entailed in these regulations. My approach is to examine narratives of surrogacy contractual behaviour from interviews to illustrate that these arrangements necessitate strong ties between the surrogate and intended parents, and also establish distinct norms and behaviour. It could be argued that the surrogacy contract does not reflect actual practice, since there exists, in the words of modern law and society theorist Stewart Macaulay, a “... gap between the real deal and the paper deal” (2003:53). However, this gap is useful in showing that contractual behaviour related to surrogacy is socially significant and illustrative of distinct “relational norms and values” (Macaulay, 2003:53). This line of thinking is also found in feminist contractual scholarship, which in the words of legal academic Linda Mulcahy, “focuses on alternative understandings of what motivates people to form relationships and fulfill their promises to each other” (2005:4). These approaches implicitly oppose, as I do in my examination of surrogacy contracts, a classical or neo-classical view of contractual exchange as “a mere expression of economic relationships: a callous cash nexus divorced from intimacy, in which exchanges are the only way in which individuals come to recognize the needs of others” (Mulcahy, 2005:4). Additionally, the distinct nature of surrogacy contractual exchange is shaped by the intended outcome, the birth of a child. This makes Thompson’s (2005) view of reproductive commodities as part of “chains of custody and kinds of biological relatedness” (2005:258) particularly relevant. As such it

is inappropriate to examine surrogacy solely from the AHRA's vague and restrictive perspective of commodification and commercialization.

The distinct contracting behaviour in surrogacy has raised contentious ethical issues (see particularly the anthology edited by Larry Gostin, 1988). Some legal theorists have argued that surrogacy should fall under family law (Capron and Radin, 1988); while others feel that the contract limits a women's bodily autonomy in ways that are unconstitutional (Charo, 1988:93). Another legal scholar asks the difficult question: "Would it be reasonable to require surrogate mothers to give up a substantial amount of privacy for the purpose of detecting violations of the surrogacy contract?" (Macklin, 1988:144). Often these same legal academics make anti-surrogacy claims by suggesting the surrogacy contract depends on the commodification of the human body (or womb). However, the practice of contracting surrogacy is not solely commodifying but follows (like many contractual relationships) from strong ties between the surrogate and intended parents.

This chapter illustrates the multiple meanings and functions of surrogacy contracts through the narratives of lawyers, surrogates and intended parents. Surrogacy contracts have various functions but most importantly they explain on paper the creation of a "new kind of family," while establishing the norms of the arrangements. Surrogacy contracts also set out and limit the expenses while serving as a kind of informed consent to all the aspects of the arrangement. Most importantly, surrogacy contracts tend to manage the intimacy of third party reproduction and (similar to any contract) operates alongside the development of trust. However, the quality of this trust and the contractual exchange is distinctive and shaped by the federal regulations.

In this chapter I also introduce the various narratives of formal and informal surrogacy contractual arrangements, which I qualify as *contract talk* inside and outside of the lawyer's office. "Contract talk" is my own term for the distinctly idealistic but also highly specific narratives of formal and informal surrogacy contractual behaviour. For instance, a lawyer's contract talk describes formal contractual behaviour. Their narratives suggest surrogacy contracts have three functions: contracts organize these arrangements, set out and limit expenses, and, may establish parentage rights. Contract talk outside the law office is informal contracting behaviour. A surrogate and intended parents may draw up their own contract without recourse to a lawyer. However, since a breach of the contract is largely impossible to detect (unless the surrogate is constantly monitored by the intended parents or there are health complications post-birth); surrogacy contracts proceed only with extremely high levels of trust. The multiple functions of contracts and the diversity of views on their effectiveness show that surrogacy arrangements involve far more than issues of commoditization and commercialization.

Lawyer's Contract Talk

In this section, lawyer's "contract talk" reveals the complexity and unique type of collaboration required of these arrangements. It must also be acknowledged that the legal value of surrogacy contracts is uncertain, for instance a surrogacy contract is to a certain extent unenforceable because there are periods when the surrogate's behaviour and the pregnancy is not monitored. However, contracts still hold a special place in surrogacy. The contract may be viewed as a kind of "informed consent" that familiarizes participants with all aspects of the arrangement, the legislative context and their rights and responsibilities in the arrangement. In the interviews I conducted with lawyers Amanda,

Elena and Cameron, contracts deal with highly practical issues. I begin Amanda's narrative to show that surrogacy contracts address the full range of issues created by these arrangements. Next I turn to Amanda and Cameron's narratives on the expenses established in third party reproduction contracts. Finally, I refer to comments by an Ontario judge on a surrogacy agreement to show that contracts also facilitate legal kinship. Even though "contract talk" shows the *ideal* dimensions of collaboration in surrogacy arrangement and cannot enforce behaviour; these narratives indicate the values and norms of surrogacy arrangements.

Contracting Surrogacy

Both Amanda and Elena show that surrogacy contracting involves a range of issues that acknowledge the unique values and norms of third party reproduction. I begin with Amanda's description of what is in a surrogacy contract. The following dialogue between Amanda and myself indicates the great level of specialized knowledge required in surrogacy contracting and reveals three key insights. First, surrogacy arrangements are not quick affairs, and they take at least a year. Second, contractual obligations in surrogacy contracts are wide ranging. They span medical and psychological dimensions, life insurance, and normative behaviour during the pregnancy and birth. In this context, individual decisions become collaborative, at least on paper. Third, there is the minimal difference between heterosexual and homosexual couples contracting surrogacy.

Amanda: The surrogacy contracts contemplate everything that could possibly happen in a year. Because a surrogacy takes at least a year. From the time we sign the contract until the surrogate gets pregnant, delivers the baby, and recuperates, is at least a year. So we deal with a lot of practical matters. How many embryos will be transferred? How many times will the surrogate agree to undergo the transfers if the first one is not successful? Within what period of time will she agree to accept transfers? What health considerations are there? Are there prohibited foods? Are there foods that are encouraged?

We deal with the psychological aspect.

We deal with the counseling, the screening, the ongoing psychological care, for the surrogate and perhaps her family, if she feels that's appropriate.

We deal with her obligation to do what the doctor instructs her to do. We deal with termination of the pregnancy under what circumstances would that be a consideration. We deal with selective reduction.

We deal with insurance – there's almost always life insurance on the life of the surrogate, just in case something happens to her that her family would be taken care of.

We deal with all the legal stuff. The waivers, the releases, the assumptions of liability.

... Who can attend the birth ... I do a letter of instructions to the hospital toward the end of the pregnancy and everybody signs it including me. And it's delivered to the hospital and what we ask the hospital to do is recognize the intended parents immediately upon birth. So if there are any medical instructions that you need for the baby the hospital would look to the intended parents. And also ask them to discharge the baby to the intended parents. And to give them identifying bracelets, so they have access to the child. The hospitals aren't bound by it – but they love it! They call me asking for it if they don't have it. And we agree right in the contract that we will enter into that letter agreement, [the] surrogate agrees that she'll sign it.

Shireen: So are there different issues that crop up for gay dads versus intended parents?

Amanda: No. The legal issues are exactly the same. There are different emotional issues ...

In many ways contracts are ideals, the actual process of the arrangement may not occur exactly as the contract sets out. Nevertheless, the contract forces people to consider the process and balance everyone's respective interests before proceeding with the arrangement. This is essential when we examine the medical issues raised by Amanda more closely. Consider the balance of interests involved in the transfer of multiple embryos into the uterus. This glosses past the medical debate where transferring multiple embryos is risky, it may lead to a high risk pregnancy of "multiples" or twins; but also

increases the chance of pregnancy. It may be best for surrogates not to carry multiples, but intended parents' interest is to become pregnant. Selective reduction and abortion are also highly intimate and controversial medical issues. A selective reduction involves reducing the embryos carried by the surrogate in utero, while an abortion takes place at a later stage in the pregnancy. The contract forces both parties to consider the circumstances that may require a termination. Again the enforcement of this part of the contract seems tenuous. But with the contract acting as a tool of socialization, the unstated result may be that contracts facilitate accord between surrogate and intended parents.

The contract sets out standards of normative behaviour during the pregnancy and birth for the surrogate and the intended parents. Amanda observes that food selection and the availability of psychological counseling are part of contracting to ensure healthy pregnancies. In another part of the interview, Amanda mentions that a prior experience with a client is the reason she includes this clause in the contract.

I remember once a client called me and said 'Amanda, I just went to the soccer field to visit my surrogate, her children were playing in a game, and she was sitting there drinking diet coke and eating sprinkled donuts.' So I have a no aspartame clause that went in after that. It's amazing how many cans of soda somebody can drink. So ... I have a no aspartame clause. I also have a list of prohibited foods. It's all from the Journal of Obstetric Medicine.

This statement by Amanda shows that food selection structures a surrogate pregnancy on paper. The contract clause is based on medical studies but also intended parents' preferences and establishes surrogate's normative behaviour. In this case, Amanda remarks that an aspartame clause is included to limit the intake of aspartame for the

health of the pregnancy. Thus, these food restriction clauses may be socially meaningful and enable intended parents to assert their parenting rights and values.

The normative practices of birth are also established in surrogacy contracts, even though contracts are *not* legally enforceable. In this case, the contract and lawyer's letter helps hospitals proceed in the unusual situation where the woman who gives birth is *not* the mother. This is observed when Amanda remarks, "The hospitals aren't bound by it – but they love it! They call me asking for it if they don't have it." Surrogacy contracts show in writing that the intended parents must receive the hospital bracelet identifying their status and parental rights after the birth.

The high level of collaboration between the intended parents and the surrogate is further instantiated by lawyer Elena. She considers that medical issues not the expenses are the most complex aspect of third party reproduction, and reiterates the contractual obligations between the intended parents and surrogate.

... the surrogacy contracts have to address all sorts of things ... what the parties agree to with respect to expenses is the smallest piece of it, but the bigger piece is dealing with all the medical issues. What is their agreement regarding multiples, selective reduction, with life insurance for the surrogate and her family. It has to deal with, you know, what her obligations are ... with respect to, smoking and drinking, and those kinds of things that might affect the health of the fetus. And the parent's responsibility for child support, to become the child's parents... [and] ... the surrogate's responsibility to attend appointments.

Here Elena acknowledges the importance of contracts in addressing the medical issues that may arise in surrogacies. She repeats that "multiples, selective reduction, life insurance" must be agreed to in a contract. She uses the contract to show that obligations in surrogacy arrangements are divided – the parent's responsibility is to the child

afterwards; and surrogate's responsibility the immediate safeguarding of "the health of the fetus." This sets out on paper everyone's intentions and obligations.

Contracting Expenses

Further narratives from Amanda and Cameron also explain the meaning of expenses in the surrogacy contract. Whereas in the last chapter any compensation for the surrogate is seen as commodification, in discussions with Amanda, for example, paid expenses offset the arrangement's health risks. Amanda gives anecdotal evidence to show the rationality behind various clauses regarding payment for bed rest and early delivery.

... there was a case where the surrogate was confined to bed and the intended parents didn't want to pay for a caregiver to come in and take care of her children. So we started adding a cost to specifically deal with it.

[...]

There was a case where a surrogate delivered early ...and because the surrogate delivered in her seventh month, the couple didn't think she was entitled to her budgets for the eighth and ninth months, they wanted to go straight into the post pregnancy. So, I've dealt with that.

[...]

You learn from every one, and everybody's different and they have their own views.

The inclusion of expenses for bed rest and early delivery are distinct contractual considerations required in surrogacy arrangements. The contracting she describes interweaves elements of care and medical knowledge even though Amanda generally represents the intended parents.

In another part of the interview Amanda further acknowledges that the contract includes a budget for the surrogate. This budget takes into account the risk the surrogate may need bed rest, an event that would be especially disruptive, since most surrogates do have children. Amanda admits this is "paternalistic" however it also shows an unprecedented appreciation of the impact on the surrogate's home life situation.

I really create a budget for her [the surrogate], because what I want – this is slightly paternalistic or maternalistic! – if a surrogate is confined to bed during the pregnancy, if she is feeling unwell and she needs help, household help, childcare, all that kind of stuff. I want to make sure she has enough of a budget left for that. That to me is the most expensive thing that we can do for her. Allow her to sit down and put her feet up. Most of these surrogates are young mums with young children, you know. And young mums never get to put their feet up, so if we can do that for them then that to me is a win.

Amanda later explained this ensures surrogates will not be irresponsible regarding expenses and diminishes the potential for exploitation because expenses are both decided beforehand and limited. Furthermore, in my estimation Amanda's structured approach to expenses does not "corrupt" the collaboration between the intended parents and surrogate.

Lawyer Cameron generally represents gestational surrogates (or carriers) and their husbands in the arrangement. His narrative of formal contractual behaviour shows that lawyers may guide surrogacy arrangements to ensure the surrogate is informed of her rights and obligations, and the federal law regulating surrogacy.

Then I'll get an agreement. I'll send it to the clients and then I'll have them back and we'll go through the agreement. Very carefully. So that they understand exactly what it means, what each of the sections deal with, general concepts, again a discussion of the law and what you can't do and then try to get a memorandum back to [the lawyer of the intended parents] of the changes that we want to see made to the contract. There are some standard changes to the agreement.

Cameron's role is to "go through the agreement," explain the sections in the contract, "general concepts" but also provide "a discussion of the law." This shows that lawyers involved in third party reproduction help surrogates and intended parents negotiate the arrangement. Cameron drew especially on his experience as a gay father by surrogacy to be empathetic and knowledgeable of the process.

Cameron also speaks about the expenses elaborated in the contract. These expenses are broad ranging from the fertility medications required to proceed with the arrangements to cell phones and massage along with childcare for bed rest. This results in different “classes of expenses.” The following narrative suggests that expenses cannot be understood as solely commodification; rather these expenses are demonstrative of the collaborative dimension of surrogacy.

There’s a paragraph in the agreement that includes things that the gestational carrier would be able to claim for by reimbursable expenses. And they go from anything to medications to reimbursement for [a] cell phone to massages to childcare to lost wages while carrying if a doctor says that the individual has to be confined to bed. So there are a number of things which are classes of expenses that the agreement contemplates coming out of the pot. So that’d be one example.

The expenses Cameron’s mentions are not solely medical in nature they all relate to the pregnancy. This suggests surrogacy expenses must address the broad impact of pregnancy on the surrogate’s life.

Cameron also remarks on the other legal documents created to facilitate third party arrangements: waivers of liability and the release confidential information. This allows intended parents access to the medical information related to the surrogate’s pregnancy. Far from being dehumanizing, Cameron observes that sharing medical information makes the surrogate and the intended parents similar to a “new little family.” This he avers does not mean “everything” is shared, but highly personal information on reproductive health is “covered off” between intended parents and surrogates.

... [other] examples are the waiver and release confidential information. For example, these agreements provide in essence that the parties to it, which are normally the intended parent, the gestational carrier and a spouse (if the gestational carrier has a spouse), that really medical information is shared amongst this new little family that are going about this project.

So the information that would generally be confidential to the individual will be shared amongst the group, usually around things like sexually transmitted diseases, HIV testing, all of the nasty things that can be transferred from one person to another on a transfer would be covered off. And that's information that is certainly ... shared. We don't have sharing of everything. There's sharing of things ...

This narrative shows the dimensions of collaboration occurring within surrogacy arrangements, and describes the parties involved as a “new little family.” This problematizes viewing third party arrangements in Canada as solely commercial in nature.

For those decrying surrogacy as the commercialization of the womb, the above “contract talk” could bring the focus back to commodification or commercialization. Instead, I believe contract talk illustrates that surrogacy operates in an uncertain legislative context not as some “underground” baby selling scheme or commercial exploitation, but rather as a formal contractual exchange. As long as the “expenses” are reasonable this means surrogacy need not be viewed as exploitative or commodifying. Amanda addresses the potential perception of formal contractual behaviour as commodification in the following statement.

I think as long as the expenses are reasonable ... [if] there's [something] of benefit that we can do for the surrogate. So does that make it commercial? Something ... something goes both ways. So if we can't make the surrogate's life better in some way – why would she carry a baby? Inconvenience her entire family and undergo the risk of the pregnancy and delivery?

The federal legislation makes a particular division between kinship and consumption. Amanda emphasizes the arrangement is a formal exchange that must satisfy a surrogate's needs because it requires much effort on her side. This acknowledgement by Amanda, who admittedly represents the intended parents, shows that legal consultation and

surrogacy contracting interweaves elements of care in ways that make it far more than a formal document.

Contracts and Parentage

Contracts in surrogacy arrangement may also determine parentage. This is observed by referencing Justice Clifford Nelson's comments from a recent 2008 court application for a declaration of parentage known as *M.D., J.D. v. L.L., I.L.* The judge remarks in following reference that the contract or "gestational carriage agreement" makes several claims about parentage, which allow him to determine parentage in favor of the genetic parents M.D. and J.D.

Pursuant to the gestational carriage agreement entered into by the applicants with L.L. and I.L., it was agreed that it would be in the best interests of the child to be placed into the immediate permanent custody of the applicants after birth. The agreement states that the applicants are not only the genetic parents of the child, but also the "social" parents. L.L. and I.L. agree to relinquish any parental rights over the child, while the applicants confirm their intention to assume all parental responsibilities. The agreement also states that the applicants will apply to this court to obtain an order declaring them to be the child's parents, and directing that they be named as such as the child's birth registration.¹⁶

Judge Nelson draws on the contract to show *the common intent* of both the surrogate and her husband and the intended parents as to who will have parental rights after the birth of the child. The contract shows the surrogate and her husband's accord with the intended parents that they should be the sole parents; and attests to the genetic ties between the intended parents and the child. The judge notes even the pursuit of this declaration of parentage was part of the formal contractual exchange written in the agreement, and ensures only the intended parents will be named on the child's birth record.

¹⁶ *M.D. and J.D. v. L.L., I.L.* [2008] CanLII 9374 (ON S.C.), paragraph 11 and 12.

The judge goes on to note that he finds the agreement is compliant with the AHRA, and no compensation was accepted by the surrogate. However, he also remarks this is not his concern, "... I have not been asked to rule on the validity of the various provisions of the gestational carriage agreement, and therefore I have not done so. The agreement's validity is not essential to the findings and conclusion reached in this case."¹⁷ The interesting development here is that the judge validates parentage claims based on the contract; however, he does not assess the validity of the contract's terms.

As a practice occurring in an unfriendly legislative context, contract talk, formalizes "non-traditional" family building and demonstrates the use of personal contract law in guiding these arrangements. The lawyers' narratives illustrate that contractual obligations also determine the process, and the normative behaviour and values of the arrangement (for example how many embryos will be created and placed in the uterus). Contracts also reduce the issue of commodification by setting out and limiting expenses for surrogacy. Most importantly, this contract talk incorporates distinct elements of care and an awareness of the medical dimensions arising from (third party) pregnancy and birth. Finally, the 2008 legal case of *M.D., J.D. v. L.L., I.L.* illustrates that a surrogacy contract may bolster the determination of legal parentage.

Contract Talk outside of the Law Office and the Dynamic of "Trust"

While the above contract talk illustrates formal contract talk, the following section emphasizes informal contractual exchanges and the distinct type of trust required in surrogacy arrangements. The meaning of trust is important but also contradictory. The need for both more legal consultation and more trust seems tied to the criminalization of compensation. Intended parents and surrogates must trust that the reimbursement of

¹⁷ *M.D. and J.D. v. L.L., I.L.* [2008], paragraph 14.

expenses will be enough or may expect off-the-record compensation. In this section I examine informal contract talk and alternative views of contracts and trust in surrogacy.

Informal Contracting

One of the key participants of this study, Fern, took a strong position against formal contracts. In this brief subsection I examine some of the reasons she suggests surrogates and intended parents might turn to informal contracting. I also draw on posts from an online surrogacy message board to suggest that the Internet may also encourage certain types of contractual behaviour.

In the following narrative, Fern states empathically “contracts are not worth the paper they are written on.” She questions the use of having a contract drawn up by a lawyer when the surrogate may not become pregnant or the arrangement might fall apart. Yet Fern also observes she signed a personal contract with the intended parents for each of her eight embryo transfers. This suggests that contractual behaviour remains an important dimension of third party reproduction, but participants in these arrangements may engage informal contractual behaviour. Our dialogue of the value of contracts and lawyers in surrogacy arrangements suggests some kind of contractual behaviour (either informal or formal) and trust are essential in these types of arrangements.

Shireen: I hear different things about these contracts and things ...

Fern: Ok, contracts in Canada are a joke! They're not worth the paper they're written on. That's your first ... information. They'd never stand in court ... they're worthless, useless.

Shireen: So will you do them anyway? I know people who will do them anyway.

Fern: I had signed a contract for every surrogacy and only one went through a lawyer. I've had 8 transfers [of embryos], my last clinic I just went through, they didn't even look at the contract. We didn't even use a lawyer. Why would we use a lawyer? Spend \$5 thousand dollars on a lawyer, what if I don't get pregnant?

[...]

Fern: Do you know much money these lawyers are making? Their prices are going up and up and up. When I first went into surrogacy it was 2500 dollars to get a contract written up, it's now 5 thousand dollars. 8 thousand if it's international! For a contract you can print off my website. These contracts aren't really worth anything anyways. That's why couples are like, what the heck! It's all about trust anyways!

Fern's narrative suggests that the federal legislation has created more uncertainty. This means first-time intended parents tend to seek out more legal consultation to guide them through the confusing legal context and the process of third party reproduction. This surge in demand has made formal contractual exchanges more expensive. To get around the cost of surrogacy contracts Fern notes that intended parents and surrogates may simply draw up contracts *without* legal representation. In this way, informal contracting pushes forward the surrogacy arrangement. Additionally, Fern observes that a contract is not a substitute for a trusting relationship. Fern summarizes this sentiment in her last point "It's all about the trust anyways!"

Another reason for turning to informal contracting is that even after drafting the contract the surrogate may still change her mind. The reason for informal contracting is striking; surrogates may "drop off like flies" when they realize they do not want to continue with the procedure. This also encourages intended parents to turn to the Internet to find contracts. Fern spoke of the situation in this manner:

But a lot of them [intended parents] are going 'No this is ridiculous!' Because surrogates aren't screened in Canada anymore and they drop off like flies, you get a surrogate you can't really compensate her, so a lot of these surrogates are ... you know ...officially first-time surrogates, not getting fully compensated the way the more experienced ones are getting and

they realize halfway into it 'this isn't really what I want to do.' And they disappear. And they [the intended parents] just paid 5 thousand dollars to a lawyer. I get this all the time ... I get people calling – 'Oh my god, I spent ten thousand dollars on legal fees for two surrogates who disappeared.' They could have saved that through an agency or if they had some kind of body in Canada that allowed screening.

Fern makes a simple but powerful observation: drawing up a contract does not mean the arrangement will be completed. This is an important counterpoint to lawyers' contract talk; contracts are ideals that may not be fulfilled in reality. Moreover, Fern's observations suggest the lack of compensation for surrogates unintentionally compromises the use of formal contractual agreements. This happens when surrogate "drop off like flies" perhaps after realizing that the extensive process and the compensation are unequal. Moreover, intended parents are left holding a worthless contract, and must pay for legal services that are now moot as they have no one to gestate their embryos.

Online surrogate message boards and websites tend to encourage informal contracting behaviour and "do-it-yourself" legal contracts for surrogacy. I observed this when I joined an online surrogacy message board, where members would post for advice and ask others to share their contracts to get a sense of what they might contain. Here is an example of such a post by an unregistered user:

*Hi!
I am planning to be a GS [gestational surrogate] for a friend of mine. We will be going for our consultation, etc in Toronto next week. They informed us that they don't have anything to do with the legal stuff. In the interest of keeping cost to a [minimum], we were hoping to avoid having to use lawyers to draw up a contract. I am hoping to find a sample copy of an agreement to adapt, something fairly simple, and was wondering if we can just get it commissioned or notarized by a lawyer or a commissioner. Anyone from Ontario have an agreement similar to this that [they] would be willing to share? Or any advice to offer? Any insight would be great!*

In this same post, members of the message board offer to email her a copy of their contract (with the personal information masked). However, this does not mean the Internet always encourages informal contracting. One member, Lena, a Canadian online participant of the study and longtime member of the surrogacy board posted the following message:

Unfortunately ... I haven't had Canadian IPs [intended parents] so never had a contract made here but believe me, although I was pretty comfy doing it myself with my USA IPs, my next contract here I will definitely do it through a lawyer recommended by X from surrogate consultation. Saving money is really not a good idea when dealing with Canadian laws about assisted reproduction. Especially for the next 12 months since we are in the [m]idst of serious changes about what the new rules will be now that the Federal Agency for Assisted reproduction technologies has been create[d] and started its operations.

In this response Lena suggests legal advice is necessary because of the “serious changes” caused by the AHRA. Legal consultation is considered a safe way to engage in a surrogacy arrangement at the beginning of the legislative regulation. In comparison to Fern’s statements that legal consultation is too expensive and unnecessary, Lena shows that less experienced surrogates may still turn to formal contractual exchanges to safeguard their interests.

Dynamics of Trust

The trust between the surrogate and intended parents is almost as paramount as the contract. Initially, I came across the issue of trust when I attended a “maybe-baby” group and in posts on the surrogacy board. In the first instance, a gay father fielding questions from men in the group remarked, even with many legal consultations, at some point they had to trust the surrogate and the process. In posts online, trust was part of the *journey* of surrogacy, and the selection or “matching” between the intended parents and

surrogate. If there was no trust between intended parents and surrogates, then the match was flawed, and it was better to “move on.” Contracts only went so far, or as Len stated, “you can’t contract a relationship.” Yet this too is an ideal that ignores the way many social relationships are contractual.

The dynamic of trust and the relations between surrogates and intended parents are often contradictory. In the following narratives, trust is not only vital in a surrogacy arrangement but requires the surrogate to establish firm limits and guide the intended parents. Trust may also blind a surrogate to her own interests. Trust is also important because of the federal laws on assisted human reproduction and depending on the type of surrogacy.

In the first part of the chapter I showed that contracts structure the norms and values of surrogacy arrangements. However, contracts are ideals. The importance and power of surrogates cannot be “contracted” away because the exchange involves their own body. Fern suggests that intended parents may want these ideals on paper, but understand that it is the surrogate’s decision to respect these restrictions. She pointed out in the interview that the constructed nature of the arrangement leads to restrictions that would be unthinkable in a traditional pregnancy. This means that intended parents do ultimately have to trust the surrogate and may overlook her transgressions, for instance, of food prohibitions.

I’ve heard about the aspartame clauses and all this kind of stuff, it’s crazy! ... [The reason why is] these couples have tried for so long and they’ve paid so much money, and they’re so afraid of any little thing screwing it up. So I can give that to them! A lot of them say ‘Just say you won’t drink it – how are we ever going to know?’ I mean one diet coke here and there is not going to hurt you.

She points out that the real issue behind food prohibition clauses originates in the collaborative quality of the pregnancy, and the time and money invested by intended parents in having a child. Fern expresses much sympathy with intended parents over the stress of having someone else carry “your child.”

She went on to state: “It’s hard for them, because they feel out of control. They’re not pregnant. They don’t know what else to say [except] ‘Oh my god don’t clean the litter box!’ ... and then you have to figure out how to work that out.” The need to “work things out” requires very high levels of trust and can lead to compromises on either side. I got a sense of what this was like when Fern revealed with much mirth her current intended parent’s faith-based food prohibitions.

Shireen : Yeah, it’s pretty interesting some of the preferences I’ve heard of what you can eat, what you can’t eat, etc., whether you’re going to put that in your contract or not ...

Fern: Oh it’s all ... it’s baloney! I’ve been battling with my couple all week actually. They wanted me to ... stop eating pork ... I run a pork farm! ... My freezer probably has the most pork probably in this county! I mean my freezer is loaded, by boss is a butcher! That’s what we do! I cannot not eat pork! I think I would die! ... They let that one go. The next thing I know ... they’re freaking out that I have a cat! I’m like so what? They’re like, ‘Well, don’t clean the cat box!’ I’m like, ‘Well, why not?’ ‘You’re going to contract that taxiplasmosis and the baby’s going to die!’ They’re totally hyper right now. And a lot of couples get like that ... She calls me the one day, ‘You better be eating apples! I hear apples are really good for brain development!’ I mean, I’ve been pregnant! I’ve had four full babies! I’ve had cats, I’ve ate pork, I haven’t got no toxoplasmosis. I’d have to be digging in a litter box and licking things! I mean it’s not going to happen. I mean I pressure wash 12 hours a week, ok? I pressure wash shit! Ok? It’s everywhere! Ok! And I have never gotten sick or anything! I’m probably very healthy because I do all that. So I mean they just, I just let her have – you know – her rant. And I tell her everything’s going to fine.

This dialogue between Fern and myself was extremely humorous. We laughed at the antics of her intended parents, however, these statements also reveal the way intended

parents push a surrogate's "body boundaries" (Goslinga-Roy, 2000). There are no dark motives for these demands, but as Fern remarked this is their first pregnancy. She also shows that she maintains her agency and must guide them. She overrules their concerns because she has given birth to four children and knows from past experience that her behaviour will not have a negative impact on the baby. The concerns of the parents, while motivated by their religious observances, also suggest a concern over the kind of child born. The intended parents want Fern to eat apples for their baby, because "apples are really good for brain development." However, though Fern remains sympathetic to the intended mother's worries, she will not alter how she lives her life. Fern shows the complex and delicate balance required between the surrogate and the intended parents; and the surrogate's responsibility to take intended parents in hand by establishing firm limits.

Another way to observe the contradictory meanings of trust in surrogacy contracts comes from lawyer Cameron. He observed that contracts could "... create trust but they also create mistrust." He pointed out that trust could be precarious, because it led to surrogates wearing "rose-colored glasses." In his words, "the relationship is so created by the time I see these people and they're so invested in these people [intended parents] and they want to do the right thing for them." In this case the trust developed between the surrogate and the intended parent diminishes the informed consent value of the contract making it a mere formality.

Fern also emphasized that contracts may simply be a formality. Her description of the contract reiterates how the contract is an ideal that may mask the true conduct, such as compensation beyond expenses. The contract is also a way for other professionals

involved in these arrangements to work around the difficult guidelines of the federal legislation.

*Because they [the clinic] know that its [third party arrangements are] going on. To protect themselves they have to see some thing in writing legally so that if there's ever an investigation, some couple is caught paying, the clinic can simply say 'hey, we saw a contract, we don't have any knowledge of what was going on.' **It's just [a] legal formality protecting them.** They know what's going on. They were staunch supporters of surrogates being compensated, they feel that they should be compensated I mean the egg donors have dried up (my emphasis).*

While I believe contracts are more than a mere formality, in the eyes of professionals, contracts may be protective against regulatory penalties. Surrogacy contracts cannot completely safeguard the interests of either surrogates or intended parents, and trust between both parties remains even more vital and distinct than in standard contractual exchanges. Moreover, contracts do move surrogacy arrangements forward in a variety of different ways. The subtext of this statement is also suggestive that there exists a link between the availability of surrogate and egg donors and the ability to receive compensation.

Finally, the type of surrogacy may also intensify the need for trust, especially after the *Assisted Human Reproduction Act* (2004). For instance, with a traditional surrogacy (TS), trust is even more vital because there is both a genetic and biological connection (as the surrogate's ova are fertilized in the process). This arrangement is seen as extremely risky (this is further examined in the next chapter), and demands more trust.

This was mentioned in an online post by intended surrogate Lena:

One thing though... with TS [traditional surrogacy], you must be sure that you trust that person because, not only [is] compensated TS is illegal here but if the surro[gate] goes 180 degrees and do [sic] not sign the adoption papers for the real mother (the father has a claim as the genetic father); the law will be against you. Even though you escape the 500,000\$ and/or jail penalty by

demonstrating that it is a US agreement where the surrogacy does not constitute a law infringement, the TS will be recognized as the legitimate mother and you won't be granted visitation rights unless you move within reasonable distance (which could prove impossible if your husband can't get a residency/work visa for Canada) but you may still have to pay child support!

Needless to say that being TS via IVF for my IF [intended father] was a big risk he was taking. I know I'm trustworthy and won't fail him but I am amazed that he was willing to take that chance, especially because my comp[ensation] is the normal US rate... I guess I am a good person.

The new dimension of trust introduced here goes beyond the surrogate taking care to behave in certain ways outlined in a contract. Lena observes that intended parents must trust the surrogate will acknowledge their parentage. This shows that contractual exchanges in surrogacy are distinct and especially in a traditional surrogacy results in further dynamics of trust and a new level of collaboration.

To summarize, trust is a basic dynamic in all contractual relationships, but in surrogacy arrangements it comes up in various contradictory ways. First, a surrogate and the intended parents require strong dynamics of trust to navigate the actual practice of the arrangements. Second, trust can also create “rose-colored glasses” so that surrogates already feel so much trust towards intended parents they are less protective of their own interests. The distinct contractual behaviour and dynamics of trust are also affected AHRA.

This examination of surrogacy contracts allows for various types of conclusions. First, in comparison with the ideas of commercialization and commoditization defined by the AHRA, surrogacy contracts in practice show that contractual obligations only go forward with the development of trust. To a large extent this trust is embodied – it is derived from the surrogate’s body and her respect of contractual obligations. The

surrogacy contract draws attention to some of the observations of anthropologist Gillian M. Goslinga-Roy (2000) on her research with traditional surrogate Julie Thayer:

Empowerment and disempowerment were not a matter of how she [Julie the surrogate] chose to dispose of her body as her property, but rather they had everything to do with her ability to preserve the 'sanctity of [her] own personal boundaries' even as she opened up the collective of her body to include the Martins' [intended parents] desires (Goslinga-Roy, 2000:129).

In other words, the contractual obligations of surrogates and intended parents do not seem to collapse people into things (Kopytoff, 1986), but rather highlight an exchange based on personal obligations between the surrogate and intended parents. Goslinga-Roy's observations and the statements of participants make it obvious that these personal obligations are enacted on the surrogate's body and so ultimately remain the responsibility of the surrogate. The narratives also emphasize that these personal obligations are based on more than money, but also involve dynamics of trust. Moreover, surrogacy contracts also operate concurrent to greater individual contractual autonomy in family law (Wadlington and O'Brian, 2007:53) that is examined further in the next chapter on legal kinship.

Chapter V

Establishing Parentage: Legal Configurations of Kinship

The Webster dictionary defines parentage as “1a: descent from parents or ancestors, b: derivation, origin; 2: parenthood.” In Ontario, same-sex parents and third party reproduction lead to new varieties of parentage. A legal parentage claim in these cases is established through a process called a “declaration of parentage.” Unlike adoption, a declaration of parentage establishes kinship ties and is registered on a child’s birth certificate.

Legal kinship in the context of same-sex parents and third party reproduction also demonstrates the variety of ways parentage may be proscribed. Legal scholars have noted that to some extent “parenthood as understood by law ... is *always* a constructed or attributed status” (Campbell, 2007:244, my emphasis). The attributes or “dynamics” of parentage (Campbell, 2007:264) *construct* parental rights around genetic ancestry, biology (or parturition), intention (demonstrated when surrogates and intended parents draw up contracts) and sociality (everyday parenting). In a recent examination of Quebec’s filiation laws and Canadian court cases on parentage, legal scholar Angela Campbell remarks that the approaches in deciding parentage vary and there are times when genetic connection alone does not lead to exclusive parental rights. She goes on to observe that the varieties of parentage mean that there exists little coherence in this context:

In regards to *coherence* of current approaches, I would suggest that none of the dynamics law relied on to establish parentage in assisted reproduction contexts is satisfactory. Each gives rise to distinct practical challenges, and each might be difficult to rationalize in the view of other family law principles, or even, plain logic” (2007:264, emphasis in the original).

In this chapter I uncover the different “logics,” rationalizations, or in the words of anthropologist Janet Carsten “trajectories of processing” (2007) undergirding varieties of legal parentage in the context of same-sex parents and surrogacy. First, I examine the varieties of approaches in legal kinship claims. This demonstrates a range of inclusion and exclusion made possible by selectively valuing different ties related to parenthood. Next, I examine legal kinship practices that favor certain surrogacy arrangements over others. Finally, I address the multiple conceptions of parentage represented in the interviews. This chapter examines parentage law and practice that move forward third party reproduction, in particular gestational surrogacy, in an era when federal legislation discourages these arrangements.

Legal Kinship - declarations of parentage

A declaration of parentage is made on a case-by-case basis, but it creates immutable kinship relations. Declarations of parentage draw on previous case law; and I have selected three declarations of parentage to show a few of the varieties of parentage created in the contexts of same-sex parents and surrogacies. A declaration of parentage is found in section four and five of the Ontario family law statute known as the Children’s Law Reform Act (CLRA), R.S.O. 1990. Originally a statute revised to eliminate any distinction between children born in and out of wedlock; it is also proving useful to acknowledge parental rights in new contexts. The statute may also be used in court to show a gap that requires the court to intervene and exert *parens patriae* to protect children’s rights, in these cases to acknowledge their genetic parents, or two mothers or fathers.

A declaration of parentage allows persons to become legal kin. The ability to be declared a parent requires showing evidence of the relationship, including but not solely genetic and biological ties. A declaration of parentage may also be used to oppose the presumption that the woman who gives birth is the mother, and her husband is the father. To understand how a declaration of parentage creates kinship, I quote lawyers from the case *A.A. v. B.B.*:

The declaration of parentage is a lifelong immutable declaration of status;
It allows the parent to fully participate in the child's life;
The declared parent has to consent to any future adoption;
The declaration determines lineage;
The declaration ensures that the child will inherit on intestacy;
The declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for the child;
The child of a Canadian citizen is a Canadian citizen, even if born outside of Canada
The declared parent may register the child in school; and,
The declared parent may assert her rights under various laws such as the *Health Care Consent Act, 1996* ...¹⁸

A declaration of parentage results in considerable parental rights. The outcome is characterized as a “lifelong immutable declaration of status” and “full” participation in the life of the child. The child is incorporated into the declared parent’s ancestry, can inherit from them, and gain Canadian citizenship. The declared parent can obtain identity documents, complete school registration, put the child up for adoption and make medical decisions regarding the child. Hence, a declaration of parentage is more than “kinship reckoning” (Edwards and Strathern, 2000) it results in kin created by law.

In the following section I present three cases involving declarations of parentage. The first case stems from a gestational surrogacy; the second case affirmed the parentage of a co-mother and extended parentage to three persons; and the third case involved

¹⁸ *A.A. v. B.B.*[2007] O.J. No. 2 (Ont. C.A.).

compensating a single, gay father for his birth registration. These cases suggest certain varieties of parentage have gained legal sanction.

Case 1: J.R. v. L.H.

I return to the first case from the introduction, the case of *J.R. v. L.H.* heard by Judge Kiteley J. The participants in the case were a heterosexual couple, and the surrogate and her husband. The judge ruled the intended parents were also the *legal* parents on the basis of genetics, "... the probability that J.R. and J.K. are the mother and father respectively is greater than 99.99%. I find on a balance of probabilities, they are the genetic parents of the twins."¹⁹ Kiteley also ruled that the gestational carrier (or surrogate), L.H. and her husband, G.H. be declared *not* the mother and father of the twins born from this arrangement; making both positive and negative parental claims recognized in law. Moreover, Judge Kiteley remarked that the case was easily decided because though L.H. was "clearly the birth mother,"²⁰ she and her husband did not oppose the application by J.R. and J.K. for parentage.

Hence, this case was fairly simple because custody of the twins was not contested by the surrogate. The judge determined parentage based on genetic ties, and she made both negative and positive declarations of parentage; excluding the surrogate and her husband, and including only the genetic parents as the legal parents of the twins.

Case 2: A.A. v. B.B.

In contrast, and as recently as January 2007, the *A.A. v. B.B.* case created a minor stir in the media when parentage was extended to three parents.²¹ Here D.D., the child of lesbian (biological and genetic) mother B.B. and known sperm donor and father C.C. had

¹⁹ *J.R. v. L.H.* [2002] OTC 764; OJ no 3998 (Sup. Ct. J.), paragraph 37.

²⁰ *J.R. v. L.H.* [2002], paragraph 38.

²¹ *J.R. v. L.H.* [2002], paragraph 39.

A.A. added as another *legal* mother (Vancouver Sun, 2007; USA Today, 2007). This case turned on several issues; the judgment, extending parental ties to three parents, overruled an earlier decision from 2003, and acknowledged that Ontario's CLRA creates a legislative gap that requires the court's involvement. Originally, the same case failed before Judge Ashton J. who decided that the pronoun "the" in section four of the Children's Law Reform Act meant that only one mother and one father could be named as parents of the child.²² Judge Ashton J. feared that "if this application is granted ... the door is left wide open to stepparents, extended family and others to claim parental status in less harmonious circumstances."²³ Judge Ashton J also felt the court's jurisdiction of *parens patriae*, the right of the court to intervene in a child's best interests, must be limited.

Since the original case in 2003, a 2006 court case *M.D.R. v. Ontario (Deputy Registrar)* found that the Vital Statistics birth registry did discriminate against same sex parents.²⁴ In the case of *M.D.R.* four lesbian couples challenged Ontario's Vital Statistics Act because it allowed only one mother and one father on the birth registration (Campbell, 2007: 253). The judge acknowledged parenthood does not rest solely on biological or genetic connections, and that lesbian co-mothers with no biological or genetic connection must have their parental rights protected.²⁵ Extending this logic, the Ontario Court of Appeals decided that in the case of *A.A. v. B.B.* the CLRA did create a gap and for the child's best interests and the court could decide parentage. The three

²² *AA. v. B.B.* [2003], paragraph 39.

²³ *AA. v. B.B.* [2003], paragraph 39.

²⁴ *M.D.R. v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268 (Sup. Ct. J.), paragraph 147.

²⁵ *M.D.R. v Ontario (Deputy Registrar General)* [2006] paragraph 209.

judges in the 2007 *A.A. v. B.B.* described the “gap” between the CLRA and the context of assisted reproduction and same-sex parents in this way:

Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA’s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child’s parents as adopting parents or “natural” parents. The CLRA, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.²⁶

Taking the position that the CLRA did not acknowledge same-sex parents but all children are legitimate the court could justify its recognition of more than one parent. The court also acknowledged that this recognition was essential to protect the constitutional rights of same-sex parents and was in the “best interests” of children born from these arrangements.

Case 3: *K.G.D. v. C.A.P.*

The third and final case of interest is *K.G.D. v. C.A.P.* and the Deputy Registrar General for the Province of Ontario.²⁷ Here gay father K.G.D. was not only declared to be the sole father of a baby girl created with the help of an anonymous egg donor and surrogate, but he recouped half of his costs in registering the birth with the Ontario Deputy Registrar. This case also exposes the gap in recognizing families led by a single same-sex parent; however what was most striking was the way the judge qualified the registration of the birth.

Judge O’Neill J. cited from the *Trociuk v. British Columbia (Attorney General)* case, where a biological father sought to have his name restored to the birth records of his

²⁶ *A.A. v. B.B.* [2007], paragraph 35.

²⁷ *K.G.D. v. C.A.P.* [2004] O.J. No. 3508 (ON, CA).

triplets.²⁸ His name had been purposely left off of their birth records by the biological mother. However, the judge in the Trociuk case asserted that the recognition of the biological father on the birth registration allowed him to “participate” in the life his children. More importantly, this same judge also affirmed that parent-child ties are not “exhaustively” defined as biological ties.

Including one’s particulars on a birth registration is an important means of participating in the life of a child. A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one’s particulars on a registration is means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child’s life.²⁹

By virtue of this assessment of birth registration, the Ontario court judge also decided the birth record must be modified to leave off the names of the surrogate mother and egg donor. K.G.D. with the support of his surrogate became the sole parent and genetic father of his daughter.

This shows some but not all of the varieties of parentage rationalizations established in court cases involving declarations of parentage. These rationalizations mean parentage claims are often decided additively; genetic ties, parental intent and social parenting together legitimate legal parent rights. Based on these markers, parentage can be limited to solely two legal parents (*J.R. v. L.H.*) or to one person (*K.G.D. v. C.A.P.*). Alternatively, based on social parenting and parental intent but not genetic ties, parentage may be extended to three parents (*A.A. v. B.B.*).

²⁸ *K.G.D. v. C.A.P.*, [2004] paragraph 21.

²⁹ *K.G.D. v. C.A.P.*, [2004] paragraph 16.

A declaration of parentage is a powerful legal kinship practice based in court. This also makes it highly exclusive, because declarations of parentage require retaining a lawyer to present the case in front of a judge. A declaration of parentage's power lies in the delimitation of kinship inclusion and exclusion; and the way parents without biological and genetics ties may gain equal status to parents with them. However, declarations of parentage are not guaranteed; an unsympathetic judge or a lawyer's unconvincing arguments may result in failure. In two of the cases (*J.R. v. L.H.* and *K.G.D. v. C.A.P.*) presented in this chapter, genetic ties allow claims of parentage. This means that parental rights are still strongly tied to genetics. This is also where declarations of parentage diverge from legal kinship like adoption – genetic ties still matter. For this reason only select lawyers with the inclination and experience complete declarations of parentage. They must assess the basis of their client's claims and make assumptions about what will convince a judge. The self-selection by lawyers is based on case law, and may influence people to act in ways that will guarantee their parental rights.

The Problem with Traditional Surrogacy

The enduring importance of genetic ties in declarations of parentage is also mirrored in the rejection of traditional or genetic surrogacy. I found this arrangement (where the surrogate makes genetic and gestational contributions) overwhelmingly rejected by almost all my participants. There was a variety of reasons for discouraging traditional surrogacy. For two lawyers, Elena and Amanda, traditional surrogacies were discouraged based on the legal recognition of the genetic parent-child bond. Elena considered the absence of genetic relations between the children and their parents in

traditional surrogacy and embryo donation meant these arrangements were *in essence* adoptions. In comparison, Amanda focused on the legal vulnerabilities created by traditional surrogacy. If the surrogate changed her mind Amanda conceded the intended father would probably lose custody, but still be required to pay child support. Operating alongside this legal reasoning were more social and emotional explanations rejecting traditional surrogacy. Cameron and Len both felt traditional or genetic surrogacy would jeopardize their custody rights and the constitution of their parental arrangements. Gestational surrogates, Fern and Casey, also viewed traditional surrogacy as emotionally risky, but based their arguments on their personal history. Overall, the threat of genetic connectedness in traditional surrogacy shifted person by person.

Elena - Traditional Surrogacy as Adoption

Before I met Elena I was well aware of her reputation for completing declarations of parentage, a fact she informed me of during the interview. However, what follows are narratives where she discusses the kinds of parentage arrangements she discourages: traditional surrogacy and embryo donation. In either scenario Elena states what is “really accomplished” is an adoption.

I think that traditional surrogacy is really legally complicated because ... [it] is more akin to an adoption. That woman is giving up her genetic child. I think we have ... significant legislation that's meant to protect everyone's rights and obligations when a woman gives up her child for adoption. There's safeguards with respect to consent, and when she can withdraw the consent, etc. and ... you're not going through a licensee which is really required. So the payments that you make to the surrogate directly, etc., I think contravene the adoption legislation. Now ... I advise anyone against traditional surrogacy and ... I'm not able to assist clients who have used traditional surrogates where there's been payments made that I think contravene the legislation.

I was shocked to hear a lawyer view traditional surrogacy as an adoption. Traditional surrogacy and gestational surrogacy vary in practice, but rest on the *same objective* for

the surrogate to give up the child. This begs the question – what is the difference between intended parents who conceive a child with donor gametes and traditional surrogacy? Besides the obvious difference, an intended parent using donor gametes will not be giving up the child, in terms of parentage, there exists similarities. In both cases, there will be an intended parent with a genetic tie, and one without.

Elena also emphasizes the genetic link between the birth mother and the child *over* the genetic tie between the intended father and the child. This dissonance is curious, however, since Elena is not against third party reproduction. This aside, Elena’s framing of traditional surrogacy as “a woman giving up her child” is most significant because of the implicit value of the genetic connection. *By taking a stance against traditional surrogacy, Elena seems to make claims for a conception of parentage based at least partly on genetic ties.* But this rejection of traditional surrogacy may have more to do with the ability to gain a declaration of parentage *if the traditional surrogate were to fight for custody*; a line of argumentation that is taken up at length by Amanda.

This gap between the different reproductive arrangements and the ability to gain legal kinship also came up when I spoke to Elena about embryo donation. In this arrangement an embryo is created with donor gametes and then is implanted into a surrogate mother. Elena also rejected this arrangement by stating this was another kind of adoption.

Elena: The problem with embryo donation – there have been some situations where there’s been embryo donation, but embryo donation to a surrogate wouldn’t work here, I couldn’t get the parentage properly done.

Shireen: Really?

Elena: If you get an egg donor and a sperm donor and implant in a third party surrogate, and the surrogate gives birth and you or your spouse have no

genetic relationship with the child than I don't see how I can get Declarations of parentage.

Shireen: There has to be one person with the genetic ...?

Elena: Because really what you've done is akin to an adoption in my view. So ... that's basically the issue! So I don't want those cases. I'm just saying I won't take them. People do them. There are some cases. Like a single woman who's too old to have her own child and she gets donor sperm, donor egg, and implants in a surrogate ... She's the intended mom, I appreciate that, but I really think that is a different animal than where spouses, where one of them is the genetic parent ... that seems more, more what a Declaration of parentage is.

This dialogue expands the line of reasoning Elena starts in her statements on traditional surrogacy. A complete absence of genetic ties, no matter the context, results in her view that this is an adoption. This ignores several complications related to parental intent and the presumption of motherhood.

For instance, Elena's position dismisses the importance of parental intent in embryo donation and how this leads to drastically different parentage. Most obviously, in traditional adoption the child is already alive. In the case of embryo donation several situations present themselves—a created embryo may already exist in cryopreservation, or it may be created by a double donation of gametes. Especially, in the latter context, the resulting child would not exist without the intended parents and they have no genetic siblings or parents. While embryo donation may be “risky,” this only seems likely if the genetic parents are known and fight for custody.

A further complication in Ontario is that the presumption of maternity rests with the birth mother. If the intended mother in an embryo donation situation gives birth she could secure her name on the birth registration. In the case of a gestational surrogacy with an embryo donation it is uncertain how competing parentage claims might be resolved.

Elena's position that traditional surrogacy and embryo donation are adoptions is a complex position that reveals many complications. Elena's opposition to traditional surrogacy seems to rest on the possibility of competing parentage claims and to return to the question I posed – this makes the distinction between a traditional surrogate and the use of donor gametes striking.

Amanda – Traditional Surrogacy as a Risk

In the following dialogue between Amanda and myself traditional surrogacy emerges as a risky arrangement. Here again the genetic tie between the surrogate and the child puts the intended parents in a vulnerable position. If the surrogate should change her mind, Amanda feels she could easily win custody.

Shireen: Now speaking of surrogacy do you do traditional?

Amanda: No. [very softly].

Shireen: Nobody seems to want to touch traditional with a ten foot pole!

Amanda: It's a real problem Shireen. I understand that it's a lot less expensive ... [but] ... there are lots of problems with traditional – one of them is that ... it's easy. People don't [have to] go through the psychological counseling and they don't have legal contracts. So when one of these [traditionally surrogacy cases] blows up. And it will – people are going to be on. Their. Own. 'Cause they've got nothing going into court. When that happens I am absolutely convinced that a judge will allow the traditional surrogate to keep custody of the child, 'cause it's her baby! Genetically, birth mother, everything! But that genetic father will have to pay child support. So he may get shared custody if they're in the same jurisdiction. But it probably won't be fifty-fifty. Cause there isn't that much fifty-fifty going on anymore. And he's going to have to pay child support which is very expensive. I had to look at it – I don't do any family law – but I had to look it up for another client. And it's a percentage of income – it's expensive! So talk about a letdown that would be a very bad scenario.

Shireen: Yeah, it would be ... it's kind of interesting that in Canada we haven't had our Baby M or anything like that.

*Amanda: There was a case in British Columbia a year or year and a half ago, no contracts, no counselor, traditional surrogacy. Surrogate was looking for best friends. She really was. Emotionally. The couple promised her all kinds of things, but as soon as the baby was born, clearly, all deals were off. Sixty days after the baby was born she went after custody – it was too late and she lost ... And then I think she abandoned it. But, it wasn't reported and it was only interim custody, so it wasn't a precedent of any kind. But it'll happen. But I also understand that there are going to be couple who have wonderful friends, very upstanding, responsible women and in those situations it's going to work. So. I've been asked to do it a number of times. I've never had to. There are some couples I've said, 'For you I would do it.' But it scares me. It just scares me. **Genetic plus birthmother, you add those two things together, [and] I think she's unfazable (my emphasis).***

This dialogue reveals the practice of surrogacy entails important parental inclusions and exclusions. Amanda is clear that traditional surrogacy brings too many ties of parenthood together in the same person (the traditional surrogate). This results in too much inclusion, thereby weakening the exclusive parental rights of the intentional parents. She states dramatically, “genetic plus birthmother, you add those two things together, I think she’s unfazable.” However, this legal conception of parentage belies the multiple conceptions of parentage rationalized in other interviews.

Amanda was also one of the only lawyers to acknowledge the benefits of traditional surrogacy; an arrangement that is less costly, and may be undertaken with no medical intervention. Amanda’s awareness that traditional surrogates may also be “wonderful friends” to the intended parents and “upstanding and responsible women” confirms my impressions of traditional surrogates.³⁰

I also refer to the case of Baby M because Canada has not experienced much public controversy around surrogacy. The American case of Baby M occurred in the late

³⁰ I encountered one traditional surrogate in the maybe-baby group I attended for gay fathers. This surrogate decided to complete a surrogacy for a longtime friend who was already a gay father with his partner. Furthermore, in a previous online study of surrogate mothers I was particularly impressed with the knowledge of a participant who was also a long-time traditional surrogate. So even though traditional surrogacy may not occur in a clinic it still remains a complex practice.

1980s. It involved a custody battle between a New Jersey traditional surrogate, Mary Beth Whitehead and the biological father, William Stern. Eventually, the judge awarded Baby M to Stern and visitation rights to Whitehead. Nevertheless, this exposed surrogacy at its least functional. Amanda concurs that a controversy of this magnitude has not occurred in Canada. Her cautionary account of a case similar to Baby M, where the surrogate changed her mind and fought for parental rights is instructive. The characterization of the traditional surrogate as “looking for best friends” in particular suggests that while this arrangement is physically easier on women’s bodies and may circumvent legal consultation, it can be more emotionally fraught.

Amanda is also clear that a traditional surrogate with enough legal savvy could theoretically sue for parentage rights. In Ontario, even with the precedent set by the *A.A. v. B.B.* case, this would jeopardize the parental rights of an intentional mother with no genetic or biological ties.

Gestational Surrogacy as a Normative Practice

In the narratives of gay fathers, gestational surrogacy seems to be a normative practice. An opposition to traditional surrogacy is framed by the implicit rationalization that further division of motherhood strengthens a gay father’s parentage claims. The separation of the genetic contributions of the egg donor and gestational contribution of the surrogate seem both legally and emotionally smart.

The position against traditional surrogacy is justified by gay father and lawyer, Cameron, based on his experience as a lawyer representing (most often) gestational surrogates and as a father who had children with his partner John from surrogacy. Cameron stated that he and John did not choose traditional surrogacy because it might

lead to a custody conflict. In this case, the absence of the genetic ties between the surrogate and the resulting baby theoretically “reduces the chance” of her claiming parentage. In Ontario the birth mother is presumed to be the mother, so as the case *J.R. v. L.H.* shows, parentage claims for intended parents are easily substantiated only when the surrogate and her husband are in agreement. Cameron’s narrative suggests a gestational surrogate would be more easily in agreement with the intended parentage when her own genetic connection to the child is not an issue.

We used an anonymous egg donor. So our clinic arranged for that as well. There’s I think some anxiety around surrogacy because ... particularly if you are going to use your surrogate as your egg producer as well, which we chose not to do, we didn’t want there to be a biological connection between the surrogate and the child ... Because we thought that might minimize the chance of the surrogate saying ‘Oh, it’s my baby I want to keep it.’ So by having an anonymous egg donor, at least an egg that wasn’t hers, [I] figured that would reduce that chance. And from speaking with her [his surrogate] and others I think that is a valid basis for [that].

Cameron’s tone suggests normative lines of thinking regarding parentage. In this case, as intended fathers, Cameron and his partner, selected a third party arrangement that would protect their parentage claims. There is a common-sense tone that comes through in his statement that suggests the inclusion and exclusion of kinship ties is strategic and guided by legal standards. This is likely to be the best course of action, since competing parentage claims have never been tested in a Canadian court, in these circumstances.

The logic of gestational surrogacy over traditional or genetic surrogacy was also echoed by single gay father Len. In his dialogue with me, traditional surrogacy seems never to have been an option.

Shireen: How did you decide you to go with gestational?

Len: Oh. That was a no brainer. Well, first of all, coparenting that's not for me ... I wanted to be a father 100% and not partial. And while I recognize the benefits of having time off [in a co-parenting arrangement] that's not what I wanted.

Shireen: Aren't there traditional surrogates who will ...

Len: There are but I just felt that I shouldn't even go there.

Shireen: For you it was the equivalent of a co-parent?

Len: Well, it is a mother in all the sense of the word. It makes the separation more difficult [and there are] more legal issues related to it so I never even thought about it.

This dialogue suggests a similar common-sense tone that makes gestational surrogacy appear more normative than traditional. However, in Len's case, he implies that a traditional surrogate might reduce the completeness of his fatherhood, as he states, "I wanted to be a father 100% and not partial." This could also be inferred from the way Len assumed I was referring to co-parenting, a shared child custody arrangement between gay men and lesbian women.³¹ Len also describes the traditional surrogate as a "mother in all the sense of the word." This restates a position that views traditional surrogacy as assembling too many markers of motherhood: genetics, gestation and birth.

These two narratives also suggest that parentage cases argued in court influence the preference of certain surrogacy practices over others. For instance, Cameron and Len have chosen arrangements that also follow the parentage logic used to guarantee parental rights in the cases of *J.R. v. L.H.* and *K.G.D. v. C.A.P.* In those cases, parentage claims are partly based on the genetic ties between child and parent – a tie that can be objectively detected. Hence, the decisions about traditional versus gestational,

³¹ French anthropologist Cadoret (2002) examines this arrangement. It seems this arrangement was more popular in the early 1980s and often occurred outside of the clinic through home inseminations. In this arrangement there will necessarily be more than two parents.

anonymous and known donors (examined in the next chapter) for gay fathers is vitally significant and may strengthen kinship ties.

Gestational Surrogates against Traditional Surrogacy

I end by examining the statements on traditional surrogacy by the two gestational surrogates I interviewed, Fern and Casey. These statements present a whole new set of arguments against traditional surrogacy that draw on personal history, siblingship ties, and the risk of emotional attachment. The opposition of gestational surrogates to traditional surrogacy was also noted by Ragoné (2000). She felt the absence of a genetic connection allowed gestational surrogates to “de-emphasize” or minimize their parental ties. Ultimately, these narratives express alternative ways of problematizing the genetic tie between the traditional surrogate mother and the resulting child.

I begin with gestational surrogate Fern. Initially she was very diplomatic about traditional surrogacy. She suggests that not all traditional surrogacies are negative. “Some are good, others are not,” though she does not illustrate what this means exactly. She is adamant that this type of surrogacy requires more time, but does not say why. The general tone seems almost neutral.

There's pros and cons in traditional. I guess I've seen a lot of traditional surrogates that are like really good. And I've seen some that are not good. I think you need a lot of screening and counseling. They really should get to know each other over – you know – a considerable amount of time. It shouldn't be we just met you one month the next we're trying.

Even in her neutral tone Fern implies these arrangements are more difficult, illustrated by her point that “you need a lot of screening and counseling.” The tacit difficulties of this arrangement are also suggested when Fern remarks that the intended parents and

traditional surrogate must know each other for “a considerable amount of time.”³² The rationale behind the emphasis on time is the traditional surrogate’s more significant contribution of genetic material and gestation. The relationship between traditional surrogates and intended parents seems much more permanent.

However, as the conversation progressed, Fern could not get around the importance of the genetic connection within traditional surrogacy. In the next narrative the genetic tie between traditional surrogate and child means the surrogate is “this child’s mother,” she qualifies the type of mother as “genetic.” Fern also implies that the practice of ignoring the genetic tie is not solely associated with traditional surrogates, “it’s not just the traditional surrogates that do *that*” (my emphasis). Her opposition to traditional surrogacy is most striking when she points to the consequences for ignoring the significance of genetic ties. It leads to “emotion issues” not of the surrogate abandoning her “genetic child” but guilt from losing her children’s sibling. A traditional surrogate not only gives birth to a child intended for other parents, but her own children do share maternal genetic ties. This is another way of qualifying the “problem” of traditional surrogacy.

Fern: ... some of these traditional surrogates are just like ‘I am not this child’s mother.’ I mean you are this child’s mother. I mean you are that child’s genetic mother. And they’ll go on about how the genes don’t matter and they’re in denial or something. I don’t know what’s wrong with them but they still need to recognize that they are the genetic mother ... I mean I think they try to make it easier for themselves by saying like that ... it’s not just the traditional surrogates that do that ... it’s not healthy and a lot of those ones you watch them over time will end up having some issues.

³² In the online surrogacy community there is a belief that strong ties between the surrogate and the intended parents might diminish the potential for conflicts of parentage. Traditional surrogacy also involved even more “matching” between the intended parent and surrogate. This was thought to give both parties enough time to mesh and consider their ability to work together.

Shireen: What kind of issues?

Fern: Some emotional issues. Like feeling guilt. As the child gets older they start to realize what they did was not just simply giving that couple's family a baby. They start to see that [baby] is their children's sibling, you know? Especially if the baby kind of looks like them ...

In this dialogue the genetic connection between the traditional surrogate and her own children results in “emotional issues.” While the lawyers and fathers exclude traditional surrogacy based on concerns of competing parentage claims, Fern defines this risk in kinship terms, the risk of realizing you have given away your child's sibling. Fern goes further with this line of thinking in the next narrative. Not only is the genetic tie in traditional surrogacy problematized, but this “problem” is refined and extended. The siblingship connection, family resemblances, the birth order and gender of a traditional surrogate's own children also make the arrangement more emotionally risky.

I see it all the time ... [a traditional surrogate might have] had all boys and [then] when they ... had a girl ... [this leads to] a lot of problems. Because they were giving away their only girl that they ever had. There was a couple of girls [surrogates] ... that ... just disappeared ... they didn't stay on the boards [online surrogacy community message boards] anymore ... I've had two boys and one of the reasons I won't do a traditional surrogacy is I'm too afraid I'll have a girl and then what? I don't know. I can't dissociate myself like that ... I couldn't give away one of my children, I just couldn't do it.

Here Fern addresses how birth order and gender may create “problems” for a traditional surrogate. She notes that the traditional surrogates who were part of the online surrogacy message boards “disappeared” implying that this was a trying experience. She makes further sense of the risk of traditional surrogacy by indexing her own personal history. She has two boys but if she completed a traditional surrogacy resulting in a girl, it would be too difficult to give up the surrogate child, since this would be her sons' only sister.

Fern's beliefs regarding traditional surrogacy repeat lines of thinking I encountered on the online message board. Many gestational surrogates explained their difficulty with traditional surrogacy by referring to the sibblingship connection this arrangement would create with their own children. They also spoke of the difficulty of giving away a child that may look like them or their children. Yet traditional surrogates were equally adamant that this was something they felt they could do, and the genetic tie was not a barrier. Most importantly, these two arrangements signal the multiplicity of parentage conceptions that exist amongst surrogates.

Consider that though Fern expresses quite common opinions about traditional surrogacy, she further problematizes the use of donor gametes. Fern's preference is interesting because in any case the resulting child will not be related to her genetically. Why does it matter whose genetic material is gestated? The difference for Fern was that "too many people" were involved, confusing traditional family formations.

*When I have a couple I like the fact that [these] people have a genetic tie to that baby ... I won't even help couples that use egg donors ... For me if you are going to use an egg donor then why don't you adopt? I mean ... **it's just too many people involved.** I don't personally like it. I mean the child's going to have a genetic mother, a mother and a birth mother ... I like things simple.*

This narrative demonstrates that heteronormative family ideals (the idea that heterosexual reproduction is the norm) co-exist alongside the use of third party reproduction. Fern refuses to work with parents utilizing donor gametes (she emphasizes egg donors) and donor-created embryos. This means gay fathers and older infertile parents are excluded. Unlike Elena, who believes traditional surrogacy *is* a form of adoption, Fern suggests it would be better to adopt. Most notably, Fern emphasizes that donor created embryos include too many potential parents. This suggests that gestational surrogates may hold

onto traditional views of the family, even as they participate in “new” arrangements based on reproductive technologies.

In a final narrative by Casey I show that gestational surrogacy can allow women to create a separation between their gestational contribution and parenthood. Here Casey protests against any association to maternity; even qualifying her as “surrogate mother” is not enough of a distinction. She posits that this separation occurs because she is “a gestational surrogate instead of traditional surrogate.” However, her characterization of herself as “the surrogate uterus” that “grows and bakes a baby” confirms Elly Texan’s (2003) conclusions that the medicalization present in gestational surrogacy allows these women to embody distance from surrogate baby.

*See I get kinda bothered when, like I don't specifically care for, the phrase surrogate **mother** (her emphasis) ... For me personally it doesn't belong there, because I'm not the child's mother. And maybe it's just because I'm a gestational surrogate instead of a traditional. Because I know that's opening a whole new can of worms just going back and forth between those two ... I was ... the womb, I was the surrogate uterus, you know, that was my role to grow and bake a baby.*

Casey’s statement rejecting any association between surrogacy and maternity is also interesting in light that she is carrying for two gay intended fathers. Even though this child will never have a mother, Casey does not claim a maternal role by qualifying her motherhood.

Multiple Views of Parentage

Traditional surrogacy is not the only context that elicits a diversity of judgments on parentage. There exists what anthropologist Janet Carsten has called “different trajectories of processing” (Carsten, 2007: 406) meaning “... complex processes of intertwining and separating different kinds of knowledge” (2007:418). Simply put,

multiple conceptions of parentage are possible and show that parental rights may *be rationalized based on different markers of parenthood that shift according to context*. By “markers of parenthood” I mean dimensions of relatedness defined by genetic ties, gestation, social parenting, and intention (or a combination therein); these could also be seen as different kinship knowledge (Carsten, 2007; Strathern, 2005).

The participants I interviewed showed a variety of conceptions on parentage which were made on a contextual basis. There were times when exclusive parental rights were rationalized by virtue of genetic ties or other “markers of parenthood.” At still other moments the negotiation between these different kinds of kinship properties involved de-emphasis (Ragoné, 1998), concealment or detachment (Carsten, 2007:418-417). Markers of parenthood justified both exclusive parental rights *and* were “constitutive of identity” (Carsten, 2007). In speaking with gestational surrogate Fern, gay fathers Len and Cameron, and lawyer Elena I found multiple conceptions of parentage could co-exist at the same time. The rest of the chapter illustrates the varieties of parentage rationalizations found in the narratives and dialogues of these four participants.

Gestational Surrogate Fern’s Multiple Views of Parentage

Gestational surrogate Fern expressed multiple views of parentage; much of the time parentage could be defined by genetic connections between the parent and child. However, she noted that “intention” was also important. She initially illustrated the importance of genetic knowledge when she described how blood was collected immediately after the twins were born in her first surrogacy. This pushed the “paperwork

forward” to establish the genetic parent’s rights and exclude her from parental duties (or as she jokingly described herself as the *not-mother*).³³

They do the DNA at birth. They take the blood from the babies from the [umbilical] cords ... and I had already given my samples like months before. And then they take the babies samples and they ship it all to doctors ...

[It] was a big ordeal. The doctors had to come in with this special kit and then they had all the cords in this pan, and they had to stand there for, I don't know half an hour, two doctors taking blood out of these cords. They had to package it all right, sign things, have it witnessed, the FedEx guy came and took it, and [laughs] oh yeah it was all – you couldn't screw that up – so a lot of people had to sign for it and make sure it's legit.

Yeah, and three weeks later I got the results ... the DNA lab sent a copy to me, to the intended parents, [and] ... copies to the lawyer. See the court won't recognize them as parents without genetic testing. Canada will not recognize a gestational surrogacy without the DNA testing. Everybody has to get the DNA testing done. If you want your paperwork to go through.

This passage illustrates the significance of completing DNA testing to confirm parental claims. Fern provides graphic details of how the babies’ blood was collected, adding that her sample was already on file. The decision to confirm parental ties by genetic testing was clearly in motion months before the birth. She also notes that the ceremony of the doctors’ blood collection, and her description of the signatures and proper packaging indicate how the procedure was treated with a great degree of seriousness. Fern notes that the genetic testing was completed in a laboratory, injecting into her personal narrative the authority of medical science.

At the time, I was struck by her memory of an event that occurred years ago, and at the way the sample was collected so soon after the birth. Clearly, genetic knowledge in Fern’s narrative is not solely “constitutive” (Carsten, 2007; Strathern, 1999) of the twins’

³³ She has mentioned to me that the social bond continues to remain strong with the intended mother; there exists an ambiguous sense of obligation towards the twins and their mother.

identity (though it is that as well). This was also displayed when she made this remark about how the genetic testing clarified her parental rights.

My favorite thing about the DNA reports that I have is it says after my name 'Fern Smith the mother is deemed by the DNA report quoted below as not the mother.' [She laughs]. I love that! It says the mother is not the mother! How confusing is that! Because it wasn't like [because of the] DNA that the mother's not the mother! Isn't it funny?

Here genetic knowledge determines the *genetic* and intended parent's exclusive parental rights, and excludes Fern from parental duties. Overall, her statements of genetic testing also show how genetic kinship knowledge functions administratively. Fern's original remark that genetic testing "pushes the paperwork forward" is a reminder of the value of arrangements that establish genetic ties from the outset to achieve legal parentage. This statement of her being a mother who is also "not the mother" is reminiscent of the first legal case, *J.R. v. L.H.*, explored at the start of this chapter, when Judge Kiteley made a negative declaration of parentage regarding the surrogate and her husband.

The ability to objectively certify genetic ties is also echoed in the matter-of-fact statement of lawyer Elena, "You want to do DNA testing to make sure the clinic didn't make a mistake, right? You should always do DNA testing. Anyone should. Right? To make sure." Both statements by Fern and Elena suggest gestational surrogacy is far more than just "... a social manifestation of genetic essentialism" (Lindee and Nelkin, 1995:64). Genetics is a marker of parentage that fits in with practices of audit culture and helps determine parental rights, these functions make genetics a *kinship property* of high caliber that both secures parental rights and determines identity.

However, Fern did not altogether dismiss other markers of parentage. In the same interview, she also spoke about the importance of *intention* to determine parenthood. This

came up when we discussed the 1999 case of an embryo mix-up at a clinic in New York. Donna Fasano who is Caucasian was implanted with the embryo of an African American couple, the Perry-Rogers, but it was only after she gave birth to the “twins” that the mix-up was revealed. A media frenzy ensued after the Fasanos’ fought for visitation rights. Fern was completely sympathetic towards Donna Fasano who played the “accidental surrogate.” Moreover, Fern observed that since this woman *expected* to give birth to twins and had bonded with the baby in utero she deserved “at least some kind of visitation rights.”

But you know what? She [Donna Fasano] carried those children like they were her own, she bonded with those kids. To me the clinic is majorly [sic] at fault. How do you tell a woman who just gave birth to twins that she bonded with over nine months, ‘You know what? We made a mistake. One of those kids isn’t yours.’ There’s a lot of studies done [that show] taking twins away at birth really screws them up emotionally. Those children bonded in-utero. I think it’s totally wrong! ... It’d be really, really terrible to take the baby from her ... I think the parents should have rights to have access to that child. Some type of visitation ... Can you imagine going to a clinic and them telling you ... ‘You’re pregnant with twins!’ And you bond with those babies and have them ... I mean you’re going to hang on to that baby ... like ... fight tooth and nail. You just don’t see it rationally.

Initially I was taken aback by Fern’s emotional consideration of this situation. Yet I was also impressed with her detailed knowledge of an event that happened nine years ago. As well I felt our discussion was significant because Fern also gave birth to twins who she carried for intended parents living in the United States. Clearly, Fern’s own surrogacy history parallels Donna Fasano’s accidental surrogacy. However, Fern only fleetingly acknowledged this commonality in the interview. Instead Fern vents about the negligence of the clinic, and suggests in this case *intention* trumps genetic kinship. Fern’s sympathy for Donna Fasano is acute when she states, “It’s totally wrong!” Additionally, Fern believes in Donna Fasano’s parenthood claims. Yet Fern remains silent about the absence

of a genetic tie between the Perry-Roger baby and the Fasanos. She also ignores the most controversial part of the story: the obvious racial differences between the Fasanos and the Perry-Rogers' *African-American child*. This is an interesting omission by a gestational surrogate who suggests genetic dissimilarity allows her to complete her own surrogacies.³⁴ Instead, Fern points to clinical studies of twins and states they become “screwed up” when separated at birth. Again, even though these “twins” (unlike her surrogate twins) are *not* genetically related, Fern emphasizes their time spent in utero implies siblingship.

After waiting for Fern to acknowledge that her statements seemed to contradict surrogacy in general. I asked her to explain the difference between the Fasano case and her own. I wondered in particular how she could make these parenthood claims on behalf of Donna Fasano, but deny them to surrogate mothers. Fern replied to my question by drawing on her current surrogacy arrangement.

Fern: Because we [surrogates] know it's not ours from day one. That's the difference. She [Donna Fasano] bonded. A week and half ago ... I was at the clinic watching on ultrasound [the doctor] put in embryos from somebody else. I know right at that moment they're not mine. This baby I see as theirs [the intended parents].

Shireen: Do you ever do anything to make sure you have that distance?

Fern: No. It's like when someone drops their kid off. You know it's not your kid and you're not going to keep the kid! ... It feels ... completely different than when it's my own [child]. Completely different.

In these statements Fern implies the value of intention. This reconfigures this parenthood marker into a *kinship property*. The transfer of the created embryo on the ultrasound

³⁴ Helena Ragoné (2000) specifically addresses how some gestational surrogates deemphasize their contribution by virtue of their racial identity. Moreover, she suggests this practice is guided by the California custody case between African American gestational surrogate Anna Johnson and intended parents Mark and Crispina Calvert, Caucasian and Philipina respectively. The judge awarded the Calverts sole custody based on parental intention and genetic testing.

allows her to visually disassociate, and to embody a highly intentional pregnancy (planned for the intended parents). She seems to suggest the intentional nature of her pregnancy also results in a different “feel” from her past pregnancies with her own children. Overall, her narrative on Donna Fasano’s accidental surrogacy and the difference with her own gestational surrogacy suggests another trajectory of processing kinship knowledge. Instead of genetics, *intention*, makes her stake parenthood claims for Donna Fasano, while at the same time rejecting her own.

Finally, Fern expressed another conception of parentage when I brought up the concerns of lesbian co-mothers to explain why I thought openness and concealment of genetic ties was complex. I related to Fern that I was moved by the tearful acknowledgement of one prospective lesbian co-mother (who would not have a genetic tie to the child) who feared that a known sperm donor’s genetic contribution would overshadow her parental role and love.³⁵

Much to my surprise, I found Fern unaffected. Though she had shown a great outpouring of sympathy for Donna Fasano, who did not share a genetic link with the child she accidentally gestated, a lesbian co-mother did not provoke any compassion. Instead, she declared her sympathy rested with the children of lesbian mothers. Moreover, Fern felt these children would not be harmed by granting visitation rights to the sperm donor and at the very least children from donor insemination must have access to this kinship information at eighteen.

I don't think there should be any anonymity on this. A lot of clinics, they really want that ... [and] ... I think the children should have rights to know who their parents are, their genetic parents. Why should they [lesbian mothers] be threatened by it? It is the genetic father. To me that is selfishness. What is the problem? He is the genetic father of that child. Why

³⁵ This occurred at a “maybe-baby” group for prospective lesbian mothers.

can't he be apart of it? Why do people always think of themselves? Why don't they think of the child? How would it possibly hurt that child to see him every other weekend? How would it? To me that shows those people are treating that child like its some little commodity, like it's theirs, their toy or something. It's a living human being! ... Maybe they [children created through donor-insemination] should have this sealed until they're eighteen. I think they should have some access to the information.

I take strong opposition to the sentiment that lesbian mother's use of donor insemination turns a child into a commodity. Nevertheless, Fern demonstrates another trajectory of processing kinship knowledge – this time privileging the perspective of children and their right to know their genetic contributors. Fern's view of concealment and anonymous donor-insemination as “selfish” parallels the strong opposition in the literature on donor-conceived children (Lorbach, 2003). This ignores the motives of parents to protect their parentage claim and a child's sense of family. Sociologist Amy Agigian in her US-based study of lesbian mothers' use of artificial insemination noted that when lesbian parental rights are protected these mothers often seek known donors or donors open to contact (Agigian, 2004:125).

Fern's emphasis on the “genetic father” and on children needing to know “who their *genetic parents* are” marks a return to genetics as a parentage marker. Whereas previously Fern emphasized “intent” as a marker of parentage, here genetic kinship knowledge trumps lesbian mothers' intent to parent. Fern goes even further by declaring the lack of openness on kinship knowledge is a form of commodification. This reiterates a viewpoint she expressed more directly regarding gay surrogacy (see chapter III). Fern's thinking about relatedness is in line with her strong reservations against gay fathers who chose gestational surrogacy and embryos created with donor gametes; arrangements she felt involved “too many people,” too many different kinds of parents (genetic,

gestational, and social or intentional), and which she may also interpret as too divergent from heterosexual norms. Finally, I must also caution that Fern's parentage conception may also be influenced from her personal life. Fern revealed earlier that both her ex-husband and her father had been adopted at birth. It was very difficult for them to access their birth records. This may also have contributed to her stance against anonymous donor insemination even for lesbian women who want to protect their parental rights.

In general, my interview with Fern suggests that many different "trajectories of processing" are possible even when a person plays a specific role in third party reproduction. As a gestational surrogate, Fern did often acknowledge the importance of genetic kinship knowledge. In her own surrogacies this knowledge held an important place in the process, and was part of the bureaucracy of moving parenthood claims forward. However, there were also times when intention also became a kinship property justifying the claims of parenthood by persons with no genetic tie. This emphasis on intention was not applied to lesbian co-mothers, instead Fern asserted a child's right to know their own genetic origins. In the next conceptions of parentage I turn to other people involved in surrogacy – gay fathers who choose to have children using gestational surrogacy.

Multiple Parentage Conceptions in the Context of Gay Fathers

When I spoke with two gay fathers, one of whom was a lawyer, further parentage conceptions became visible. Generally, gestational surrogacy suggests a specific conception of parentage grounded in two kinship properties, genetics and intention. For heterosexual couples, their intent (often formalized in the surrogacy contract) initiates the pregnancy and a genetic tie to the baby justifies their parental claims. Since, both men

and women in heterosexual surrogacy arrangements may contribute gametes to the creation of an embryo (implanted into a surrogate mother), their parental claims based on genetics more easily fit with heteronormative ideals of parenthood.

Gay fathers also make parental claims based on intention and genetics, since their sperm inseminates the egg. However, because the eggs may be contributed by a donor (anonymous or known) genetics seems a much less defining marker of parentage. More specifically, the genetic contribution of the egg donor is naturally de-emphasized since the woman who contributes the genetic material will not play an active role in the child's life. Len spoke about the biological connection to his daughter Sophie with a certain amount of ambiguity. He initially begins by stating his feelings would not change if she was adopted, yet he acknowledges her resemblance to him and his mother are especially meaningful and strengthen their parent-child bond.

Len: I could assume ... if I was her adoptive father that I would have extremely strong and no different feelings to the fact that Sophie [his baby girl] has a resemblance to me ... I look at my childhood pictures and I look at her and there are times when if it weren't for black and white and color you wouldn't know who's who. It's slightly starting to change but earlier on it was very clear. Then that obviously makes ... increases the bond ... or the feeling but I don't know if it wouldn't have made a difference.

Shireen: Did that fit with your idea of fatherhood?

Len: Yeah, my kid looks like me that's important ... that resemblance is important ... I actually said that when she was born ... 'I see my mother's eyes.' Now you can take it whichever way you want to take it. Because, it can be like 'Oh my god my mom is looking at me!' But, I think, there's something in that you know. You see the similarities. On the other hand I never think, a negligible amount, less than 1 per cent, does she resemble the egg donor in any way.

This dialogue reminds us that genetic kinship information can only be emphasized to a certain extent, because gay surrogacy requires an egg donation, yet the egg donor will not

have any role in raising a child from gay surrogacy. Moreover, it is solely the egg donor's contribution that may be de-emphasized. In this case, Len emphasized how Sophie resembles him and her grandmother, but not the egg donor.

This de-emphasis on genetic ties also came up when I was speaking to Cameron. I assumed correctly that he and his partner chose surrogacy because of their consideration of securing parental rights and the value placed on genetic knowledge. But when I asked Cameron what the "biological tie" meant, he was relatively silent. It did not seem to mean much; however, it did not mean so little that he could reveal to me who was the genetic father. And though he deflected this awkward question politely; I realized this was a social faux-pas. I had discounted that genetic knowledge is also intensely private and personal. Especially when there are two parents of the same gender, such a question may suggest the biological or genetic parent is more legitimate.

Shireen: But so ... what about the issue of biological ties? Because a lot of people choose surrogacy for the biological element [and] at least one partner will be biologically related.

Cameron: We thought that was a positive reason for doing it that way.

Shireen: So that biological tie ... ?

Cameron: For sure. Exciting. It was exciting.

Shireen: Do you know which? [Who is the genetic father].

Cameron: We do know, we don't tell anyone.

Shireen: I don't want to know!

Cameron: I'm not telling you either! [The tone between us is light and humorous].

Cameron remained humorously deadpan about the importance of a genetic connection, describing the genetic ties with his twins as simply "exciting." At the time I pressed him

further on the general meaning of this biological connection in his family. He replied a biological connection only meant "... there's actually a connection. A real connection as opposed to an environmental connection ...". So while I originally assumed Cameron as a gay father *and* lawyer would emphasize the implacability of genetic connections and he did when we spoke about the choice of selecting gestational surrogacy. In this context, Cameron stated simply, "We wanted to have child and we were fortunate to be able to do it." The context of gay surrogacy is particular in this sense, because too much emphasis on genetic ties could also lead to excluding the parental legitimacy of the co-father (with no genetic tie).

These two narratives suggest several varieties of parental considerations in gay surrogacies. For instance, if there are two fathers, genetics as the sole marker of parentage, may lose value, because this emphasizes only one father over the other is genetically related to the child, even though both contribute social parenting and care. For single gay father, Len, there seemed fewer qualms in describing how his daughter resembled not only him, but also her grandmother (though not the egg donor). I also heard of other strategies to creatively negotiate genetic knowledge. Gay fathers might implant two embryos into a gestational surrogate, each genetically related to a single father; take turns creating embryos, and mix sperm and not reveal publicly genetic knowledge.

Parentage Conceptions and Openness and Concealment

The possible parentage conceptions of gay fathers were confirmed by Elena. Adding another twist to the trajectory is that lawyers involved in gay surrogacy may have genetic knowledge that gay father do not. As stated previously, DNA testing and genetic

knowledge is used to process legal parentage. However, this does not mean gay fathers choose to learn who is genetically related to whom. The idea that genetic knowledge is “constitutive” (Carsten, 2007) can also be used creatively to deflect the association between fatherhood and genetic kinship.

Elena: ... Some gay men ... some of the pieces that I've done with gay dads, they don't want to know who the father is genetically, they've mixed. Have you heard that? But sometimes they don't want to know the results of the genetic testing. So I actually don't tell them. Oh, I find out but I don't tell them.

Though it might seem odd that a lawyer knows genetic relatedness before the parents consider the way kinship knowledge creates relationships (Strathern, 1999:79 cited in Carsten, 2007:414). This choice to ignore genetic knowledge functions within conventions of legal kinship that values genetics as a property of kinship.

Lawyer Elena also went further by speaking generally about the meaning of openness and concealment in the gay, lesbian, bisexual, transgender and queer (GLBTQ) community. She pointed out that the GLBTQ community was well aware of the destructiveness of keeping secrets regarding certain aspects of identity. Moreover, queer reproduction (Mamo, 2007) often led to same-sex parents being much more open about their children's origins. In terms of gay fathers this follows logically because there must be some explanation for the origin of the child. However, in her capacity as a lawyer, Elena often recommended the use of anonymous donors (egg or sperm). At a time when knowledge about genetic origins is seen as a right; this caution gives pause and shows how kinship knowledge practices are tightly aligned with parentage insecurity. Elena makes the following statement:

... I would say this ... the gay and lesbian couples that need to make use of gamete donation tend to be quite a bit more open than the straight couples.

There is not the degree of secrecy because of course they're going to have to explain to this child somehow that there was some donation involved, somebody else's genetic material involved.

So, I think, for that reason that the gay and lesbian community has really been at the forefront of teaching the rest of the community that this is not a matter that should be a secret. This shouldn't be the big family secret. So you see again in California where known donor sperm is available at a few sperm clinics those ... are predominantly [used by] lesbian as opposed to straight couples... So you see that.

I put my legal hat on I'd prefer people to use anonymous donor material. Because we don't know what's going to happen in the parentage department ... If there was a disagreement down the road between a known donor ... we don't know what will happen.

We don't know whether a known donor would be entitled to custody and access rights to see the child and we don't know whether that donor will have financial obligations for a child. And we don't know whether the contracts that we draw up will be enforced by the courts. We suspect not. So for that reason, there's a lot of uncertainty

Elena's statement on concealment and openness shows the importance of acknowledging different contexts of parentage. Clearly, GLBTQ parents might acknowledge markers of parenthood differently. One of the most important dynamics is the co-parent either mother or father who does not share a genetic connection to their child. Genetic knowledge may be concealed to protect a co-parent's legitimacy, or to protect against competing parentage claims. Openness regarding genetic knowledge in these situations is tightly aligned with the security of parentage when parental claims are secure; parents may be more open to revealing genetic or biological knowledge. A GLBTQ or single parent context may also be more forthcoming about a child's origins because their use of third party reproduction is more apparent and thus more easily disclosed. In comparison, heterosexual couples, especially those who use their own gametes, could conceivably

never admit to the use of surrogacy. The concealment of donor gametes may be more easily achieved in a heterosexual context.

Nevertheless, Elena remarks as a lawyer “putting on her legal hat” that the uncertainty of achieving a declaration of parentage means stacking the deck in favor of the gay and lesbian parent. And this requires some concealment by choosing to use anonymous donors. Moreover she acknowledges that since the contracts have not been tested and custody by same-sex parents has rarely been contested, certain conceptions of parentage seem to be a surer guarantee of parental rights over others.

Finally, the significance of multiple conceptions of parentage is that they offer a range of inclusion and exclusion that articulates with the logic of different contexts. I have argued that these parentage conceptions can co-exist even for persons who play specific roles in third party arrangements. Fern, a gestational surrogate, though generally emphasizing genetics as an implacable kinship property would on occasion emphasize intent, or alternatively return to emphasize the rights of the child to genetic kinship knowledge.

This chapter explored some of the varieties of prescribed parentage conceptions in cases of declarations of parentage; the ability to gain parentage leads to varieties of inclusion and exclusion based on markers of parenthood, including genetic, gestation and intention. The first subsection examined three court cases that showed how the court made parentage claims based on these markers. Personal narratives and dialogues with participants showed that there was a range of interpretations regarding how and when parental markers determined parentage. To clarify the influence of declarations of parentage I examined how traditional or genetic surrogacy is seen as too risky, too

inclusive of parental ties. I also took up many narratives to illustrate the range of possible conceptions of parentage. Participants often held many “trajectories of processing” (Carsten, 2007) at once. All of these different dynamics demonstrate subtle, nuanced understandings of the importance of the genetic, biological and social connections in staking parentage claims.

Chapter VI:

Queering Surrogacy: Gay Fathers as “Moral Pioneers” in the context of Assisted Human Reproduction

The gay men who chose to become fathers by assisted human reproduction are “moral pioneers” (Rapp, 1999:306). This term was originally used by anthropologist Rayna Rapp (1999) who wanted to bring attention to the new kinds of decisions faced by women undergoing amniocentesis, decisions that required much deliberation. The men who elect to have children through surrogacy also face new kinds of decisions and dilemmas. Men in this situation really think about why they want to become parents, and what parenthood means to them. This chapter shifts the focus to gay men who choose to become fathers by surrogacy.

Before going further, I want to underscore the reasons for including gay surrogacy in only one chapter when this arrangement could easily have become the core of the thesis. First, as stated in the chapter on methodology, it was considerably difficult to find enough gay fathers who both chose surrogacy and wanted to participate in the study. Nevertheless, gay surrogacy remains one of the most complex third party reproduction arrangements. It requires high levels of reproductive technology, both an egg donation and gestation, and the costs are prohibitive. In these ways, gay surrogacy provides the perfect context to view the effects of the federal legislation on a population that legitimately requires the arrangement to have a newborn baby, possibly with a genetic connection to at least one of the partners.

Moreover, while I use the inclusive notation gay, lesbian, bisexual, transgender and queer (GLBTQ) community, I focus solely on two cases of surrogacy by self-

identified gay men.³⁶ It must also be underscored that while gay surrogacy is relatively new, gay fatherhood is not.³⁷ However, gay fatherhood through surrogacy involves different issues than fatherhood by way of domestic or international adoption. Actual statistics on gay surrogacy are not known at this time, and anecdotal evidence suggests both that gay surrogacy is more frequent and yet still limited to a small number of gay men because it is extremely costly. However, it is highly possible that this family building option will become more popular amongst gay men. One of the rewards of gay and lesbian activism in Canada is that gay and lesbian youth tend to not view their sexual orientation as incompatible with parenthood. This chapter is a call for further research on gay surrogacy and the other ways gay men become fathers by way of adoption, and co-parenting arrangements in Canada. Gay surrogacy also operates alongside the family by choice model of gay and lesbian kinship suggested by Kath Weston (1991). Clearly, then gay surrogacy is only one way among others to become a father and to have a family.

The chapter title also pays homage to sociologist Laura Mamo's study of lesbian motherhood, where she established the terminology "queering reproduction" to show that dominant assumptions and institutions can be both altered and maintained in reproduction by gay and lesbian intended parents (2007:5). Queering surrogacy is also meant to point out the way gay surrogacy works against and for heterosexual norms (or heteronormativity). An examination of gay surrogacy is also tightly aligned with "stratified reproduction" a theoretical notion originally put forth by Shellee Colen and taken up by anthropologists Rayna Rapp and Faye Ginsburg in their anthology on the anthropology of reproduction. This term names "... the power relations by which some

³⁷ Gay men have also become fathers from a past heterosexual relationship, adoption, or co-parenting agreement.

categories of people are empowered to nurture and reproduce, while others are disempowered” (Ginsburg and Rapp, 1995:3). Class and power relations do under gird gay surrogacy and expose the diversity within *the* GLBTQ community. My study also emphasizes the need to address same-sex parents’ experiences with third party reproduction more fully.

Gay surrogacy is also tightly linked to dialectics of sameness and difference, and configurations of inclusiveness/exclusiveness. As Evelyn Blackwood noted in her study of matrifocal families it is important for anthropologists to “denaturalize” heteronormativity, and question the notion that heterosexual marriage and family is normative (2005:4). Yet it also remains important to avoid overemphasizing difference to the point of exclusion and constructing gay “others” as completely different from heterosexual fathers. This chapter is structured to address these concerns. In Part I Gay Fatherhood I deal specifically with the context of gay surrogacy; while in Part II: Gay Surrogacies in Practice, I address the process of these parenthood projects. Hence, this chapter examines the particular range of sameness/difference and inclusion/exclusion prevalent in gay surrogacy.

Part I: Gay Fatherhood

Gay fatherhood suggests a variety of issues related to sexuality and gender. This section examines some of contextual themes that arise in gay surrogacy. Gay surrogacy supports the legitimacy of men choosing to become fathers, and challenges the assumption that the desire to have children is solely felt by women (Cadoret, 2002). This is phrased in gay fatherhood literature as the issue of entitlement. Additionally, sexuality and sexual identity is referenced in these arrangements in a variety of ways. However,

perhaps the most important issue for gay surrogacy is social class. The great cost of completing a gay surrogacy makes this practice exclusive even in an era of social and political inclusion.

Gender and Sexuality in the context of Gay Surrogacy

Issues of gender and sexuality in gay surrogacy come up in a variety of ways. First the emergence of gay fatherhood (and gay surrogacy more specifically) follows from the rise in lesbian motherhood through artificial insemination. Several academics have located lesbian motherhood as *the precursor* to gay fatherhood (Weston, 1991; Agigian, 2004; Sullivan, 2004; Mamo, 2007). Anthropologist Kath Weston in her preeminent study of gay and lesbian kinship noted that the lesbian baby boom of the 1980s (through the use of insemination) changed American understandings of kinship as “... reduced to procreation, or procreation to the image of differently gendered persons locked in heterosexual embrace” (1991:193). Another scholar, sociologist Laura Mamo located the emergence of gay families as “... part of a thirty-year trend ... produced through the next wave of the two social forces *after* lesbian reproduction: gay and lesbian movements for equal rights and increased regenerative possibilities produced through ‘advances’ in biomedical science (e.g. surrogacy)” (2007:236, my emphasis).³⁸

In Canada the emergence of gay fatherhood should be seen as the result of shifts in Canadian social policy, such as the decriminalization of homosexual acts in 1969; the recognition of the rights of gay, lesbian, and bisexual people under the 1982 Canadian Charter of Rights; and since the 1980s an increased awareness of lesbian, gay, bisexual, transgender, and queer (LGBTQ) human service needs after the HIV/AIDS epidemic

³⁸ This does not mean that gay surrogacy is always seen as an acceptable practice by lesbian mothers. Some of the women I spoke with off record often suggested surrogacy was an exploitive practice.

(O'Neill, 2003:128). The inclusion of LGBTQ peoples is entrenched in the guiding principles of the *Assisted Human Reproduction Act* (AHRA) that defends the use of reproductive technologies regardless of sexual orientation and marital status. This also follows in the wake of the legalization of same-sex marriage in Canada (Roberts, et al., 2005:668; Barnett, 2006:131). Gay surrogacy requires a legal context supportive of same-sex families.³⁹ Hence, the larger context behind the emergence of gay surrogacies is uniquely Canadian, and the product of contemporary trends in social policy.

The Absence of a Mother in Gay Surrogacies

One of the most remarkable features of gay surrogacy is that the resulting child will not be born to an intended mother. French anthropologist Anne Cadoret (2000, 2002) and psychoanalyst Geneviève Delaisi de Parseval (2008) have both remarked on the dynamic between gay fathers and the women who help them. Both suggest that gay fathers more readily acknowledge the surrogate as *a kind of mother*, whereas heterosexual couples tend to de-emphasize the gestational surrogate through their genetic tie with the child (Ragoné, 2000).

The absence of the mother was acknowledged by the participants I interviewed in different ways. Amanda qualified the absence of an intended mother tends to result in easier surrogacies, with none of the emotional turbulence found in heterosexual couples' surrogacy arrangements who come to this arrangement to remedy their infertility problems.

Gay fathers can't have a baby. So there's none of the turmoil and emotion going on along with a woman who has tried now for five years and is feeling in some way inadequate or has somehow failed to have a child and it's her

³⁹ For instance the case of *R. (M.D.) v. Ontario* (Deputy Registrar General) has determined that Vital Statistics must record both names and grant declarations of parentage to same-sex parents.

fault. All that stuff doesn't happen in the context of two guys who are trying to have a kid.

This suggests that gay surrogacy is relatively easier on the surrogate than heterosexual surrogacy. Many surrogates on the surrogate message board also expressed these same sentiments; however, further research is required to give more credence to this observation. The flipside to Amanda's observation were Fern's remarks. She felt that gay fathers attracted the wrong kind of surrogate. The surrogates drawn to work with gay fathers did so to retain a special place in the life of the resulting child, which contravened the aims of surrogacy.

It's like some women they only want to help gay men because ... [they] feel threatened by the intended mother and they feel once the baby is born they will be cast off ... [In gay surrogacy] ... even if there could be an egg donor involved they'll still be an important person and that has a lot to do with that [...]

See when I first came into surrogacy there was no surrogates helping gay men ... Surrogacy has become popular over the years and now it's just exploded ... a whole bunch of them [gay men] tried to do it and then the rest kind of went 'you know what we can do this and we're not going to be criticized and there's agencies that help us and lawyers that help us and now Canada allows us to be married and recognized as spouses.' ... It is becoming more accepted. But at the same time I don't think surrogacy in Canada is becoming more accepted. It feels like we're going backwards ...

Aside from the less favorable tone, Fern's comments on the popularity of surrogacy amongst gay men are insightful. She gives the impression that surrogacy is becoming a more accepted option for gay men, but the practice is losing ground legislatively in Canada. This push-pull sentiment between the social acceptance of gay fatherhood and the claims for third party reproduction is an interesting dynamic to watch in the future.

Lawyer Elena also remarked on the relationship between gay men and the surrogate and egg donor. She considered gay men seemed more open with the women

involved in the arrangement, both the egg donor and the surrogate, since they often retained a relationship after the birth of the child.

But I do find that the gay clients I have had have been very open with the egg donors and the surrogates. That the relationship often ... maybe you found this in some of your interviews? But they continue a relationship with some of these women after the child is born ... I find surrogates seem to be really motivated by wanting to help the couple and I think that's less true for donors necessarily ...

Her further observation that there exists a different level of motivation between the surrogate and the egg donor is also significant. This is may be suggested in Len's account of his relationship to the surrogate and egg donor.

Referencing Sexuality

Psychologists (Johnson and O'Connor, 2002) and social work practitioner (Greenfield, 2007) provide reviews of studies to show gay men's sexual orientation has no negative effect on their children. However, often these same studies also assume "... an amazingly uncomplicated relationship between claiming an identity and feeling a sense of belonging or community" (Weston, 1991:124). The effect of sexual orientation or the degree of "queer" in "queer reproduction" cannot be assumed. I often found there were instances when sexual orientation structured the surrogacy undertaken by gay men, and there were times when the issues might be similar to heterosexual childless couples. Additionally, the comments made by Len and Cameron cannot be considered to stand for all the concerns and dilemmas experienced by gay men undertaking this type of parenthood project. However, overall this subsection suggests that gay surrogacy should neither be seen as completely distinctive or reducible to sexual orientation.

Overall my observations echo those insights of sociologist Laura Mamo. In her study on lesbian mothers she noted lesbian women demanded inclusion and recognition

for their families in ways that challenge heteronormativity; but many of their reproductive practices upheld “race, gender, cultural and health hierarchies” (Mamo, 2007:223). This means “queer reproduction” seems to sustain more traditional considerations regarding genetics. This is apparent in the following narrative where Len discusses the meaning of a genetic skin condition after he meets his egg donor. Initially, Len’s doctor observed his skin condition was probably genetically heritable. During Len’s search for an egg donor, the woman he met also had the same skin condition. At this point, Len had to reflect very intensely on what this genetic information meant to him alongside the egg donor’s other social status qualities. In the narrative, Len characterizes this as “looking in the mirror,” an uneasy process of weighing this genetic information and determining if he would proceed with the arrangement. He decided to proceed with the egg donor based on a hypothetical heterosexual situation. He reasons if they had met in a heterosexual context he would not reject her, so “why would I now?”

*I have psoriasis and way, way back the doctors said where’s it from ... I didn’t ask whether I was going to have kids with psoriasis or not, well, if it’s genetic and both parents have it then the likelihood is that my child will have it. Now the egg donor I found had psoriasis. So there’s several things here. The one thing was what was it ... that I found attractive in her? She had some external beauty but ... she was doing her Master’s. One could say that these are indicators of certain things but they’re also very status oriented indicators. That’s fine. But realizing that it’s fine. You know ... a lot of it was seeing myself in the mirror. So, do I like what I see or do I not like what see? And we rarely look at the mirror and like what we see [...]
Well, okay, well, if I was straight and I met this woman and ... we wanted to have children together ... would I say, “Well, you’re so nice ... it’s not me it’s you ... you have psoriasis!” I wouldn’t do that, right? [I laugh and he’s speaks in a light tone] ... So why would I [in this context]? ... It wasn’t an immediate answer it was like something that was in my mind forever. Until I [decided] this is crazy, it’s not relevant.*

Len justifies his choice based on a hypothetical heterosexual reproduction, and acknowledges that the egg donor’s more “status oriented” features also swayed his

decision. This suggests that gay surrogacy does not operate in a vacuum; it borrows and blends heterosexual norms of reproduction.

A negotiation of “race, gender, cultural and health hierarchies” (Mamo, 2007:223) is also prevalent in the following narrative. Here Cameron speaks about racial considerations he and his partner undertook when setting out on their parenthood project. They exclude the possibility of adopting a non-Caucasian child who is racially-unlike themselves, since they rationalize that having two fathers is enough of a complication.

I mean from my perspective one of the interesting questions that I've thought about and we've talked about, John and I, is would we have been comfortable adopting a child who is not like us? And I don't mean gay, I mean, not Caucasian? And I think the answer is 'no.' I think children of gay parents are going to have enough to deal with, they don't also need to have, they're also of a different heritage than their gay parents are.

Both Len and Cameron's rationalizations suggest that sexual orientation might inform parenting decisions in a variety of complex ways that require further inquiry. This shows two distinct but subtle ways that gay fathers may negotiate the importance of their sexual orientation.

Alongside the idea that gay fatherhood challenges heteronormativity is that it breaks down the notion that only women are entitled to have children. The term entitlement has also come up in the gay fatherhood literature. For instance Kevin McGarry, a gay father through international adoption wrote about how he observed the “entitlement issue” in “maybe-baby” groups he led. He states “... It seems that gay men don't feel entitled to become fathers because they are gay. As it is not biologically possible for them to have a baby with their partner or by themselves, they have to find a way to rationalize their fatherhood within another context” (2003:31-32). In contrast, I found neither Len nor Cameron identified with the notion of entitlement. Len found the

term confusing, in one sense he did feel entitled to have a child and this was partly “why Sophie is here.” Yet again Len also recognized to be entitled implicitly suggests power relations, and an authority to bestow or recognize this entitlement.

I have to figure out my relationship with the word of entitlement ... part of me feels that the reason why Sophie is here is because I felt that I was entitled to have a child. And ... and the alternative is that being gay I'm not entitled to it ... so I have to fight that, and I'll have a child despite the fact that I'm not entitled ... to have a child. Well, I guess the question is what's the definition of entitlement and who ... is the source of that entitlement? Is it something ... that is bestowed upon me? Is it a privilege that I have? By mere facts of certain characteristics that I hold? Or is it something that I seize?

The concept of entitlement held ambivalence for Len; it was both a source of rights and the acknowledgement of power. In contrast to Len's view of entitlement, Cameron also rejected the term of entitlement. He remarked in our interview that entitlement is not appropriate because gay surrogacy depends on the ability to pay for the arrangement.

Furthermore, I found it impossible to assume gay men experienced their sexuality in the same ways, or presume “harmonious solidarity” (Weston, 1991:124) between all gay men or “the” LGBTQ community. Cameron took a very judicious view of homosexuality and his perspective was rather distinctive and at odds with my experience attending a “maybe-baby” group for gay men. The following dialogue acknowledges this tension.

Cameron: I'm just looking at the situation about what's easier. Would it have been easier in my life to have been a straight or gay? I expect it would have been a lot easier to have been straight ... growing up. So, putting a child in that environment is – if I was intellectually thinking – would I be happier for that child to be raised in a straight family as opposed to a gay family, probably ...

Shireen: Of course through the course of this research I've been saying to myself I wish I had gay parents right about now. I'm thinking they'd probably be more motivated than my parents are ... we're coming at it from different positions here.

Cameron: It's an interesting question and we've thought a little bit about that issue. Because ... if you had to choose would you choose? To be gay? I certainly wouldn't.

Shireen: Really?

Cameron: I wouldn't. Am I happy now that I am? Yeah. But if I were to come up at eleven and have a choice to be either gay or straight, which one would I pick? I'd pick straight.[...]

This dialogue suggests interesting differences. Cameron begins by hypothesizing it might be easier to be heterosexual, and he can see why some might oppose raising a child in “a gay family.” Yet I offer the view that gay and lesbian parents are particularly motivated; which makes them more likely to be better parents than heterosexual ones. This indicates that further research on same-sex parents must take into consideration the personal meaning of sexual identity and parenthood for gay men who engage in assisted human reproduction. There are times when sexual orientation may or may not be a distinguishing aspect of this parenthood journey.

Nevertheless, Cameron's following dialogue with me on socio-economic hierarchies is especially striking. He estimates the costs of gay surrogacy to be between \$50 and \$75 thousand dollars. This may not include the legal costs required for gay men to establish their custody rights. The simple observation that this arrangement is “not for people who are poor” demonstrates that while gay fatherhood is made possible by inclusive social policies, it remains a highly exclusive and elite undertaking.

Cameron: ... a big concern with respect to this process and having watched a number of people [go] through it. It is not for people who are poor. Bottom line. There's a terrific number of people out there who would make terrific parents who don't have the wherewithal to be able to spend \$ 50 [or] 75 thousand dollars on a process like this. And I'm talking somewhere in the middle, I think there's a lot of people who pay a lot more in order have their child.

Shireen: 50\$ thousand?

Cameron: 50 to 75. At least, yeah.

Shireen: I've heard the base is 15 to 20 for a surrogate.

Cameron: Right ... [but] ... if you go and add up all the costs, the legal costs for the intended parents, the legal costs for the gestational carrier, if there's an egg donor involved you've got costs associated with that, you've got all the fertility clinic costs, some are covered by OHIP, most of them aren't. You've got medication costs, additional hospital costs, you've got the costs that you're paying, the expenses to the surrogate, and the current going rate is about 15\$ thousand, between 10 and 15. The [lawyer involved] always tries to put in 10 and I always try it at 20. So there's a whole bunch of costs that makes it prohibitive.

The high costs of gay surrogacy means it is out of reach for many gay men. I had to acknowledge this during the coffee break at the ““maybe-baby” group’ I attended for prospective fathers. Several men and I spoke about the various possibilities regarding third party reproduction. We considered less costly options such as embryo donation (where there would be no genetic connection to the intended father), and traditional surrogacy, which I now know many lawyers would not support. But these prospective fathers just shook their heads in disbelief. It was simply too much money. The dream of having a newborn baby, maybe one with a genetic link to one of the fathers was out of reach. This point aligns with the statement by Terry Boggins, director of Center Kids, the family program of the Lesbian and Gay Community Services Center in New York. He states “Gay men may, now, without having sex with a woman, make babies. We may now, as openly gay couples, adopt babies. But creating our families costs a lot of money, and many, many of us don’t have enough” (Boggins, 2001:180). While gay surrogacy offers exciting new possibilities for parenthood, and shows how gender and sexual

orientation may be meaningfully reconfigured, it is sobering to observe that this arrangement is out of reach for many gay men.

Part II: Gay Surrogacies in Practice

In this section I illustrate how surrogacy proceeds for gay men. First I turn to Len's parenting experiences: his personal preparation and his organization of the logistics, and his relationships with the surrogate and egg donor. Next, I address Cameron's story of surrogacy. I finish by examining Len and Cameron's accounts of their children's birth.⁴⁰

Before continuing it is interesting to note that Cameron and Len completed surrogacies just before and after the *Assisted Human Reproduction Act* (AHRA) became law. Len's surrogacy took place after the legislation when compensation was illegal. I believe this may partly explain Len's complex narrative of his independent arrangement with a known egg donor and surrogate. Cameron and his partner John completed their surrogacy just before the federal legislation became law. They used a clinic that retained anonymous egg donors and surrogates in house. Hence, the law's influence on third party reproduction arrangements may be suggested by these two accounts.

In general, gay surrogacies contest and conform to gendered aspects of reproduction in diverse ways. These arrangements are shaped by the material facts of gender, partnerships with female third parties, and the restrictions created by the federal legislation. Gay surrogacies may be divided into three general stages. The first stage is characterized by intensive personal preparation. The second stage involves the logistics

⁴⁰ It may seem curious that I focus much more on Len than Cameron. This stems from the greater length of time I spent with Len. My interview with Cameron was divided between asking about his role as a lawyer involved in surrogacy arrangements, and his own experience with surrogacy.

of the arrangement. The last stage is the birth, a life event often structured around women. These multiple stages suggest gay men engaging in assisted human reproduction are socialized to become particularly motivated and intentional fathers.

The first stage of gay surrogacies requires further mention, because it is applicable to queer reproduction in general.⁴¹ The complexity of third party reproduction involves specific issues and has led to the creation of support groups, commonly known as “maybe-baby” groups. The “maybe baby” groups I observed were highly organized and intensive. They had their own “course pack” readings. The gay fatherhood course pack was just under 450 pages and included information on gay-lesbian co-parenting, gay adoption, surrogacy, along with readings about considering parenthood. The first steps to queer reproduction may also begin online through community websites (Mamo, 2007:66). The decision to prepare for queer reproduction depends on personal connections to the LGBTQ community, and is subject to the availability of “maybe-baby” groups. The biological differences between gay men and lesbian women do impact their choices regarding third party reproduction. Gay surrogacy requires seeking out and establishing relationships with lay and professional experts involved in third party reproduction, including the women who will participate in the arrangement, egg donors and surrogates, along with clinicians, lawyers, and psychologists. Prospective fathers also turn to other gay men who have become fathers by surrogacy to guide their behaviour. Hence, queer reproduction and specifically gay surrogacies and reconfigure the gendered aspects of reproduction in distinctive ways.

⁴¹ This can apply to either lesbian or gay prospective parents. For instance Laura Mamo describes the personal preparation for lesbian women in her 2007 study.

Len's Preparation and Organization for Surrogacy

I turn now to Len's story of deciding to become a father and his first steps towards this aim. Originally, we met at a "maybe-baby" support group; he was there as a returning "alumni" and he shared his story with his daughter Sophie at his side. Not yet a year old, she held the spotlight and captured the attention of the "wannabe" fathers in the audience with her personality and energy. Len's commitment to fatherhood was obvious in his care for Sophie, and he graciously accepted to be interviewed over the course of two interviews.

Len's description of his preparation to have Sophie was a complex mix of elements both personal and medical. Originally, he intended to have a child with his partner. This relationship did not work out, but he still felt inclined to be a father. After making the personal decision to be a single father, Len wanted a structured process to complete this aim and joined a "maybe-baby" group. Alongside these personal steps, he decided to have his sperm tested. The following narrative also helped me to gain an appreciation for what it feels to make the transition from being a singleton to parenthood. Initially, Len compared his anxiety of participating in a queer parenthood event to the first time he entered a gay bar. The sense that he did not belong and he would be out of place as a single man attending an event for families is particularly clear in the following narrative.

I knew that I wanted to become a parent for a long time. And then actually I separated from my ex ... But in any case after we broke up I kind of made a mental list of ... what goals were ... related to him and therefore have to be scrapped or put on hold and what are not. And ... this [having a baby] was something I had a general plan for that was not something I needed to wait for. I'm definitely not waiting for him. But also what? I'm going to wait for being in relationship for five years until I feel that it's stable enough to bring a child into that relationship? Or ten years? Or when? You know? I could

have arrived at the decision that I wasn't doing it alone. That if I have to wait 10 years, I'll wait 10 years ... I actually don't even remember ... how did I make the decision that indeed I'm going to do it on my own and not wait. I don't know.

[...]

And then I decided, well, I need to kind of structure it because I have all these other things at work, and all these other things that are happening. Well, I heard about the ["maybe-baby"] course and I said, 'ok I'll register for the course and I'll kind of go through a structured way.' I'll read this and ... that. That will be my structure to go and do that.

[...]

There was a [gay and lesbian parenting event]. I heard about that and I read some description of what was going to be there and it said something about prospective parents ... And I stood there, outside the [community center], before walking in, and I felt like, exactly like, the first time I walked into a gay bar. I felt so self-conscious and ... what are they going to think of me ... a single man walking into ... and they all have families ... but it's the kind of thing where I walked around and said 'Ok Len you are walking in now!' So ... I walked in and registered for the course. So that was the first kind of official step into it although basically it was to get information but it was a real feeling of 'I don't belong. I'm not part of that.'

The decision to father alone after the end of a relationship is highly personal. Yet Len also pushed through the feelings of being out of place to attend a queer parenting event. His characterization of the registration for a “maybe-baby” group as an “official first step” suggests how a community-based social program can help mark the transition into another life stage, and the new identity of being a father. A change of status that would become further solidified as he progressed through the surrogacy arrangement.

Len's narratives of the process of gay surrogacy suggest how it shaped him into a highly involved and active parent. Charis Thompson (2005) observed that reproductive technologies do not simply *assist* reproduction, but they socialized *intended* parents to become parents. Gay surrogacy also requires a particularly *intentional* kind of parenthood and the transition into this kind of parent was complex. Initially, Len describes how he spoke with a lawyer who recommended he speak with another gay father, who also

offered surrogate consulting. He went through the “maybe-baby” group. However, over the course of our conversation, it became clear he could not completely “outsource” the considerable amounts of knowledge required to complete the arrangement.

Somewhere in the fall I met Dan Clark [a surrogacy consultant] ... A lawyer recommended that I speak with him ... [H]e also came to the queer parenting [course and] ... I had actually spoken to him before he came as a panelist. And he at least did, I don't know if he still does, some consulting. So, he wasn't an agency but he was doing some help with consulting ... So I decided ... my idea was you need expertise. I don't want to become an expert in that; I'm an expert in something else. I wanted somebody else who will do it, who will be the expert ... Very soon realizing that no one else is going to be the expert. So I have to study it, I have to understand it, I have ... to become ... the expert ... as far as negotiating with a surrogate, working with, finding a surrogate. Figuring out what it is I need to talk about, what are the issues that are important.

The idea that “you need expertise” is something I experienced as well. Assisted queer reproduction requires a knowledge that spans fertility treatments and laws of parentage and custody. Len needed to “become the expert to negotiate” with the surrogate and establish the central issues. Some of the issues he remarked on included deciding about abortion and selective reduction (decreasing multiple embryos in utero). To some extent these are issues that come up for anyone participating in third party reproduction.⁴²

The need to become an expert was further reasserted by Len when he describes working with the fertility clinic. He needed to become socialized to the clinical procedures, and also understand the basics of a female reproductive system, such as a woman's ovulation cycle, and how to match the cycles of the egg donor and the surrogate. The following narrative demonstrates the significant type of coordination Len had to master and hints that the clinic did not ease the challenge:

Now, I had to make sure, I had to figure out how the clinic works, how to the get the surrogate and the egg donor to the clinic, who I need to speak with at

⁴² Amanda mentions in Chapter IV that the legal issues for heterosexual and gay couples are similar.

the clinic [and] how the timing works ... I think that the clinic was somewhat resistant to some of that. [...]
I said [to the clinic] ... 'We're here now, when do you need ... the document from the lawyer or whatever it was?' Or ... you just met with the egg donor or you just met with the surrogate ... when is her next cycle? ... [A]nd if her next cycle is then, how many weeks in advance do you need to start? So what are we talking about? If the cycle begins now then obviously this cycle is off so the next cycle. Do you need it next week? Or do you need it in three weeks? Trying to ... create a project timeline. Now obviously, if I were, if it was my cycle, then I would know more about my cycle. But ... even knowing that it's 28 days ... and it's not necessarily 28 days ... it's not something I ever needed to know ... and I'm not an expert in biology and my memory doesn't work well. These [are the] kinds of things to try and figure out ... given that there are three parties involved [...]

This narrative speaks to the complexity of third party reproduction. While, Len tried to create a “project timeline” coordinating the reproductive processes remained challenging. His remarks about the reproductive cycle of a woman are important. It shows how gay surrogacy requires working around the material facts of gender for as Len states “if it were my cycle, than I would know more.” In some ways, it seems Len had to gain particular knowledge of women’s bodies and reproduction to complete the arrangement.

Preceding Len’s experience with the clinic was his search to find the women who would be part of the arrangement. This part of the process is often similar to online dating (Werb, 2007). It is also influenced by the federal legislation that has criminalized third party surrogacy agencies. Len needed to go and find women who would participate in the arrangement by himself and this was a source of considerable difficulty. Len joined online message boards to complete this part of the parental project. I found advertisements on these surrogacy sites are significant in themselves. They demonstrate the normative values of prospective parents who define themselves and set out what they seek in a surrogate and egg donor. Len described his first advertisement as quirky and

amusing, framed as a recipe. And while he did state he was “gay Jewish,” he also mentions not wanting to reveal too much.

I actually like my ads. Well, I can't give you the actual words. I'm sure I have it somewhere here. But what I said ... it was basically like a recipe. I have this, I have this, I have this and I'm looking for one egg donor and one surrogate ... it had the words 'lots of love' so it's kind of written like what's there and what's missing. I did probably say I am gay Jewish ... but I didn't ... feel like I wanted to put a description of who I am.

These sites are a popular means to access prospective surrogates and egg donors, and similar to online dating, the challenge is finding genuine and functional partnerships. Len's concern when using this medium is evident from his limited openness in the advertisement.

However, this did not deter responses from prospective surrogates and egg donors. He speaks about not counting the replies to his advertisement after “two dozen,” and being surprisingly “overwhelmed” after “building up to this.” Ironically, the attention he received did not make the process of finding a surrogate and egg donor any easier.

And I posted the ads. And I got close to over two dozen [replies] and after that I stopped counting ... I was overwhelmed. I thought I was ready. Here I was building up to this. Learning what I need to know... Looking at the [surrogacy] site but not posting yet and kind of searching and marking ... [I] ... got an email [set up] especially for [the advertisement] ... and put the ad up. And I got the responses ... [and] I froze. I just did not know what to do.

This narrative shows how finding a surrogate and egg donor can be an overwhelming process. It might be surprising that a detail-oriented and highly organized person such as Len would “freeze” at the responses to his online advertisement. I believe Len's difficulty stems from the social significance of these women; unlike online dating, the women who participate in these arrangements are engaging in parts of motherhood (contributing

genetics and gestation) and the outcome is his child. The partnerships they engage in with Len are clearly more than that of a work colleague, yet a lot less than a mother and wife.

Alternatively, the surrogates on the message board I joined often described the process of finding intended parents (either heterosexual or gay) as “matching.” This also has undertones of online dating, and the surrogate and the intended parents were “a match” when they agreed on issues regarding the pregnancy (like those of selective reduction and abortion), and shared common values of religion, politics and family. “Matching” is further complicated because it involves the alignment of similar aims. These “failed matches” can be quite instructive in helping prospective parents refine their search for partnerships in reproductive arrangements.

Len and I spoke about one failed match with a prospective Jewish surrogate from California. The match failed not because of a personality clash, but rather because of his slight delay in replying. In the interview Len and I agreed the surrogate’s desire to “rush” into a surrogacy arrangement did not bode well. But Len framed this incident as instructive; he realized if he and the surrogate “didn’t get along, they didn’t get along.”

The first I heard from her was June 12th. And then on June 19th I responded to her ... then on June 18th I hear ... [Len begins reading from the email archive on his computer],

‘I still don’t know your name, anyway I’ve been contacted by a couple that wish to start immediately, I waited for you and was hoping to be able to do your mitzvah because I have strong pull for helping Israelis but unfortunately you took a wee bit longer than I expected so I went ahead and decided to help these wonderful people.’

... Initially [Len states], I was like ‘Thank you, best of luck.’ [B]ut I think that on the one hand there was something devastating in the experience ... It was an eye opener. It ... somewhat felt bad but it felt bad for a second. And then actually relieved. And then after [I realized] that if we don’t get along, we don’t get along and I’m not going to be offended by it.

The prospective surrogate's response also demonstrates how surrogates want to satisfy their own interests. She explained her interest in working with Len via their commonalities; both she and Len were Jewish, and she framed a potential surrogacy for him as a "mitzvah." Len's account of this incident demonstrates why the search for surrogates and egg donors may be challenging. Even though the goal is to make a "match" this may not be enough to secure the relationship.

This incident was part of Len's first round of searching for a surrogate and egg donor. He goes on to relate how he found a prospective egg donor but no surrogate, and his profound exhaustion from the search.

[I] didn't get anything with a surrogate, I had a possible egg donor, [and] felt that I was overwhelmed, exhausted! Exhausted from the search ... And it wasn't [the] number of responses that I got and having to read everyone and think and respond ... It's not that much work! But ... it was very emotionally taxing to deal with it. I had to find, I had to figure out things about myself, I had to figure out what's comfortable for me which I didn't ... I thought I was ready but I wasn't ... I decided to take a little break ...

Len acknowledges his exhaustion from the search is not entirely clear. The actual tasks involved; reading, thinking and responding to replies were not especially taxing for this professional. However, the significance of his search remains palpable, a "match" will lead to efforts to have a child, and it involves knowing "things" about himself, determining his level of comfort when engaging with women who would become his partners in creating his own family. It is not surprising in a way that Len decided to "take a little break." And after several months had elapsed he posted again, two separate advertisements, for an egg donor and surrogate.

In this second round, Len was successful with his search. He found both a surrogate and egg donor much more quickly. This can be attributed to the way he sought

to establish contact and acknowledged online communication could only express a certain amount. He needed “that human touch,” to actually speak with the women who would help him father his own child.

But then I figured out for me the next step is the phone call. I don't want to get your photographs, I don't want to get [the] description of who you are, I want to hear your voice and I want to talk with you on the phone. After we've had an initial conversation we can go ahead and continue ... I somehow felt that I needed that human touch ... Part of it is the risk. That you know, you know ... who is that? Is that a fake virtual being? Or is it a real person? But also [I] felt that the email can only do so much with regard with what it conveys. So both for me to be able to convey my views ... and both for the surrogate or the egg donor so that I can get from her a little bit of a sense of who she is ...

This narrative establishes implicitly the kind of relational work required in third party reproduction. To create a partnership Len had to further communicate with these women or in his words, “get from her a little bit of a sense of who she is.” Again this suggests that the women who participate in these arrangements are not simply “objectified” reproductive parts but rather in partnership with Len.

Ultimately, Len's narratives suggest the challenge of preparing for queer reproduction. This preparation start with Len's self-reflection on this life goals and end with Len becoming an “expert” of sorts, acquiring a know-how that spans “matching” with a potential surrogate and an egg donor through online surrogacy advertisements to women's reproductive cycles and clinical practices. Len's narratives explicitly show the complexity of coordinating and executing a surrogacy arrangement. This complexity also characterizes Len's relationships with the surrogacy and the egg donor which is explored next.

The Surrogate

My second interview, at Len's home, helped me to gain further appreciation for the bond created between him and the surrogate. He paused at one point in the interview to show me the blanket made by Sophie's "surro-grandmother" and mentioned the surrogate's family barbeque he and Sophie had attended in the summer. Len's relationship to the surrogate was not simple. In this subsection I examine how Len spoke of his partnership with the surrogate.

In the following first narrative Len speaks about how he structured his relationship with the surrogate during the pregnancy. Beyond Len's subsiding fears that the surrogate might "disappear" him; there was also a need to keep "an open channel." Their organized phone call one night a week illustrates how the arrangement fit into the surrogate's daily life.

I wanted to be in touch with her [during the pregnancy]. Even before you know that she's not disappearing on me or anything like that ... and that if she wants to ask me anything it's an open channel ... But on the other hand I didn't want to have a situation whereby I call when it's not welcome or that I'm calling too much or too little. We ended up settling on one call, normally, one call a week. So it was a Sunday evening ... after her kids went to bed ... Our regular weekly conversation ... Yeah, we had a few conversations on other days ... but ... I didn't have that need for checking ... I felt that it was good. For me and I think it was good for her as well.

This narrative gives a sense of how a surrogacy arrangement is lived. After the surrogate's children went to bed, Len and the surrogate would speak about her week and the pregnancy. This was not an inflexible arrangement, and shows that a surrogate may over the course of the pregnancy build a relationship with the intended parent or father.

The following narrative demonstrates that a surrogate and intended parent's "partnership" also extends to her family in various ways. For example, Len mentioned

the “drama” when the surrogate separated from her husband. In a tone similar to a friend, Len observes “it’s good for her that she separated from her husband.” This remark belies the uncertainty created by the separation. He also waited in waiting rooms with her husband and later worked around the surrogate’s new living arrangements after her separation. The surrogate’s parents actively supported the surrogacy too; “her mom was the one who gave her the shots,” the fertility medication that enabled the pregnancy.

... the surrogate got married ... a month or so before I posted the ad and then they separated a week before the transfer was scheduled. At that point, the fact that there was a lawyer involved was really helpful ... I think ... It’s good for her that she has separated from her husband ... I don’t know all the details. But let’s say I’ve met him and ... if I’m entitled to an opinion ... despite the fact that it was very difficult for her, I think that it’s a good thing that they separated. In a very selfish way when I first met him and I realized, ‘Oh my god I’m going to have to ... be with him in waiting rooms, how am I going to get through this?’

[...]

There was an issue with her kids. Her kids were active and at a certain point she actually moved in [with her parents] ... so there were times that I could talk with her and times ... not. But her parents were actually very supportive. So it was actually good. Her mom was the one who gave her the shots.

Most importantly, Len’s experience of surrogacy was shaped by his relationship with the surrogate *and* her family. This picture of collaboration shows how any intended parent may be caught up in the surrogate’s life. Here the trust and support between Len and his surrogate, and her family’s contributions also influence the pregnancy.

I turn now to the dilemma of acknowledging the surrogate’s role in the following dialogue. I asked Len how he would explain Sophie’s origins to her. This results in contemplation on how he or Sophie might refer to the surrogate. Len observes the surrogate and the egg donor might be called “special women.” Yet in Ontario the woman who gives birth is legally presumed to be the mother of the child. Moreover, Len reflects the surrogate’s absent genetic link to Sophie making her only partially a mother.

Shireen: So have you thought about how you're going to tell Sophie about it?

Len: I believe that it will be something like, there was a nice lady helping ... [me] ... [Another] option, and it's still an option, is that you know she doesn't have one mom, she actually has two, very special, women.

Shireen: But you would categorize them as mom?

Len: Let's say ... legally, the surrogate was her birth mom. Ok, legally she is no longer considered her mom. The egg donor legally was never considered her mom. So, there's the legal aspect. There's the fact that she [the surrogate] was legally considered her birth mom, is because that's the way ... this works ... [in Ontario].

Shireen: So, on the birth certificate it's the name of the surrogate?

Len: Zero, there's nothing ... Her name was never there. Um, but the thing is that the law considers her automatically to be the birth mother. There's no other option. Even when ... the intended mother is the genetic mother. She's still not considered anything until legally the court affords her the right. So, I think she's [Sophie is] going to have to decide what terms she uses.

[...]

Let's say that she does decide to call the surrogate her mom. Do I then tell her, 'Well, you know she's just partially your mom because you know it's not her egg, it's someone else's egg.' And you know, she's going to be three when that possibly occurs then do I bother telling her ... I don't know yet. I don't have a long time but I have a little bit of time before I have to start.

[...]

[I]f someone asks me ... I say, 'there is no mom involved in her life and that she was born through surrogacy.' That's what I tell people. That's definitely what I'm going to tell her, the question is what language am I going to use?

[...]

Her surrogate brother ... I don't have a name for that [relationship] ... calls her or called her [during the pregnancy], when she was born, his 'special sister.' So it might be her 'special mom' or her 'special brother' or 'special person,' well, we'll see. I think I'm more concerned with how she's going to call me than I am how she's going to call them ... I don't know if she's going to call me [father] in Hebrew or in English.

This dialogue encapsulates the various kinship considerations generated by third party reproduction. While Len struggles to define the women involved in Sophie's conception; there is no need to include them on her birth certificate. They do not have a significant social role in her life. Furthermore, Len remarks suggest in everyday parenting the

absence of a mother is not difficult to clarify. Hence, the categorization of these women does not override the importance of the parent who does the everyday parenting, Len himself.

If Len is unsure how to categorize the women involved in Sophie's conception, the relationship with the surrogate does not become any clearer in the following narratives. Len does not claim to be close to the surrogate, yet they clearly do maintain a particular relationship demonstrated by the consistency of their communication, or as Len observes "I keep more in touch with her than I keep with many of my friends." Len's remarks suggest the surrogate occupies an ambivalent kinship relationship to him. Her kinship status is between two polarizations described by Len as a "best friend" and an employee ("I write a cheque and she sends me an email").

I keep in touch, I don't call regularly, we email, we set phone calls, we [have] visited twice. We make plans. Like she's going to be in the city, we made plans to see each other again ... it's a very reasonable relationship. She's not my new best friend as far as what we talked about but I ... keep more in touch with her than I keep with many of my friends ... it's not something I write a cheque and she sends me an email or an envelop with receipts.

This ambivalent status leads to more mixed motives for keeping up the relationship. In the following narrative Len remarks that he is "indebted to the surrogate in ways." He does not elaborate *in what ways*, but this suggests that there are enduring and ambiguous obligations between them. This is not a simple one-to-one exchange, "I provided the dollars and she provided something else." Finally, unlike close relationships, Len is somewhat uncertain of her statements about the value of the surrogacy.

I have the motivation of keeping her as a potential future surrogate. The friendship is separate. But it feels a little weird... I'm also ... indebted to her in ways ... there's no way I could repay her in any way. So it's a very weird basis for friendship ... [but] ... it's not a one sided relationship ... I provided the dollars and she provided something else.

I recognize that especially in this kind of relationship like many relationships but what she tells me is what she wants to tell me ... So I can, I can go with most of what she tells me, and especially things like, what she says about the value of how it was for her and the fact that it was a good experience for her. That she wouldn't say that unless she really meant it.

This statement by Len is incredibly honest about the mixed motives and sentiments that characterize his relationship with the surrogate. Moreover, the ambivalence of the relationship stems from the context itself, as Len observes, “it’s a very weird basis for a friendship.” However, he can neither satisfy his debt to her, nor fully understand her motives, and this leads to special ties between them.

Much of the literature on surrogacy stems from a period when this arrangement was enjoyed solely by heterosexual couples. Len’s narrative suggests that certain aspects of surrogacy may be experienced distinctively by gay men. Since, there exists no intended mother there seems to be more space to acknowledge and relate to the surrogate. The arrangement leads to interesting kinship ambivalence between the gay father and the surrogate for she is neither a parent nor a “mother machine” (Corea, 1985). But similar to heterosexual couples the surrogate’s position is not relevant in everyday parenting. However, Len’s narratives of his relationship with the surrogate shows how a new kind of kinship and enduring ties are possible, which contrasts with his experience with the egg donor.

The Egg Donor

Although my thesis is about surrogacy, the use of surrogacy by gay fathers necessarily involves egg donation. Before presenting Len’s account of egg donation, a short preamble about this context is required. Egg donation, unlike sperm donation, is a fairly involved process that includes taking fertility medication and then a minor surgical

procedure to extract the eggs. These eggs are then fertilized with the sperm of, in this case, the gay intended father, to create embryos, which will then be placed (or “transferred”) into the surrogate’s uterus. At this point the egg donor’s role is complete.

Egg donation (not unlike surrogacy) results in complex issues. While I know of no anthropological studies of Canadian egg donors, European anthropologists have examined egg donation in Spain (Bestard, Orobeting and Salazar, 2005), England (Konrad, 1998; 2005), and America (Thompson, 2005). Their work suggests that the important issues include anonymous or known donation and the social significance of genetic contributions. Moreover, the terminology, “egg donor” is a misnomer, because it hardly reveals the range of motives and ambivalent beliefs of women who are compensated for their “reproductive capacities” (Orobeting and Salazar, 2005; Konrad, 1998, 2005). Egg donor advertisements are also a particular site of controversy, because specific features like race and education are emphasized suggesting the eugenic dimensions of the practice (Hobbs, 2007).

In Canada, the issue of compensation also structures egg donation. As mentioned in chapter III, egg donors cannot receive compensation. But this has not deterred the most determined intended parents who have turned to the Internet and traveled to other countries where egg donation can be compensated. The diverse medical and lay participants I spoke to off the record related issues of anonymity and disclosure and compensation with the *availability* of gametes to childless couples and gay and lesbian intended parents. These issues are also hotly debated in studies of donor-created children, also known as donor inseminated (DI) children (see for instance, Lorbach, 2003; Becker, 2003; and Inhorn, 2003 her chapter on stigma for a cross cultural illustration from Egypt).

One Canadian non-profit group, known as the Infertility Network, resolutely opposes the use of anonymous gametes, and criticizes the federal legislation for omitting the creation of a donor registry for children created by these means (Blyth, 2002).

These debates are far beyond my analysis of egg donation. My aim is much simpler: to acknowledge the importance of egg donation to gay surrogacy, and provide a contrasting frame of reference to Len's account of surrogacy. Len's choice to use a known egg donor from the States, who traveled up to Canada, is one among many other choices. Gay men and heterosexual couples may have relatives willing to donate their eggs; or chose anonymous egg donation where they select a profile but have never met with the donor. The categorization of "known" and "anonymous" donors is subjective. And this remained one of the most important differences between Len's relations with the surrogate versus the egg donor. For instance, although Len worked with a "known" egg donor, he did not "know" her as a friend or relative. This distinction adds greater complexity to the debate between disclosure and anonymity.

Moreover, while egg donation is required in gay surrogacy, embryo creation for a gay couple versus a single gay man may be more complex. The decision of selecting sperm from either intended father may be difficult and I was made aware of a variety of strategies to equalize the genetic contributions of gay fathers. Clearly, since Len is a single parent this was not an issue. But I encountered gay couples in the "maybe-baby" group who chose to transfer two different embryos to ensure each father would have a genetically related child. Alternatively, gay fathers may mix their sperm in the creation of a single embryo and choose not to know whose DNA was passed to the child.

Len's account of the relationship with the egg donor presents us with a different aspect of gay surrogacy. While Len's account of the surrogate makes it clear that there exists strong ties of obligation, Len's relationship with the egg donor seemed less strong. The reason for this may be that Len and the egg donor did not bond as friends. Or this impression may be the result of the non-disclosure agreement between Len and the egg donor. However, as lawyer Elena notes, often gay fathers do maintain deeper ties with the surrogate than the egg donor.

Initially, Len began describing his choice to use a "known" donor. Len indicated what "known" meant in his case. He initiated the relationship with her and did not find her through a clinic. He has her personal contact information, though he does not assume she will keep him updated if she moves. Most significant is the egg donor's citizenship, she is American because Len could only pay her there.

The egg donor ... is known in the sense that I contacted her. I have information on her. I don't know [if] the contact information is current or not. There again I'm really limited in what I can tell about her because of the contract. She is from the United States ... There were a couple of Canadian donors but not many and the way to circumvent the law anyway is to pay her in the US. So, let's say there is a contract and the contract is based in Canada and that part of the contract ... is fully compliant ... but whatever doesn't happen in Canada doesn't happen.

This narrative is also significant because it shows anecdotally how Len's arrangement was affected by the legislation. The inability to provide compensation meant he was more inclined to work with an American egg donor.⁴³

Len further remarked that his decision to work with a "known" egg donor who he met through the Internet was not quite acceptable to the clinician involved in the

⁴³ Though this has its advantages, if genetic health related issues ever came up, further contact with the egg donor may be quite impossible.

arrangement. The following narrative further demonstrates that “knowing” an egg donor does not necessarily mean sharing a close relationship. The following statements came up in different parts of the interview, but show how two main events, the egg “transfer” or removal of the ova and the earlier contracting phase structured the relationship of Len and egg donor.

Well, the doctor didn't like the fact that I knew her. That she was a known donor ... and he didn't tell me that directly ... I think that in general known donors are considered more risky. I met her when she was here at the clinic but that's it. I met her when she came for her tests and I met her when she came for the transfer. I was there for the transfer that was part of the way we ended up creating the trust. I was with her when she was recovering from her procedure. [...] It was actually with the egg donor as we got into doing the contract things came out. Well, how are you going to ensure that you're going to pay me this? Or do this? Or when am I going to get the money? And these kinds of things came up when the contract was being drawn up. She had issues of trust ... with men in her life and that came up during that point. And I just had to assure her that I'm not that [kind of man and] she can trust me. It worked out. At least up until that point.

Len shows that actually meeting her at the transfer and supporting her through the procedure did create trust. This trust was originally sparked during the contracting phase of the relationship where Len had to disclose how she would be paid and when. He acknowledges too that her personal “issues of trust with men in her life came up.”

This shows the different dynamic at work in an egg donation. Len's relationship with the surrogate developed over the course of the pregnancy and was nurtured by collaboration with her and her family and through phone calls and other social contact. The procedure with the egg donor involves collecting reproductive tissue and this limits the length of contact. So while Len remarks that the relationship with the egg donor “worked out at least up until that point,” some difficulties did come up after the egg donation was completed.

The trouble began when the egg donor requested a “reference,” I assume for another egg donation. This is implied because Len noted that the man requiring the reference began to ask “all sorts of questions” that created anxiety for Len since it meant his identity might be revealed, because “the population is just too small.” This led to Len wanting to “disengage” from his obligation to be a reference. However, the egg donor never responded.

Now she actually emailed me and requested a reference later on. Months after, Sophie was not born yet, and initially I said ‘sure.’ And I was contacted by whoever she was in touch with and he started asking all sorts of questions ... and I realized that if I’m going to give anymore answers I’m going to expose who I am ... Because the population is too small ... so I actually said to him, ‘I’m sorry but ... I need to disengage.’ I emailed her and told her that I did provide the reference to him but I did say in the future ... I won’t be able to do that. She never responded to it.

This minor conflict led to further complications when Sophie was born. For instance, in the following narrative Len is uncertain as to whether the egg donor would want to know the outcome of her donation. Again a “known” donor does not clarify the terms of social obligations. Len does not want to provide her with information if she has moved past her egg donation. Nor does he know if she was “offended” by his request regarding the reference. This results in him writing an email that takes a “neutral” stance – neither revealing information but suggesting she might get in contact.

*... I didn’t tell [her] that Sophie was born but I did email her to ask her if she would like any updates ... I was struggling with it for a long time because ... there wasn’t a line in the contract saying that she will be notified ... So, I didn’t know, should I send her a note? ... Should I? Should I not? Maybe she doesn’t want to know. I just didn’t know. So, I eventually decided to email her and say, “I’m sorry that I didn’t contact you until now’ ... but if she is interested in how things turned out that she should let me know and I’ll let her know. **This way I didn’t divulge any information and kept it as neutral as possible.** I never heard back from her. So I don’t know if I offended her before when I said I’m not going to do it [the reference letter] ... Or ... she’s moved to a different phase of her life and she doesn’t want to know about it.*

And she doesn't want to deal with it ... All of these [explanations] are possible and I just felt that I needed to be, to do the due diligence of being on the right side, or doing right by her ... (my emphasis).

Len's final remarks of "the due diligence" and "doing right" by the egg donor shows he feels some obligation. However, unlike the surrogate where there is still communication, with the egg donor the channel seems to be closed. The impact of this is much more far reaching than with the surrogate. This means that if the egg donor did contribute eggs to some one else, Len might not be made aware if Sophie has partial genetic siblings. Moreover, Len acknowledged that even though his ties with the egg donor have diminished Sophie may still be able to contact the egg donor. This remains the only part of the contract "still in effect" with the egg donor.

In sum, Len's narratives on the egg donor suggest the diverse issues related to this part of gay surrogacies. The first issue stems from the Canadian legislative context, where the criminalization of compensation requires Len to seek an egg donor in the United States. The second issue is the actual meaning and practice of "known" donation may not correlate well to the relationship that develops between the intended parent and donor. In this case, the ties between Len and the egg donor seem more faint, and after the donation much more fraught. It is important that further research be conducted to establish the significance of different types of egg donation for gay fathers, alongside further examination of the effects of the federal legislation on the availability of ova for childless heterosexual and homosexual intended parents.

Cameron

Though originally my interview centered largely on Cameron's role in representing surrogate mothers during contracting, his story of surrogacy and egg

donation remains distinct from Len's parental journey. Moreover, since Cameron and his partner had children through surrogacy, this would have necessarily affected the arrangement. In this section I present some of Cameron's distinctive experiences with surrogacy, how he and his partner learned about the arrangement, and a brief statement on the dynamic of two fathers in surrogacy and Cameron's examination of his relationship with the surrogate.

Cameron and his partner John did not turn to a queer parenting course; instead Cameron used his "law school contacts" to find a lawyer specializing in surrogacy and was introduced two gay fathers by his rabbi. Cameron describes how meeting these men introduced him and John to surrogacy. He describes the importance in this way, "... to have stumbled into meeting these guys who basically saved us a couple of years, I expect of home study, adoption, go to this country, go to that country." Cameron recounted the surrogacy journey undertaken by these gay men, the first they had met to become parents via surrogacy. Unlike Cameron and John, this couple's arrangement crisscrossed several American states, and culminated in the birth of child in California (where it is possible for gay men to draw up pre-birth orders with surrogates that guarantee their custody rights).

We knew probably months before that we wanted to embark on this process and we were really glad that we met these two guys. These guys had actually done it and had a son, pretty young at the time ... They were planning on doing it again. They had done it in the United States so they had a very complicated and expensive process for them. And they had the surrogate in California, the embryologist was in Arizona, the egg was somewhere else, someone had to be able to coordinate all this and ultimately the child was born in California.

In comparison to this complicated arrangement, Cameron and John undertook surrogacy in a much simpler manner. Cameron summarizes their surrogacy in this way: "*I mean we*

are textbook lucky. Is what we are. One clinic. Egg donor. Surrogate. Twins. Boy and a girl. So you know in terms of the classic good news story, we are lucky." Cameron and John's "luck" with the arrangement may have also been related to the legal context at the time. They proceeded with the surrogacy and egg donation just before the federal legislation criminalizing compensation. Cameron remarked that they pre-paid the balance of the compensation due to the surrogate to make sure they had done so well before the date in which the legislation became law.

Another aspect of Cameron and John's arrangement that deserves mention is the need to choose whose genetic contribution would be used to create the embryos transferred to the surrogate. Originally, Cameron and John decided to complete two surrogacies, for two children. Each father would take turns donating the sperm, and this would mean each would have a child genetically related to them. However, there was a minor upset on this score as they ended up having twins. Rather than "tempting the gods one more time" Cameron and John decided not to continue having children.

The interesting issue here is ... we had decided who would go first on the basis that we were going to have two [children]. So the next person would go second. So one of us said, you know, you go first, no problem. Then we ended up with twins, of course! So as a result there was a decision that had to be made whether we were happy with twins or whether we were going to tempt the gods one more time and do it. But we've decided we're happy and we're lucky. So we're stopping.

To mitigate the situation it seems Cameron and John had a declaration of parentage drawn up as opposed to a step-parent adoption that would divide the fathers into two types of parents: genetic and adoptive.

...we could have done [a step parent adoption but] ... if we did that though you [must be] pretty upfront about who's "the" father and who's "the" step-father. I never thought of it like that. Because you will always be the one of the two parents in a step parent adoption has to adopt, the other parent is the

biological father, the other parent is the adoptive father. So the advantage of Declaration of Parenthood is you don't need to get into that.

By turning away from the step-parent adoption process Cameron and John purposefully chose not to categorize either one as a step-parent or adoptive parent. Later in the interview Cameron questioned my use of the term co-father. When I repeated the standard definition of the co-father as a social parent, he responded resolutely: "Our kids have two dads. That's it." This may suggest the issue of genetic contributions can become a specific concern when there are two fathers involved in a surrogacy.

Cameron also spoke about the relationship with the surrogate. Since he and John had chosen anonymous egg donation, there was little to say about this woman.

Cameron's statements are also particularly informed by his experience representing surrogates. He spoke about the relationship in an ambivalent manner. The relationship with the surrogate was both "exciting" and "strange." He felt this ambivalence stemmed from the specific purpose of the arrangement, "you've really for an *individual* purpose have brought someone else into your life." The agreement also marked the relationship with the surrogate, creating anxiety because "you've have sort of given up control" to someone "you don't really know." After all she does not live with the intended parents and you have to trust she is conducting herself according to the agreement.

It's exciting in one sense, it's very strange in another sense. Because you're really for an individual purpose, have brought someone else into your life. They're not living in your house so despite the fact that you've created an agreement around what people can and can't do. There's often some anxiety about whether she's taking care of herself. Or is she out drinkin' and smokin'? Is she in a hot tub or ...is she having a tattoo? You know those [are the] sorts of things that go through your mind and of course rationally it probably doesn't matter but ... and you've sort of given up control, really, to someone else who you really don't know, you've met them a few times, so it is a fascinating relationship that develops ... and for us it was possible.

Cameron remarks lightly about fears of the surrogate drinking and smoking, bathing in the hot tub and tattooing. And he stresses again in his last words how it was possible for them to complete the arrangement in these circumstances of working through the anxiety, giving up the control and trusting the surrogate, as well as affording the arrangement.

I inquired further about his categorization of the relationship with the surrogate. I wanted to know was she was considered a friend or family member. Yet Cameron continued to stress the ambivalence of the relationship. It was not a friendship, but “for that period it is.” This continued when Cameron remarked, “We’re friends with our surrogate we just don’t communicate with her very much.” When I inquired about the type of contact, Cameron replied the surrogate kept in contact by Facebook. This online community allows public users to create profiles and network with “Facebook friends.” It also created the ability for the surrogate to view pictures of the children for her own knowledge of how they were “doing and growing and that kind of thing.”

Cameron: I wouldn't describe it as friendship. Although for that period it is. We're friends with our surrogate we just don't communicate with her very much.

Shireen: Oh, so you do kind of keep in contact?

Cameron Yeah, well, you know everybody's got Facebook, so ...

Shireen: Your surrogate and you have Facebook together! ... I haven't had anyone tell me that yet!

Cameron: From their perspective she just wants to know everything is fine and wants to be able to see the kids, not personally, but see how they're sort of doing and growing and that kind of thing ... Like with pictures ... So there's an ability for her to do that just by virtue of being a Facebook friend. Family, no, not really. Friend, yeah, but you know, a special kind of friend. And a friend that you know at the end of the process you're not going to be the same kind of friend you were while it was going on. And during the period that this was happening and at a time when you could actually pay your

surrogate, a business relationship too, in a sense. Because you're really paying somebody to do something you can't do yourself.

This dialogue suggests Cameron's relationship with the surrogate is much tidier than Len's feelings of obligation, and he excludes the surrogate as family. Yet similar to Len the surrogate is a "special friend." Finally, Cameron remarks that the tie with the surrogate was also complex because it was "a business relationship."

In Cameron's account of his and John's surrogacy there seems to be a relatively simple preparation phase as compared with Len's arrangement. Cameron and John seem to easily navigate the process of finding their surrogate and engaging an anonymous egg donor. Another distinction is that Cameron and John had to deal with how they might acknowledge the genetic ties between themselves and their children. They chose not to acknowledge publicly who is the genetic father and pursued legal parentage that would not make any distinction between them. Finally, Cameron also speaks of ambivalence towards the status of the surrogate, but this does not stem from her ability to occupy a kind of motherhood place. Instead, it results from her being a much distanced friend who was once very close (during the pregnancy) and who maintains an interest in the children.

The Birth

The birth marks the end of the process of gay surrogacy, but also presents another context where gay men must work around a system established for heterosexual reproduction. Len and Cameron's efforts to have their parental rights recognized over those of the surrogate could be viewed as challenging heteronormativity. This is not a claim they would make themselves, yet the birth did require creative negotiations with the hospital. It is also at the birth when both fathers had their legal counsel draw up forms to send to the hospital regarding their situations. These forms do not have legal authority

in themselves, and the following narratives show how Len and Cameron experienced the birth of their child as a principal event where they became fathers and the surrogate was distanced from the arrangement.

Len's narrative of preparing the hospital for the birth of Sophie was much more challenging than Cameron's account. Len remarks that the hospital did not seem to understand how to accommodate his fatherhood, even though he observes "... it becomes really complicated because in a way she [the surrogate] is the birth mother." Len required a separate room for the surrogate and nursing staff's "support" after the birth. The hospital was unwilling at first to comply with these demands. However, Len's demand that he spend time with Sophie and not simply "visit her in their nursery" demonstrates an important way in which the birth plan with the hospital was a moment for Len to assert his parental rights.

We had to ... make a birth plan [with] the hospital. We set up a time and it becomes really complicated because in a way she [the surrogate] is the birth mother, the law states she's the patient, the hospital needs to accommodate her and make sure that her needs are met. [...] We knew what we wanted ... the dad (or dads) is provided a room with the newborn and the surrogate is provided a separate room. And the father or fathers receive support from the nursing staff within the maternity ward. And I laid out my requests and they resisted, and said 'No we can't offer you a room at all.' Sophie will be in their nursery and ... I can come and visit. And I said no. Sophie's best interest is that I spend 24/7 with her ... And we went back and forth with regards to that. Now the birth plan is [usually] not done with the dad but with the mother. The surrogate was perfectly fine with me handling all that ... she cared ... [about was] ... what and where she got [an] epidural and things like that ...

In following narrative Len also spoke about the issue of name bracelets and rights. Here again Len had to reassert his parental rights and force the hospital to deal with his unique situation. The importance of having the hospital comply with removing the surrogate's

birth bracelet, since she held no parental right, is also another illustration of how the birth event allowed Len to reassert his parental rights.

In addition to that there was the issue of names being used and rights and bracelets. In general in some hospitals that do use bracelets, they put a bracelet on the surrogate, the birth mom ... and ... the child gets two bracelets, one, with their name on it and their patient id (or just the patient id because they don't have a name). One of my comments was you need to remove the bracelet of the birth mother from her hand because she doesn't have rights, and you have to put mine. Otherwise what's the association? And they did not know how to handle that at all. They said, 'Well, our system wouldn't print it. We'll write one up by hand.' And all sorts of things. Then they actually came up with the idea, 'Well, you know the birth mother can come in under whichever last name she wants to come in, it doesn't have to be the OHIP name.' So the surrogate went in under my last name. So Sophie was never called by any other last name than her last name. Which I love. It can't be done again. I now know that the office of the Register General does not approve of that because the child has to have the same name as the name of the woman coming in.

However, this narrative also shows that the hospital ended up creating a kind of fictional married state between the surrogate and Len. This shows the limitations of an institution in coping with the arrangement, though as Len observes “It can't be done again.” This narrative is full of the various considerations that arise when the child being born will not be the child of the woman giving birth. Overall, Len's narratives suggest that in the context of a gay surrogacy, the birth of a child has added social dimensions. It makes a father, but *not* a mother. Moreover, Len had to stand up for his full parenting rights and take up his role as primary parent of Sophie. In particular, making sure he remained with Sophie after birth, receiving the bracelet that would identify his relationship to the baby, and distancing the surrogate from the situation required negotiations with the hospital staff.

In comparison, Cameron was able to effectively leverage his professional affiliation as a lawyer to “smooth the waters” during the birth of his and partner John's

twins. He remarks that John and him, similar to Len, met with the surrogate and the unit manager at the hospital before the birth.

I suggest to people often that if you're going to go through the process try to have everything organized as best you can, don't leave the hospital part up in the air and hope and pray that you've got a nurse that's going to be sympathetic or not difficult ... When John and I had our twins, we arranged actually to meet the unit manager on the floor where we were going to deliver. So we had a meeting between our gestational carrier and us ... and the unit manager, just to sort of go through what was going to happen.

In this narrative, Cameron states that the risks of a gay surrogacy creating difficulties can be mitigated by planning and preparation. He underscored the value of this preparation further in the next narrative by noting he had heard of “horror stories” where social workers, unfamiliar with the arrangement had tried to talk gestational surrogates (or carriers) out of giving the children to their fathers.

I had heard horror stories although I hadn't personally experienced them. Social workers showing up at the time of delivery trying to talk gestational carriers into wondering whether they want to give up the child. That kind of thing ... This was a few years ago and again this was just something I had heard had happened in a hospital, in Ontario.

Regardless of this caution, Cameron goes on to relate his great delight at the birth of the twins. There was no question that the twins went directly into Cameron and John's custody. The surrogate was moved to another private room and Cameron and John shared the ward with several other families. Cameron relates this was a very positive experience, which he credits to his own professional connections, legal notification by their lawyer and good planning.

So our situation was: we went in to the hospital, it was an induction, we had a day picked and we knew exactly, subject to beds being available ... how it would go. And it did. It went swimmingly ... our daughter came out first. Cut the cord. Into ... John's arms, then our son came out nine minutes later, cut the cord and into our hands.

We had a room in the hospital, so John and I and our kids were in the hospital and the gestational carrier had a private room somewhere else. So she wasn't stuck having to deal with, you know, three other screaming babies, and their mothers when our carrier didn't have a baby and didn't really want to give anyone an explanation of why she was there without a baby. So that all seemed to work very well. The hospital was terrific. And it was all a very positive experience.

After the birth, he and John become a family like any other with their twins amidst the “three other screaming babies and their mothers.” The surrogate moved off of the ward, since she is not the children’s mother.

Cameron ends by describing again why gay men in surrogacy arrangements must “sort these things out in advance.” This is the day that has been the result of a great deal of planning, complex negotiations, time and effort by a variety of people. The birth is the ultimate last event of the surrogacy arrangement; and his characterization of the birth as “one of the most exciting days of your life” is especially poignant.

So, that was a positive experience. So, I ... say to people, try to sort these things out in advance because the last thing you want, you're very excited, this is a big day, and you get there and suddenly something happens. Not with the baby. But someone makes a stupid comment or ... It's just things that don't need to be downers on what's supposed to be one of the most exciting days of your life.

Again comparing the experience of the hospital between Len and Cameron is instructive in showing how these arrangements can be accommodated by the hospitals. The organization of the birth also contributes to transforming gay men into fathers in particular ways, just as the surrogate who helps them become “not-mothers.” Len and Cameron’s narratives suggest their parental rights are further anchored at the birth by compelling the hospital to recognize their role as primary caregivers over the surrogate.

In conclusion, gay surrogacy opens up a myriad of different issues. First, gay surrogacy demonstrates a range of inclusion and exclusion. Gay surrogacy is an inclusive

practice leading to father-headed families. Yet clearly Len and Cameron's narratives show gay surrogacy is also an incredibly exclusive practice and an intensely relational endeavor. The emphasis on their different experiences of gay surrogacy was intentional. There are no standard ways of becoming a parent, nor any stereotypical "gay man" who engages in queer reproduction. Gay surrogacy may at times contest gendered notions of parenthood; but at other occasions this arrangements results in issues that are not related to gender or sexual orientation. Gay surrogacy nonetheless is highly distinct parenthood journey.

It is an inconvenient reality that while on paper the government does not discriminate against gay and lesbian potential parents, the criminalization of compensation may limit their access to third party reproduction and reproductive technologies. On the surface the different third party reproduction arrangements experienced by Len and Cameron show the mounting difficulty of accomplishing parenthood projects before and after the legislation. However, further research is required give credence to this conjecture, along with elucidating the multitude issues that stem from gay surrogacy.

Chapter VII: Conclusion

I began this thesis with the remarks of Ontario Superior Court Judge Kiteley. She spoke about how surrogacy arrangements necessitated “a roadmap” for those involved in the arrangement “to know what to expect.” By drawing on the narratives from interviews I documented the experiences of people involved in surrogacy arrangements and to a certain extent third party reproduction in Ontario, Canada. I argue overall that the surrogacy contract, parentage laws and gay surrogacy often contest the simplistic understandings of third party arrangements in the *Assisted Human Reproduction Act* (AHRA). Nevertheless, all of these different elements do influence how surrogacy is practiced, even as the context of the AHRA means the practice of surrogacy and third party reproduction is often also a “grey area.”

In chapter III I examined the federal legislation’s guidelines on surrogacy. These reveal that parts of surrogacy are illegal (compensation) while others remain legal (expenses), forcing those who engage in the arrangements to work *around* the AHRA’s vague legislative concerns of commodification and commercialization. This may change with the advent of a federal agency regulating the practices associated with reproductive technology. However, ignoring the social complexity inherent in these arrangements makes its effectiveness questionable. People use these technologies and participate in third party reproduction arrangements in ways that are meaningful to them. My belief is they will continue to find ways to participate in these arrangements with or without the approval of the law regarding compensation.

In this same chapter I question the assumptions implicit in the *Assisted Human Reproduction Act* (2004). I contend the legalization of altruistic surrogacy (with

expenses) is highly moralistic and at times may lead to further commodification. This also ignores how surrogates' involvement in reproductive technology often stems from a complex mix of motivations. I suggest at best that the legislation is too vague about how commodification harms women and children. At worst these regulations may also perpetuate the very conditions they want to prevent. More interesting, is the dialectic between consumption and kinship in which the government with little justification frames forms of consumptive kinship practices (surrogacy and gamete donation) as too much commodification.

Yet narratives from participants show multiple conceptions of commodification are possible. The AHRA's regulations may be interpreted as shifting commodification to countries where compensation is legal for third party reproduction *or* encouraging these arrangements by eliminating compensation. In another instance, gay surrogacy is seen as too commercial, because it involves an agency, egg donor and surrogacy, and is highly costly. Surrogacy completed overseas is also considered too commercial because of the distance between the surrogate and the intended parents. This suggests understandings of commerce and reproduction shift and may be framed by an individual's perceptions. By ignoring how consumptive kinship practices are relative and multiple conceptions of commodification co-exist, the federal government pushes aspects of surrogacy underground by "exporting" the practice to other countries. Ironically, it may also encourage the practice in Canada by keeping the price of surrogacy artificially low and hidden in receiptable expenses.

I also examined the contractual behaviour involved in surrogacy arrangements; generally this chapter shows surrogacy contracting is a kind of consumptive kinship

practice. As such it cannot be characterized solely by either commodification or kinship. Instead, these contracts establish the norms and values of the practice, and result in interesting dynamics of contract talk and trust, necessitated by the uncertainty created by the federal legislation, but also by the very nature of surrogacy as a collaborative process.

The legal kinship practice found in Ontario, called a declaration of parentage demonstrates a range of parentage conceptions resulting from the context of third party reproduction and same-sex parenting. Declarations of parentage are a particular legal kinship that draws on a multiplicity of parentage markers, including genetics, biology, intention and social parenting. Legal kinship cases may influence which third party arrangements are preferred as genetic or traditional surrogacy is seen as more risky based on legal and emotional considerations. Moreover, in interviews participants held multiple parentage concepts, also termed “trajectories of processing” (Carsten, 2007), in addition to varieties of legal parentage, where markers of parentage, such as genetics, biology or sociality may be used to accept or reject parentage.

Lastly, I present accounts by gay fathers who decided to use third party reproduction arrangements to have their children. Gay headed families must navigate the various considerations arising (at times) from their gender and sexual orientation. In the two cases of gay surrogacy a myriad of different issues came to fore. Most interesting was the distinct kind of collaboration possible between the gay father and the surrogate in addition to the egg donor. Gay surrogacy also involves various dimensions of inclusion and exclusion. In general, these arrangements are inclusive in that they allow gay men to become parents, but they remain exclusive and financially prohibitive.

Finally, this study emphasizes the value of anthropological contributions to social debates on family, parenting and reproduction at “home.” This research is often complicated by the need for an insider status. Nevertheless, anthropology has a duty to contribute to social understandings of kinship inclusion and exclusion in contemporary society and to examine the influence of current meanings of family in reproductive technology practices.

Appendix 1: Selected Excerpt from the *Assisted Human Reproduction Act* (2004)

PRINCIPLES

2. The Parliament of Canada recognizes and declares that

(a) the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;

(b) the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;

(c) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies;

(d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;

(e) persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;

(f) trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition; and

(g) human individuality and diversity, and the integrity of the human genome, must be preserved and protected.

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