

LEGAL GUIDE FOR LGBT PARENTS & FUTURE PARENTS

LGBT Family Coalition



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1

GENERAL RULES

ABOUT FILIATION FOR SAME-SEX COUPLES

What is filiation?

Filiation is the legal link between a child and a child's parents. It establishes rights and responsibilities for both the child and the parent(s). For instance, a legally recognized parent may make decisions about the child's upbringing, may travel with the child, make medical decisions for the child and be legally recognized as the child's parent in schools and other institutions. With a filial link, the child will automatically, in the absence of a will, inherit from the parent and be able to use the family name.

How many filiations can a child have?

A child can have two bonds of filiation in Quebec: one for each parent, regardless of the parents' gender. The *Civil Code of Québec* does not currently legally recognize more than two parents for any given family.

As an example, two women in a relationship may ask a man to help them get pregnant through artificial insemination and to raise the child together. Regardless of their intentions, however, only two of the three people involved in conceiving and raising the child could legally be the child's parents.

Another example of families with more than two social parents is blended families that result from divorce or separation and the formation of a subsequent union. Stepparents in blended families, regardless of their sexual orientation, may assume the role of parents, but are not legally recognized as such.

How is the legal link (filiation) between parents and a child established in Quebec?

There are several ways to establish filiation:

A- BIRTH CERTIFICATE

When a child is born in Quebec, his/her parents are listed on the **act of birth** and recorded on the **birth certificate**. This serves as the primary method of establishing filiation for both opposite-sex parents and same-sex parents. A birth certificate is sufficient to establish the legal bond between parent and child.

B- POSSESSION OF STATUS

If there is no birth certificate to prove filiation, **uninterrupted possession of status** may also serve as proof of filiation. Such proof exists when it can be established that a person has believed himself/herself to be a parent of the child since birth, and has always acted as the parent. This status must be continuous and may be proven by demonstrating a series of facts, observable to others, showing the relationship between the child and the parent in question.

If uninterrupted possession of status matches the act of birth, the child's filiation generally cannot be contested.

C- PRESUMPTION OF PARENTHOOD

When a child is born to a couple in a marriage or civil union, the spouse of the person who has given birth to the child—be it a man or a woman—is presumed to be the child's other parent. This means, for example, that when a child is born to a married couple, even if the partner of the birth mother does not claim his or her filiation, the fact of their marriage creates a presumed tie of filiation to the child.

The presumption of parenthood does not, however, apply to *de facto* or common-law spouses.

D- ADOPTION

Adoption replaces a child's original filiation with a new set of legal ties between the child and their adoptive parents. This new filiation creates the same rights and obligations as filiation by blood and filiation by assisted procreation.

What happened in 2002 when the Civil Code was reformed? Why was this so important for families with gay and lesbian parents?

The National Assembly of Québec passed an act in 2002, which set new rules for establishing the filiation of children conceived through assisted procreation. These rules ensure that children of same-sex parents have the same rights and protections as children with opposite-sex parents and that all parents are granted the same rights and responsibilities. The law also allows same-sex couples to jointly adopt children born or residing in Québec.

What is a parental project?

A 'parental project' exists once a single person, a same-sex couple, or an opposite-sex couple decides to use genetic material (sperm or eggs) from another person, who will act only as a donor, in order to have a child. The legal parent or parents of a child conceived through a parental project are the people who formed the parental project, not the sperm or egg donor. As such, they have the rights and responsibilities of parents toward the child.

The concept of the 'parental project' created, in 2002, a legal regime in Québec through which, for example, lesbian couples could conceive a child with donor sperm and be recognized legally as their child's mothers, without requiring that the birth mother's partner adopt the child.

Can a child's filiation be changed?

Once filiation is established, it can be contested and perhaps changed only in exceptional circumstances. (Adoption, by which a new filiation replaces the prior one, is a different case.)

Here is an exception to prove the rule: if two women wish to have a child together, and one woman becomes pregnant as a result of sexual intercourse with a man, the biological father can claim filiation up to one year after the child is born, and his paternity would replace the biological mother's spouse's filial link with the child. In other circumstances, if the filiation of the birth mother and her partner is established, a donor will not be able to threaten it (see section B).

Legally speaking, are there any differences between a biological and a non-biological parent?

No. The filiation of children born of assisted procreation is established on their act of birth, and as long as filiation has been established, all parents have the same rights and responsibilities.

Why don't we have to do co-parent adoptions here like they do elsewhere in Canada?

The laws of filiation in other Canadian provinces differ from those in Québec. In Québec, both parents' names are included on a child's birth certificate when the child is born, whether they are same-sex or opposite-sex parents. In other jurisdictions, the non-biological parent has to adopt the child in order to gain legal status as a parent. In Québec, the reforms of 2002 have meant that same-sex parents do not need to adopt their own children.

What if I was previously married to a man/woman?

Can my partner become legally recognized as the parent? In Quebec a child can have only two legal parents. If two parents are recognized on the child's birth certificate, it cannot be amended or changed later to replace one of the parents, except by adoption by special consent. In order to establish a new filial link, an existing filial link must be removed, which is typically very difficult to do. However, if only one parent is listed on the child's birth certificate, that parent's partner can legally adopt the child through adoption by special consent.

I'm transsexual and conceived my children before I transitioned. Can my children's birth certificates reflect this change?

In the case of children born without assisted procreation, whose bond is one of 'filiation by blood,' the legal status of 'mother' flows from the fact of having given birth to the child and the legal status of 'father' flow from the presumption that the child was conceived from that man's sperm. Under current Quebec law, these statuses cannot be changed to reflect the fact that a child's 'mother' is now a man or that the 'father' is now a woman. Though this has been contested in Quebec courts, it has proven unsuccessful so far. In 2004 a decision from the Quebec Superior Court denied the petition of a trans man to amend his children's birth certificates so as to changed his parental status from 'mother' to 'father' (see Case 1). The judgment does not however address what would happen if a transsexual person froze sperm or eggs for use in *future* assisted procreation with a partner *following* a transition.

* CASE STUDY #1

Trans Parents and their Children's Birth Certificates

FACTS

Before becoming a man, N.M. had given birth to two children. After the sex reassignment, the Registrar of Civil Status of Quebec accepted the change of sex and the change of name for N.M.'s records. However, the name was not changed on the birth records of the children, and N.M. was still recorded as the mother of his children. N.M., now going by the name J.M., requested that his children's birth certificates be modified to reflect this change as this was resulting in consequences for his children, most notably an anxiety associated with the revealing of their parent's sex change. More precisely, he requested that the name J.M. be indicated in the records as father and to strike N.M. as being listed as mother.

QUESTION

Can birth certificates be modified for children whose parents undergo sex reassignment?

JUDGMENT

Although the Registrar of Civil Status issued a certificate indicating the sex reassignment, this does not affect the biological aspect of the maternity of N.M./J.M. In other words, even after sex reassignment N.M. will forever remain the biological mother of his children. The judge explained that the sex reassignment only affects the children's birth certificates in order to avoid ambiguities relating to marriage or filiation. The judge held that, although the children may be subject to inconveniences due to this ruling, a sex reassignment does not have a retroactive effect: their filiation to their biological mother was created before the sex reassignment. Therefore, the judge rejected the request for modification to the children's birth certificates.

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USE OF FERTILITY CLINICS

(For more detailed information on the medical and social aspects of using fertility clinics please see our **'Guide for Lesbian and Bisexual Future Mothers'**)

What are the laws around fertility clinics?

A 2004 federal law addressed many issues, from genetic research, to fertility clinics, to sperm and egg donation, to stem cell research. All assisted reproduction was regulated by the federal government until 2010, when the Supreme Court of Canada, in a challenge launched by Quebec, declared large portions of the Act to be invalid as outside the Parliament of Canada's powers.

Following this judgment, provinces became responsible for issuing licenses for assisted reproduction facilities and regulating the collection and disclosure of donors' health information and identities. In Quebec, Bill 26, *An act respecting clinical and research activities relating to assisted procreation* (2009), addresses these issues.

The section of the *Civil Code of Québec* dealing with 'Filiation of Children Born of Assisted Procreation' (added in 2002; see section A) sets out the general laws about assisted procreation and how parentage is determined in those circumstances.

The Processing and Distribution of Semen for Assisted Conception Regulations (1996) set out stringent health and safety requirements for processing and distributing third-party donor semen used or intended for use in assisted conception. These requirements defined procedures for donor screening (including testing), labeling, quarantine and record-keeping for third-party donor semen prior to use in assisted conception.

Can insemination be done at home with sperm bought from a sperm bank?

No. Quebec law prevents assisted procreation activities from being performed outside of licensed centers.

Is there access to fertility clinics for same-sex couples?

Yes. The *Assisted Human Reproduction Act* prevents discrimination on the basis of sexual orientation or marital status.

Will I be discriminated against because I am single?

By Quebec law, you cannot be discriminated against on the grounds of your marital status. The *Assisted Human Reproduction Act* establishes that persons seeking to undergo assisted reproduction procedures must not be discriminated against on the basis of sexual orientation or marital status.

Are sperm donors paid?

In Canada, it is a criminal offense to pay donors for genetic material. However, it is not illegal to reimburse sperm or egg donors for receipt-able expenses. "Receipt-able expenses" has yet to be clearly defined, but in theory, these would be items like gas mileage used in transport to and from the clinic, vitamin supplements, and additional medical expenses. The purpose of reimbursing donors for receipt-able expenses is to ensure that performing an essentially altruistic act doesn't financially disadvantage donors.

Will there be a sperm shortage?

According to an article in *The National Post* (February 28, 2011), there is currently a sperm shortage in Canada. The article posits that as long as men are not compensated for donating sperm, as they are in countries such as the United States, there will continue to be a sperm shortage for use in assisted procreation. The article cites a study by Assisted Human Reproduction Canada that estimates there are 60 altruistic sperm donors for every 5,500 patients. However, U.S. sperm banks are frequently used internationally, so for practical purposes there is not a sperm shortage.

Why are donors anonymous in Canada?

Anonymity is justified by the desire to protect the donor's privacy. Anonymous sperm donation is also often said to simplify the legal status of the child relative to

his or her parents. In fact, whether a sperm donor is anonymous or open-identity (see below), he has no responsibility for and no bond of filiation with the child born as a result of assisted procreation, and cannot later claim paternity. The anonymity of sperm donation is subject to change from province to province. In May 2011, a decision by the British Columbia Supreme Court effectively banned anonymous sperm donation in that province, by ruling that children of anonymous sperm and egg donors have the same rights as adopted children to identify their biological parents. The BC Court of Appeal, however, overturned that decision. Government lawyers argued that nowadays a woman seeking donor insemination can obtain detailed social and medical information on the donor, even if the donation is anonymous. The Supreme Court of Canada refused to hear the case (see Case 2).

In Quebec, donor anonymity is presumed, and a donor in the province must give express consent if he wishes to make his identity known.

* CASE STUDY #2

Donor Anonymity

FACTS

Olivia Pratten was conceived in 1981 in British Columbia using sperm from an anonymous donor of whom she knows almost nothing. She has long felt that part of her identity is missing, and she is worried that her health and the health of her future children could be compromised by the lack of information. Pratten sought information from Dr. Gerald Korn, the Vancouver doctor who performed the insemination. Dr. Korn no longer had records relating to Pratten's donor as he was not obligated to keep records for a patient for more than six years from the last entry recorded, and documents had thus been destroyed. Pratten claims the government of BC permitted the destruction, thereby depriving her of basic information necessary for her physical and psychological health. Pratten also asserts that the situation is profoundly unfair, discriminatory and contrary to her rights, as there is discrepancy between donor offspring and adoptees: adoptees have the possibility of knowing their biological origins.

QUESTION

Should the children of sperm or egg donors have the same rights as adopted children to access their donor's identity?

JUDGMENT

The Province has recognized, through cases of adoption, that questions about biological origins and feelings of loss and incompleteness are legitimate. The Province has addressed those concerns by enacting laws whereby information is gathered and preserved, allowing adoptees the opportunity and right to access that information. Therefore, the BC Supreme Court permanently prohibited the destruction, disposal, redaction or transfer out of BC of Gamete Donor Records in British Columbia. However, the BC Court of Appeal held that there is no constitutional right to know the identity of one's parents, and Pratten's case was rejected. The Supreme Court of Canada declined to allow further proceedings.

What if I want my child to be able to contact the donor?

If you want your child to have access to the donor of genetic material, you can select a sperm bank donor who has explicitly consented to make his identity available. These donors are known as ‘identity-release donors,’ or ‘open-ID donors.’ At the time of donation they agree that when the child turns 18, he or she can access the donor’s identity and contact information through the clinic. The donor is, however, able to change his mind about whether his identity is to be released to the child. Identity-release donors are only available from sperm banks outside of Canada, and you will need to pay out of pocket for sperm from an identity-release donor.

Alternatively, selecting a known donor (as opposed to an identity-release donor) will allow you and your child to know the donor’s identity from the outset. A known donor is anyone personally known to you who agrees to give you genetic material in order for you to have a biological child. Using the genetic material of a known donor means you will probably have to perform at-home inseminations with fresh sperm.

Do clinics in Quebec perform inseminations involving known donors? What if I can’t do inseminations at-home?

Sometimes recipients desire to use a donor with whom they have a personal connection. There are many reasons why one would consider using a ‘designated’ or ‘known’ donor:

- + To continue the genetic lineage of a partner by choosing a member of the partner’s family
- + Using a donor of a certain ethnicity which is otherwise unavailable through anonymous/open-ID donor selection
- + To provide children the opportunity to have a relationship with the donor.
- + To have information about the donor in addition to what is available through the donor’s profile.

* CASE STUDY #3

Known Donors and Fertility Clinics

FACTS

This case concerned a lesbian living with her partner in a long-term relationship. The couple already had a child, conceived with the sperm of a known donor. As they wanted a second child biologically related to their first, they asked the same donor to help them out. Because the lesbian was now older and less fertile she needed the help of a fertility clinic and was therefore subject to the regulations around assisted conception. The regulations require donors who are over 40 and/or who have had sex with another man to submit to a procedural screening. As the donor in this case was both homosexual and over the age of 40, he was required to undergo this screening. In addition to these tests the lesbian was required to request special access authorization from Health Canada in order to use the donor’s sperm.

QUESTION

This regime does not apply to heterosexual women who use semen from a spouse or sexual partner. Are the regulations discriminatory because the government could potentially restrict a lesbian’s right to choose who would father her child?

JUDGMENT

The court determined that sperm screening was necessary for insemination by all known sperm donors, regardless of whether the recipient is a lesbian or heterosexual woman. A woman’s husband or sexual partner, however, would not need to be screened on the simple rationale that there is little point in imposing this because she has already been exposed to any risk that exists through normal sexual relations. Finally, the court determined that the age and sexual orientation restrictions applied to donors are not discriminatory because they are based on legitimate health

For those who cannot, for a variety of reasons, do inseminations at home with their designated donor, there is only one clinic in Canada that operates a designated donor program. It is Repromed in Toronto. The clinic provides services to patients and physicians across the country for use in their reproductive treatments.

If the donor is not a woman's spouse or sexual partner, ministerial directives exclude a variety of people from donating semen, most notably men over 40, and any men who have had sex with men – even once – after 1977. Repromed, however, allows recipients the opportunity to apply to Health Canada under the Donor Semen Special Access Program (DSSAP) for use of semen that would otherwise be prohibited under the Semen Regulations.

The *Processing and Distribution of Semen for Assisted Conception Regulations* (1996) establish that all semen used for assisted procreation must be processed and quarantined for a minimum of six months. These regulations apply even in the case of designated donations. These regulations were upheld by the Ontario Court of Appeal in 2007 (see Case 3).

In Quebec's fertility clinics, donor anonymity is absolute. Therefore, if you want to use a known donor and must use a fertility clinic to become pregnant, you should contact Repromed in Ontario.

Can a donor be legally recognized as a parent?

In Quebec, a donor cannot claim recognition as a parent unless the child was conceived through sexual intercourse. Even then, the donor can only bring the claim within the first year following the child's birth or from becoming aware of the child's birth. Using artificial insemination rather than resorting to sexual intercourse in order to become pregnant can prevent this from happening.

Are the medical expenses of using a fertility clinic covered by Medicare?

Since 2010, expenses are covered for six cycles of inter-uterine inseminations and three cycles of *in vitro* fertilization, as well as for ovarian stimulation when performed by a physician in a regulated clinic. There were six clinics in Quebec (in Montreal and in Quebec City) that were covered at the time of the original agreement. Since then a number of eligible clinics have been added.

Sperm samples from identity-release donors may be used in Quebec, but because donors must be anonymous, only sperm from anonymous donors is covered by the Quebec plan. For open-ID donors you must pay out of pocket.

Can I get a tax credit on my income taxes?

You can claim a refundable tax credit for expenses related to artificial insemination or *in vitro* fertilization that are not already covered. The tax credit is equal to up to 50% of all eligible expenses that you or your spouse paid for such treatment. The maximum tax credit is \$10,000 per year.

3

AT-HOME INSEMINATION

(For more detailed information on the medical and social aspects of at-home inseminations please see our *'Guide for Lesbian and Bisexual Future Mothers'*)

How does the Civil Code of Québec address at-home inseminations with known donor sperm?

Quebec law states that a known sperm donor who provides genetic material for at-home insemination does not automatically become the child's parent. A child's filiation is established with a birth certificate. When both parents are women, they can both be

listed on the birth certificate as the legal mothers. The woman who did not give birth to the child will assume the same legal responsibilities as a father would, insofar as they differ from the mother's (for instance, she could take paternity leave).

Should we make a contract with the donor?

Yes, contracts for insemination arrangements with a known donor protect your legal interests as parents of the child (see sample contract at the end of this document, Appendix 2).

What should the contract say?

A contract for a parental project using insemination with a known donor should make explicit that there was no sexual relationship between the donor and the child's biological mother, that the donor knows that he is not part of the parental project, and that the donor will claim neither rights nor responsibilities towards the child. Does the contract need to be notarized or reviewed by a lawyer? Such a contract does not need to be notarized. It can be made at home and simply signed in the presence of a witness.

* CASE STUDY #4

At-Home Inseminations and the Law

FACTS

A lesbian couple had made a contract with a sperm donor stating that if a child was born, the donor would willingly give all responsibility for raising the child to the couple, and the couple accepted that responsibility. The two women had an oral agreement with sperm donor to allow him to visit his child, but over time the couple's relationship with the donor deteriorated.

The child was born in 2000. After the introduction of the *Act instituting civil unions and establishing new rules of filiation* by the Quebec government in 2002, the biological mother's partner had

her name put on the birth certificate. As a result, the child had two legally recognized mothers. The donor, however, wanted to be declared father and to have his name on the child's birth certificate. He took the couple to court seeking custody of his biological child.

QUESTION

Can a sperm donor claim a filial link with the offspring of his donation and have the filiation changed in his favour?

JUDGMENT

Even though the conception occurred before the 2002 law, the donor was aware he was simply a donor, and so he may not claim a filial link with the resulting child. A simple genetic link is not sufficient enough to create a filial link between donor and child.

Can a donor sue for custody despite the existence of a contract?

Generally, a sperm donor can only sue for parental status and, with it, custody if insemination occurred through sexual intercourse with the birth mother. Where a valid contract makes clear that there was no sexual relationship, a donor cannot contest the child's filiation.

The rules on filiation make a lesbian couple's parental status secure. That being said, disputes around the exercise of parental authority are decided by a court in the best interests of the child. Once a relationship with the child has developed, mothers might not be able to exclude a known donor from the child's life.

Has a known donor's status ever been tested in the courts of Quebec?

Yes. The Quebec Court of Appeal agreed with the Superior Court's ruling in favour of a lesbian couple who had children by a known sperm donor via at-home insemination (see Case 4).

Can I have a sexual relationship with my donor, just for the purpose of conceiving?

If you have sex and become pregnant, even if only for the purposes of conceiving, the father of the child can establish filiation before one year has elapsed after the child's birth. Furthermore, the spouse or partner of the child's mother has no legal recourse to prevent the father from establishing filiation in these circumstances, even if her name is included on the child's birth certificate.

If I have sex with a man, become pregnant and do not tell him, can he come back years later and claim parental status even if he was never involved in my child's life?

If a man found out he was the biological parent of your child, he could claim paternity and contest the filiation of your partner or spouse. The Civil Code states that a man who suspects he is the father of your child has up to 30 years after the child's contested filiation was established to bring a claim of paternity. In other words, for a man to be only a donor for your parental project, he must consent to playing that role.

4

ADOPTION

(For more detailed information on the adoption in Québec please see 'Adoption and Fostering of Children in Quebec: A Guide for Gays and Lesbians')

Can gays and lesbians form foster or adoptive families?

Yes, gays and lesbians have the same parental and couple rights as heterosexuals in Quebec. While overcoming prejudicial attitudes from individuals within Québec's foster care system may still present challenges, the province's Youth Protection Agencies are legally required to treat applications for foster care or adoption from gay and lesbian couples no differently from those of heterosexual couples. Since 2002, most of Quebec's Youth Protection Agencies have greatly evolved in terms of their attitudes toward potential foster and adoptive parents from the LGBT community.

What are the different types of adoption and which agencies manage them?

In Quebec, there are four methods of adoption: regular adoption, adoption by special consent, 'mixed bank' adoption, and international adoption. Adoption is overseen by Quebec's Youth Protection Agencies.

Regular adoptions are ones in which the birth parents give up their rights to the child, usually when the child is born or while the child is still an infant. These types of adoptions are extremely rare in Quebec and the wait can be seven to eight years.

An adoption can be by 'special consent' if a family member is adopted or a spouse adopts a partner's child.

Mixed bank adoptions are ‘Foster with a View to Adopt’ placements, where the children are not up for adoption at the time of placement, but may become eligible for adoption in the future. Children are usually placed in this program when the biological parents are not ready or willing to give up parental authority despite their incapacity to care for the child. Eventually, a judge may declare the child to be eligible for adoption, eliminating the need for the parental consent.

Most gay and lesbian couples who adopt children in Quebec do so through the mixed bank program. Each year, a few hundred children are adopted through this program.

In Quebec, international adoption is the most popular choice amongst heterosexuals. The Secrétariat de l’adoption internationale oversees international adoption in Quebec. It establishes relationships with adoption agencies in different countries around the world. Adoptive parents from Quebec who wish to adopt internationally have to go through the Secrétariat.

INTERNATIONAL ADOPTION

Can gays and lesbians adopt internationally?

Adoption agencies in different countries have different requirements in terms of the criteria for who can or cannot adopt a child. For example, in 2012, China restricted adoption to heterosexual couples who have been married for at least two years. International adoption regulations vary greatly by country and are often subject to change.

Access to international adoption is provincially regulated. For the most current information about which countries can facilitate international adoptions for couples or individuals in Quebec, you may refer to the Secrétariat à l’adoption internationale, the official agency concerned exclusively with international adoption.

Currently there are very few countries that allow gays and lesbians to adopt their children. One of the only possibilities is the United States. Ontario allows adoption from certain American agencies, but in Québec it has not been possible since 2009 for anyone, straight or gay, to adopt American children.

Why can’t social workers here in Quebec lie for me, if our laws support gay- and lesbian-headed families?

Social workers are professionals who have ethical responsibilities to disclose truthful and relevant information to the adoption agencies. Lying could put them at risk of legal liability and compromise their professional status.

Can I hide my sexual orientation when I try to adopt?

A number of countries allow adoption by single people or married heterosexuals, but not homosexual couples. Same-sex couples who are married, have common property, file joint income tax returns, have other children together, and so forth, might have too many legal ties to easily present themselves as ‘single heterosexual’ people. For this reason, many gays and lesbians turn to the adoption of children born or residing in Quebec.

If I adopt internationally, after the adoption is finalized, can my partner adopt the child?

According to the *Civil Code of Québec*, the spouse of a partner can adopt the other partner’s child, if the child has no other parent. Because adoption ‘confers on the adopted person a filiation which replaces his or her original filiation’ and ‘creates the same rights and obligations as filiation by blood,’ there is no legal reason why, once adoption at the international level has gone through, the adoptive parent’s spouse could not adopt the child.

REGULAR ADOPTION

Does it take seven to eight years to adopt a child in Quebec?

The seven-to-eight-year wait period is true only for those on the list for regular adoptions where the original parents give immediate consent for adoption. You can spend seven to eight years on a waitlist before a baby whose parents want to place the child for adoption immediately is born, because the demand for adopting infants is very high. The average waiting time to adopt a mixed-bank child, however, is 30 months. If you are willing to adopt an older child or toddler, the delays are shorter, because there are more older children than infants available for adoption in Quebec.

MIXED-BANK ADOPTION

What is the mixed bank program?

The Mixed Bank was established for children at high risk of abandonment, and/or whose parents are unable to provide for their needs and education. Mixed Bank children are first placed in foster care, and adoption by the foster parents may become possible after a certain period in a successful foster arrangement. Until a Mixed Bank child is adopted, he or she is legally under the care of the director of youth protection, who regularly checks in with the child's foster family to insure that the placement is going well. During the placement, the child's biological parents must be proven unfit to parent in order for the fostering arrangement to become a permanent placement or adoption. Many foster parents successfully adopt their Mixed Bank children every year.

What is a permanent life plan?

A permanent life plan is a plan for the long-term living situation of a foster child. The terms and timeline of a permanent life plan are determined by a court. A

permanent life plan can provide for the child to rejoin his or her biological family, or for adoption, guardianship, or placement until majority.

Was there a recent law that shortened the time before a child is given a permanent life plan? What was the impact of this law?

Yes, the *Youth Protection Act* (2007). The main objective of this law was to ensure continuity and stability for children placed in foster homes. Specific time frames are provided in the law for permanent placement of children according to their age. A court will determine a foster child's permanent life plan (guardianship, adoption, or placement until majority) after 12 months for children younger than 2, after 18 months for children between 2 and 5, and after 24 months for children 6 and older. The court can also decide to prolong the time before a permanent life plan is determined for the child in exceptional cases: if the child will likely return to his original family situation in the foreseeable future, if the best interests of the child seem to require an extension, or if there are serious complicating factors, such as foster situations where the needs of the child have not been met. Paradoxically, couples have reported that shortened time frames for permanent placement and adoption of children have occasionally resulted in judges' hesitating to finalize adoptions.

What is placement until majority? Will the child really be mine?

Placement until majority is a foster care arrangement in which a foster parent(s) agrees to provide parental care for a child until that child reaches the age of majority (18). Placement until majority is different from formal adoption. Foster parents with children in placement until majority arrangements have parental obligations towards the foster child, but they are not legally the child's parents. Families in Quebec with a placement until majority arrangement receive a stipend from their regional Youth Centre to defray the costs associated with fostering a child. With a placement until majority, Quebec's youth protection services will be ultimately responsible for the child's wellbeing, and will regularly check up with the foster family and the foster child, until the child turns 18.

If it's a long-term placement, can my child take my family name?

Will we always have Youth Protection in our lives? Foster parents do not have any legal authority over the children in their care. They agree to provide for the foster child's needs while he or she is in their care. Because of this, foster children do not take the family name of their foster parents. Only adoption creates legal rights for non-biological parents of a foster child, and the child may then take the family name.

Adoption through foster care is possible. If foster parents decide they would like to adopt their foster child when/if he or she is eligible, they must be reevaluated through the adoption program to make sure they are fit to adopt the child. This evaluation process is different from that required to become a foster parent. Many children are adopted this way in Quebec every year.

EVALUATION

Will I be able to fully adopt a child born in Quebec, regardless of my sexual orientation?

Yes. Gays and lesbians in Quebec now have the same parental and couple rights as heterosexuals.

I heard that the Civil Code requires that all parents who wish to adopt undergo a psychosocial evaluation. Can we be evaluated as a couple?

Yes. The *Civil Code* requires all parents wishing to adopt to undergo a psychosocial evaluation. The evaluation of the "conjugal relations" is included in the criteria, which are stated in the *Youth Protection Act*.

A psychologist or social worker will make a specific recommendation with respect to the potential parents' suitability to adopt. During the evaluation, the psychologist or social worker will assess the couple's motivation for adopting, their socioeconomic

status, the personal history of each partner, the nature of the partnership (e.g., *de facto* spouses, married, in a civil union), and the relationship between the parents and any existing children in their care.

If I am single, will I be able to adopt a child born in Quebec?

There is no law in Québec preventing a single parent from applying for adoption. Any adult who is single, married, in a civil union or a *de facto* relationship may apply for adoption. The most important factor is that the adoption be in the interest of the child. No matter what your status is, you must do a home study (psychological evaluation). A licensed worker will discuss your financial situation, couple status if applicable, views on parenting and how the child will fit into the family.

Will I be discriminated against because I am single?

Under Quebec law, you cannot be discriminated against on the grounds of your marital status. Adoption is available to people married or single, although, as already mentioned, some countries restrict international adoptions on the grounds of sexual orientation or marital status.

FILIATION AND THE BIRTH CERTIFICATE

What will my child's birth certificate look like if he or she is adopted?

Adoption replaces a child's biological filiation. If you are a single parent adopting, your child's birth certificate will list your name as the child's sole parent. If you and your partner adopt, you will both be listed on the birth certificate as the child's parents.

The government has several times considered legal changes that might recognize the original parents on the birth certificate of an adopted child.

If I meet someone later on, can they become the legal parent of my child?

If you have legally adopted the child alone, yes. Adoption severs previous ties of filiation. Therefore, if a single parent adopts a child, a second person may adopt the child. In Quebec, the child must be consulted if he is 10 years or older, and must give consent if he is 14 years or older.

What will my child's birth certificate look like if he or she is placed with me until the age of majority?

Placement until majority doesn't change a foster child's filiation. The foster child's birth certificate will not change to show your and your partner's names if he/she is placed with you until majority. Only adoption erases a child's previous filiation and replaces it with a filial link to the adoptive parent(s).

5

MULTI-PARENT FAMILIES

If we start our family with a known donor and want him to be legally recognized, can he be?

In Quebec, only two people can be legally recognized as parents. If a lesbian couple inseminates through a fertility clinic, the donor is unknown. If a lesbian couple wants to use the sperm of a man they know personally, the insemination has to take place at home and the donor will not be legally recognized as a parent. However, if insemination takes place through sexual intercourse, the donor can claim paternity within one year of the child's birth or of learning of it. If he does so, the non-biological mother will lose her ties of filiation. The 'third parent,' even though not legally recognized as a parent under provincial law, can contractually (through a notary) be allowed to make certain decisions for the child, usually for a finite period.

* CASE STUDY #5

Multi-Parent Families

FACTS

Two women who had been in a stable relationship for nearly a decade decided to start a family with the help of their friend who donated his sperm. When the child was born the biological parents were legally recognized as the child's parents. The two women were the primary caregivers of the child, but believed it would be in the child's best interests that the father remained involved in his life. Two years after the child's birth, the non-biological mother applied to be recognized as the boy's legal mother.

ISSUES

Is it possible for a third person (non-biological parent) to be legally recognized as a child's parent, without depriving the biological parents of their legal status as parents?

JUDGMENT

The judge found that it was contrary to the boy's best interest to be deprived of the legal recognition of one of his mothers, and replacing the father's parental status with that of the non-biological mother would be equally contrary to his interests. The judge found this was not deliberate discrimination by the government but rather that legislators hadn't foreseen this possibility. The Court of Appeal therefore issued a declaration legally recognizing the third parent.

But aren't there cases where a known donor and a lesbian couple are all legally recognized as parents?

Yes, the Ontario Court of Appeal gave an order recognizing the same-sex partner of a birth mother. In this case, three people were raising the child: two mothers and a father, the donor. The court ruled it was in the child's best interest to legally recognize all three individuals (see Case 5). However, this decision is not directly pertinent to Quebec and only applies to this specific case.

In addition, recent legislation in British Columbia provides, in cases of assisted reproduction, for conferring parental status on the intending parent or parents *and* their donor if all so agreed in writing prior to the child's conception.

What if my sperm donor changes his mind and wants to be recognized as a parent?

When lesbian mothers use assisted procreation, both their names are written on the birth certificate and the law does not distinguish between the biological parent and the non-biological parent. A man who donates sperm for a parental project cannot claim paternity, nor will the child be able to establish filiation with the donor.

What if my sperm or egg donor doesn't even want to visit?

Shouldn't my child have the right to see him or her? The nature of a donor-recipient relationship is that the donor has no parental rights and, in turn, no legal obligations. A donor cannot be forced to be a part of the child's life. Because there is no link of filiation, the child has no right to see the donor.

6

SURROGACY

Is surrogacy illegal in Quebec?

Though surrogacy itself is not technically illegal in Quebec, surrogacy contracts will not be legally recognized or enforced. In fact, the *Civil Code of Québec* establishes that 'any agreement where a woman agrees to procreate or carry a child for another person is absolutely null.'

Then what is illegal?

The *Assisted Human Reproduction Act* (2004) is the federal law that addresses surrogacy. The *AHRA* makes it illegal to pay a woman to be a surrogate mother, accept payment to be a surrogate mother, or pay intermediaries to arrange for surrogacy. It is also illegal to offer or advertise payment for any of these things. It is illegal to counsel or aid someone to become a surrogate mother if they are younger than 21. Surrogacy is legal in Canada as long as neither the mother nor intermediaries are paid. These federal laws apply to all of Canada.

The *AHRA* does not impact the validity of any surrogacy agreement under provincial law. This means that even though unpaid surrogacy is legal in Canada, provinces are free to pass their own laws about whether or not they will legally recognize and enforce surrogacy contracts. Some provinces recognize surrogacy agreements as valid so long as they do not contravene the *Assisted Human Reproduction Act*. Currently, Quebec does not recognize or enforce surrogacy contracts.

Can I make a contract with my surrogate?

Yes, but in Quebec no court will enforce it.

After the baby is born, can my partner be legally recognized as well?

Yes, in theory. If the child's birth certificate lists only one parent, it is possible for the parent's spouse to adopt the child. For example, if the legal parent is the child's biological father, he could give special consent for his spouse to adopt the child.

What if the surrogate doesn't want to give up the baby?

Even if you made a contract with the surrogate, no court in Quebec will regard it to be binding. If either you or your spouse is the genetic parent of the child, a legal challenge involving custody would have to be mounted.

Wasn't there a case in Quebec with a heterosexual couple where the wife of the biological father who used a surrogate failed to get legal recognition?

Yes, in 2009. As a result, the child has only one legally recognized parent. Even though the legal recognition of the husband's spouse would have been in the child's best interest, the court found the child's best interest to be less important than the fact that the couple had founded their family through a process that was seen to be 'against public order' (see Case 6).

Accordingly, it is not guaranteed that adoption can be used to regularize the status of parents for a child carried for them by a surrogate.

Then why do I hear of gay male couples that were recognized by the courts?

Because surrogacy is not legally recognized in Quebec, individual cases are up to the discretion of particular judges. Some same-sex couples have succeeded in having the non-biological father legally recognized, whereas others have had difficulty.

* CASE STUDY #6

Surrogacy and the Legal Recognition of the Second Parent

FACTS

A heterosexual couple with fertility issues recruited and paid a surrogate mother in order to conceive via artificial insemination using the man's sperm. There was a verbal agreement made for the surrogate not to claim parental rights after the child's birth. The surrogate's information was deliberately not declared in the child's birth information and the child therefore had only one legal parent, her biological father. Though she is not the biological mother, the man's wife sought to adopt the child and be named as the mother on the birth certificate, becoming the second legal parent.

ISSUE

Can the spouse of the biological father adopt the child and in doing so be named as the second legal parent in the case of surrogacy?

JUDGMENT

To decide this case, the court could not overlook the steps taken by the couple in trying to become parents to the child in question. Though the adoption of the child by the biological father's spouse would be legal, the court held that their means to this end was illegal and contrary to public order. The court ruled that the child's best interest could not overrule the way she was conceived: the child does not have a right to a legally recognized mother at any and all costs. The court therefore denied adoption by the biological father's spouse on the grounds that allowing it would mean turning a blind eye to the law and allowing illegal actions for legal ends.

7

MARRIAGE, CIVIL UNIONS, *DE FACTO* SPOUSES AND CHILDREN

Can same-sex couples marry in Quebec?

Yes. The definition of marriage is a matter of federal jurisdiction and before 2005 there was no federal law recognizing same-sex marriage. However, in 2004, following similar rulings in Ontario and British Columbia, the Quebec Court of Appeal ruled that the legal definition of marriage as a union between ‘one man and one woman’ violated the *Canadian Charter of Rights and Freedoms*, and therefore changed it to a union ‘of two persons.’ Same-sex marriage thus became legal in Quebec at that time. By 2005, court decisions in eight of the 10 provinces had effectively legalized same-sex marriage.

In 2005, Parliament passed the *Civil Marriage Act*, which legalized same-sex marriage in all of Canada and defines civil marriage as the lawful union of two persons.

Who can perform a marriage?

The individual provinces make laws regarding the procedures for solemnization of marriage. In Quebec, clerks and deputy clerks of the Superior Court and notaries can perform marriages. Mayors, members of municipal or borough councils, and municipal officers designated by the Minister of Justice can also perform marriages for residents of their respective municipalities or boroughs.

If you would like someone you know personally to perform your marriage, that person can apply to be an officiant by submitting a Request for the Designation of an Officiant of a Marriage or Civil Union to the *Direction des services judiciaires* of the *Ministère de la Justice* at least 3 to 4 months before the date of the ceremony. The officiant application is available on the Justice Québec website or at courthouses.

What rights and obligations are married couples entitled to?

Married couples are entitled to spousal support, medical decision-making, workers’ compensation, pension benefits, and presumption of parental rights. Married couples are also entitled to property division when their relationship ends. When a couple divorces, the value of the family patrimony is divided equally between spouses. The family patrimony includes the family’s residences and the objects furnishing or decorating them, the family’s motor vehicles and any investments made in a retirement plan during the marriage.

All property outside the family patrimony falls under the matrimonial regime. This is a set of rules determining ownership and administration of property during the marriage and its distribution on breakdown. Unless spouses choose otherwise by marriage contract, they will be subject to the partnership of acquests. This regime leaves the spouses ownership and control of their respective property during the marriage. On breakdown, it divides the value of the partners’ increase in wealth during the marriage, except for property acquired by gift or inheritance.

What are civil unions? Why were civil unions created in Quebec?

In 2002, the National Assembly of Québec passed the *Act instituting civil unions and establishing new rules of filiation*. At the time, same-sex marriage was not legal in Canada and the Quebec government could not amend the definition of marriage, something within the powers of the Parliament of Canada. Civil unions created a way for same-sex partners to get the same legal recognition, rights and benefits as married opposite-sex couples.

The conditions for forming a civil union are mostly the same as those for entering into a marriage. Both same-sex and opposite-sex couples can enter civil unions. Civil unions give the same benefits, rights, and obligations to partners that marriages do.

Children of civilly united parents are not at a disadvantage to children of married parents.

The legalization of same-sex marriage in Quebec in 2004 and in all of Canada in 2005 made the civil union largely irrelevant. After this, civil unions have become infrequent. Still, same-sex and opposite-sex couples in Quebec can still get a civil union instead of a marriage if they wish.

What are the differences, currently, between civil unions and marriage?

Now that same-sex marriages are legal in Canada, the major difference between civil unions and marriages is how the respective partnerships can be dissolved. There must be a judgment of divorce to dissolve a marriage, but a civil union requires only that the separating partners make a joint declaration before a notary, so long as the interests of their children are not at stake. Divorce is regulated federally, while the dissolution of a civil union is a provincial role. The effects on children when a civil union ends are the same as when a couple divorces. The couple's rights and responsibilities towards their children and to each other still remain.

Another minor difference between a civil union and marriage is age. Both parties must be 18 in order to form a civil union, whereas marriage is permitted at 16 with consent of a parent or guardian.

What are de facto spouses?

De facto spouses live together without marrying or getting a civil union.

De facto spouses are not entitled to spousal support, inheritance, or division of property.

De facto spouses are generally not recognized in the *Civil Code of Québec*, but different statutes regarding employment assistance, legal aid, income tax, the Québec Pension Plan and workers' compensation do provide for *de facto* spouses. The best way for *de facto* spouses to protect their legal interests in the event of death or a break-up

is to create a cohabitation contract, signed before a notary or lawyer, and to have a clear and unambiguous will. A cohabitation contract should include provisions for property (listing each spouse's assets and their value, both large and small), sharing of responsibilities (details of each spouse's contribution to household expenses, and shared responsibility for debts), power of attorney (an authorization for one spouse to act on the behalf of the other spouse in the event of serious illness or accident), and gifts from one partner to the other (in which the amount and conditions of the gift are confirmed, such as a promise to pay one spouse \$15,000 upon retirement).

Do we need to get married if we are having a child?

No, you do not need to get married if you want to have children. However, while *de facto* spouses have the same rights and obligations towards their children as married and civilly united couples, they do not have the same obligations towards each other. Moreover, the rights and obligations of marriage can help to protect a partner who makes financial or career sacrifices to raise the children. Also, the rules around marriage breakdown can provide advantages to the children of married couples, for example, regulating the right to use of the family residence.

Additionally, as previously stated, the presumption of parenthood does not apply to couples not in marriages or civil unions. Thus, if an unmarried lesbian couple has a child the non-biological mother is *not* automatically presumed to be the child's other parent. Filiation must be established through the birth certificate. A written agreement of both partners to participate in the parental project may therefore be a good idea for unmarried couples to ensure that, even if the couple separates before the birth of the child, their intentions regarding co-parenting are clear.

If we're not married or civilly united and we break up, will my ex-partner have to pay child support?

Yes, your ex-partner will have to pay child support if he or she is legally a parent. Once filiation is established, parents have an ongoing obligation to support their child, which can take the form of time or money, according to the parent's ability.

If we're not married or civilly united and we break up, will my ex-partner have to pay spousal support?

No, an ex-partner can only apply for spousal support payments following a divorce or the dissolution of a civil union. *De facto* or common-law partners do not have any legal obligations to one another following a break-up.

A former *de facto* spouse challenged the current law before the Supreme Court of Canada, asking for spousal support and property division after separation from her partner. The case was commonly referred to as *Éric v. Lola*. If the court had decided in favour of the woman claimant, common-law spouses in Quebec would have had access to spousal support and property division after separation. Such an outcome would have especially benefited those *de facto* spouses, often women, who have assumed unpaid work such as primary childcare. Although extremely divided, the Supreme Court of Canada, came down in favour of *Éric*. The decision maintained the status quo, although implicitly inviting Quebec's legislators to amend the Civil Code so as to correct inequalities between married and *de facto* couples (See case 7).

Will my child's lifestyle change?

Your child's lifestyle will change following a break-up, divorce, or civil union dissolution insofar as living arrangements are concerned. Parents are obligated to financially support their children, regardless of their marital status. Child support payments are calculated based on the total income of both parents, the number of children, the custody time given to each parent, and certain additional costs associated with the child's specific needs. Parents can also draw up their own child support agreement, as long as the agreement is in the best interests of the child and receives court approval.

Since ex-partners not in a marriage or civil union are not entitled to spousal support, they might experience a decline in their standard of living that would in turn affect their visiting children.

*** CASE STUDY #7**

Legal Protection for *De facto* Spouses

FACTS

A wealthy businessman and a young woman met in 1992 in the woman's home country. As a couple, they travelled the world together several times a year. In 1995, the woman moved to the man's home province of Quebec. Though they soon broke up, the woman became pregnant with their first child; she later gave birth to two more children with the same man. The woman largely did not work outside of the home and often accompanied the businessman on his travels. He provided for all of her needs, as well as those of their children. However, he told her he did not believe in marriage, and so they never married. After living together for seven years and having three children, the couple separated.

QUESTION

After the separation, the woman did not receive the same protections and benefits as a divorced woman would in the same situation. Are the regulations discriminatory because the law does not afford the same protections to *de facto* spouses as it does for spouses who were married or in a civil union?

JUDGMENT

In Quebec, spouses in *de facto or common law* unions are not entitled to family law protections that are given to spouses in marriages, regardless of the length of the relationship, the number of children born into the union, or the level of economic interdependence. A majority of the court found a lack of protection for *de facto* spouses represents discrimination. However, the law creating this distinction was found to be valid, as a reasonable attempt at respecting the choice of couples who decide not to marry and therefore avoid the rights and obligations of support and sharing of property.

What if I had my child before we met? Can my partner adopt my child? Can being married make this easier?

If a child's birth certificate lists only one parent, the partner of the child's parent can adopt the child in an **adoption by special consent**. The child's existing legal parent gives their consent for the child to be adopted. The spouse then becomes the child's second parent. In order to be able to adopt your spouse's child, you must have lived with your spouse for at least three years, or you must be married or civilly united.

It is hypothetically possible to adopt your spouse's child from a previous partnership, although it is extremely difficult and rare because of the particularities of the rules of filiation. The child's parent from the previous partnership must consent to the adoption, unless he or she is unknown, has died, has abandoned the child, or has been deprived of his or her parental authority by a court. If the former partner consents to the adoption, the adoption will dissolve the filial link between the child and the former partner, replacing it with the new spouse. Most parents do not want to dissolve the filial link they have with their child following the end of a relationship with the child's other parent. In Quebec, a child can only have two legal parental links.

8

MATERNITY/ PARENTAL LEAVE

What are the rules for maternity/parental leave?

In Quebec, there are two different types of leave without pay: maternity/paternity leave, and parental leave.

Maternity and paternity leave are available to pregnant employees and their spouses. Parental leave is available to each parent of a newborn or newly adopted child.

Employers must be given three weeks' written notice of both maternity/paternity leave and parental leave, unless state of health or premature delivery requires that the employee leaves sooner.

At the end of the parental leave, the employer must reinstate the employee in his former position and give him the wages and the benefits to which he would have been entitled had he remained at work.

How many weeks do I get and how many does my partner get?

Maternity leave is available to pregnant employees for a maximum of 18 continuous weeks that can be spread before or after the date of delivery, as the employee wishes. Paternity leave is available to the spouses of pregnant employees, including the same-sex spouse of a woman who gives birth as part of a joint parental project, for a maximum of five consecutive weeks at the child's birth. Each parent of a newborn or

newly adopted child is entitled to 52 weeks of parental leave in addition to maternity and paternity leave. Parental leave cannot begin until the week of birth, or in cases of adoption, the week when the child is entrusted to the parents.

What benefits are we entitled to?

The Québec Parental Insurance Plan provides benefits for the entire duration of both maternity and paternity leave.

The Québec Parental Insurance Plan provides benefits for parental leave, but only for up to 32 weeks. These benefits may be taken by either partner or shared between them, either concurrently or in succession.

Can I get maternity/parental leave if I am self-employed?

Yes, self-employed individuals can generally receive maternity/parental leave and benefits, subject to similar conditions of eligibility applicable to wage earners.

What if our child was adopted rather than born into our couple? Does maternity/parental leave apply to us too?

Parental leave is applicable to the parents of adopted children. It begins the week when the child is entrusted to the parents.

What if we used a surrogate?

In the case of same-sex male couples using a surrogate, parental benefits are only granted to the biological father. However, if the non-biological father adopted the child, he would presumably be able to take parental leave and can share the parental benefits with the biological father.

9

WILLS, MANDATES, GUARDIANSHIP

Now that we are having a baby, do we need to get some papers in place?

The person who delivers your baby will complete an **attestation of birth**, which states the place, date and time of the birth, the sex of the child, and the name and domicile of the mother. You will receive a copy of the attestation of birth. The parents must then file a **declaration of birth** with the *Directeur de l'état civil* within 30 days of the child's birth, together with a copy of the attestation of birth. The declaration of birth needs to be completed in the presence of a witness, who also signs it. The declaration of birth states the child's name, sex, place, date and time of birth, and the name and domicile of each parent and of the witness. It also states the family relationship between the child and the person or persons making the declaration. If the parents are married or in a civil union, either parent can file the declaration of birth on behalf of the other spouse.

In cases of both filiations by blood and by assisted procreation, the child's filiation is officially established by the **act of birth**, which the *Directeur de l'état civil* creates based on information provided in the attestation and declaration of birth.

What about a will?

When a child's filiation has been established, he or she will automatically inherit from a parent in the absence of a will. You may want to create a will to specify who will inherit your property after you die, and how much each person will receive. Anyone over 18 can create a will, and you can change a will at any time.

There are three types of wills:

- + A **holograph will** is the simplest kind. It does not require any witnesses and it can be very simple, a few sentences in length, but it must be handwritten and signed by you. It is always a good idea to date your will so that it will be easy to tell what your final wishes were. Tell someone you trust where your holograph will is kept, or give it to a notary or lawyer so that it can be registered in the *Registre des dispositions testamentaires et des mandats du Québec*.
- + A **will made in the presence of witnesses** can be typewritten or written on a computer. Someone else can also draft a will for you. For this type of will, you must declare that the document is your will in the presence of two witnesses over age 18, and then sign it. The witnesses do not need to know the contents of your will. As with a holograph will, someone you trust should know where your will is kept or you can give it to a notary or lawyer to register.
- + The **notarial will** is a will drawn up by a notary. It requires formalities while the first two types of will do not. It needs to be made in front of a notary and a witness (two witnesses under certain circumstances; for example, if the person making the will is blind). The notary keeps the original, so there is very little chance that yours will be lost. The notary can also use their expertise to help you avoid errors and ambiguities that sometimes complicate inheritance. The notarial will is the most difficult type of will to challenge in court because it is an authentic act.

What about a mandat en cas d'incapacité/mandate in case of incapacity (power of attorney)?

A mandate in case of incapacity is a written document in which one person designates another to oversee the protection of their person and property in the event that an illness or an accident deprives the person of their faculties temporarily or permanently. The law does not require a mandate in case of incapacity, but writing one can ensure that someone you trust will act according to what you would have wanted for yourself if worse comes to worst. For example, some people are sure that if they were in a terrible accident that caused irreversible brain damage and a coma, they would not want to be kept on life support. In that case, a mandate in case of incapacity naming your spouse would enable him or her to tell doctors to turn off life support machines. However, you would need to tell the person named in your mandate about your specific wishes ahead of time. Those wishes are not listed in the mandate; only the name of the person who will act in your place is listed.

Does this need to be done before our child is born?

No, there are no deadlines for drawing up a will or mandate in case of incapacity based on when you plan to have children. You can also change a will or mandate at any time. If your will or mandate is kept with a notary, you will need to contact the notary to make changes to your documents.

Should we designate guardians in case something happens to us?

If you want to ensure you have a say in who takes care of your child if you are no longer able to do so, you can designate a guardian. The term for guardian in Quebec is tutor (*tuteur*).

Parents can designate a tutor by naming the tutor and a substitute in their will or in a mandate in case of incapacity, or by submitting the **Declaration of Dative Tutorship** form to the *Curateur public du Québec*. You should keep a copy of all legal forms for your records, and inform family members of your wishes.

If a child's parents have died or are unable to care for her or him, and no guardian has been designated, there will be a court hearing to determine who will take care of the child.

What if I die in childbirth before my partner gets her name on the birth certificate? Will she be recognized?

If you are married or in a civil union, the **presumption of parenthood** will ensure that your spouse is listed as the child's parent on the birth certificate. The presumption of parenthood applies when a child is born through assisted procreation to same-sex or opposite-sex spouses who are married or in a civil union. A child's filiation cannot be contested just because the child was born out of a parental project involving assisted procreation. A written agreement of both partners to participate in the parental project may be a good idea for unmarried couples to ensure that, even if the couple separates or the biological parent dies before the birth of the child, their intentions regarding co-parenting are clear.

10

LEGAL RECOGNITION OUTSIDE OF QUEBEC

Will my child's birth certificate be recognized as a legal document outside of Quebec?

Yes, your child's Quebec birth certificate will be recognized as their official birth certificate outside the province.

As parents, if we travel outside of Quebec, which one of us will be legally recognized?

If you travel outside Quebec and the laws regulating same-sex parenthood differ, it is possible that only the biological parent of a child would be recognized. However, if your partner is the legal parent of your child, it would be difficult for a foreign government to deny him or her legal rights over the child.

Are we still both legal parents outside of Quebec?

Your legal status as parents outside of Quebec will vary according to different countries' laws.

I am French/Belgian/American/etc.: Will my child be able to have dual citizenship?

Your child’s ability to have dual citizenship will depend on how the laws of the country deal with LGBT parents. In some countries, only biological or adopted children of heterosexual parents can acquire a second citizenship through their parent. In other countries, your child will be able to get a second citizenship if the parent who is already a national of that country is the child’s biological parent.

If we live outside Quebec, will our two-parent status be recognized?

Your two-parent status that is valid in Quebec may or may not be legally recognized by other countries you may live in, depending on their laws concerning same-sex partnerships, marriage, and parenting.

Weren’t there some recent legal cases in France where two parents who had been recognized legally outside the country came back and asked for their status to be recognized in France?

Yes. In 2010, the French Cour de cassation (France’s Supreme Court) legally recognized the filiation between a child and the same-sex partner of the child’s biological parent (see Case 8).

Decisions such as these vary widely according to the respective countries’ existing laws and are typically treated on a case-by-case basis, unless a regime similar to Quebec’s is already in place for same-sex parents.

Will the fact that my child has two same-sex parents trail him into adult life? For example, if he wants to get a job in Saudi Arabia, will his birth certificate stop him from doing that?

Birth certificates are rarely required for employment opportunities, but may be necessary in order to get, for example, a passport. It’s difficult to say with certainty if or how your child’s having same-sex parents will impact his or her opportunities in the future. In international situations, a lot depends on the domestic laws of the other country regarding same-sex partnerships and parenting.

*** CASE STUDY #8**

Recognition of Same-Sex Parents Outside of Quebec

FACTS

A bi-national lesbian couple were living and working in the United States. They had entered into a domestic partnership. While residing in the US one of the women conceived a child through a fertility clinic. She was an American national, while her partner was French. After the child was born, the Superior Court of the county of Dekalb, Georgia, permitted the adoption of the child by the French female partner of the mother in 1999. As a consequence, the birth

certificate mentioned that the American woman was the mother, and that the French woman was a parent.

QUESTION

Can both women be acknowledged as the parents of the child on French soil?

JUDGMENT

Although judges at the first two levels rejected the request, the judges of the Cour de cassation, France’s highest court, deemed that it was in the child’s best interest to have two legally recognized parents, regardless of the parents’ gender.

What about travelling? Will this create problems at the border?

As long as you have passports when crossing a border, there should be no problem.

Although your child's passport does not designate who their legal parents are, it is very important to bring along other papers that establish your child's filiation every time you travel. Whether it is the child's birth certificate or his/her adoption papers (in the case of an adopted child), you must have proof of who the legal parents are as both parents (if there are two) must give permission for a child to cross international borders. If you are in a two-parent family but decide to travel alone with your child, the other parent must provide written permission for you to cross international borders.

What will his/her passport say? Are our names on it?

No, passports do not list the names or genders of the passport holder's parents. Passports list the holder's name, gender, nationality, date of birth, place of birth, the passport's date of issue, and its expiration date.

APPENDIX 1

RESOURCES

Adoption and Fostering of Children in Quebec: A Guide for Gays and Lesbians

(A publication of the LGBT Family Coalition)

It includes a historical overview, definitions, information about the children, their biological parents and youth protection, legal information, the process of adoption, resources, as well as interviews with gay and lesbian parents who have adopted and/or fostered children.

www.familleshomoparentales.org/documents/pdf/AdoptionGuide_en.pdf

Centre communautaire des gais et lesbiennes de Montréal

Non-profit organization offering advocacy and legal information services for members of the Montreal LGBT community.

www.ccglm.org

Éducaloi

A non-profit organization whose mission is to inform Québec residents of their rights and obligations by providing legal information in everyday language.

www.educaloi.qc.ca

Guide for Future Lesbian and Bisexual Future Mothers

A publication of the LGBT Family Coalition for lesbians and bisexual women who want to become pregnant with the help of a fertility clinic or through at-home inseminations with a known donor. Can be ordered from the LGBT Family Coalition at:

www.familleshomoparentales.org

Justice Québec

Offers accessible information about the state of the law in Québec. Click on “Publications” and then “General Information” for summaries of family law in Québec.

www.justice.gouv.qc.ca

Legal Aid (commission des services juridiques)

Under legal aid, citizens who meet certain criteria can get the services of a lawyer (and sometimes a notary) free of charge or at low cost. To find out who is eligible or to apply for legal aid:

www.csj.qc.ca/SiteComm/W2007English/Main_En_v3.asp

Legal Information Clinic at McGill

A non-profit, student-run, bilingual and free legal information service. Provides legal information, referral and community services to the McGill and Montreal communities.

www.mlic.mcgill.ca

LGBT Family Coalition

A Québec-based non-profit organization advocating for the legal and social recognition of LGBT families. The Coalition is behind the publication of this guide as well as numerous other resources for LGBT parents and future parents.

www.familleshomoparentales.org

Mile End Legal Clinic

A network of Montreal lawyers and law students dedicated to making justice more accessible. The Clinic offers consultations on an individual basis with lawyers and law students to people who need legal information but whose financial resources do not allow them to pay for a lawyer. No appointments necessary.

www.justicemontreal.org

Québec Parental Insurance Plan

Information about maternity, paternity and parental leave and benefits.

www.rqap.gouv.qc.ca

Secrétariat à l’adoption internationale du Québec

Offers resources as well as a list of certified adoption agencies that have a current relationship with the government of Québec to facilitate international adoptions.

www.adoption.gouv.qc.ca

APPENDIX 2

CONTRACT FOR INSEMINATION

WITH A KNOWN DONOR

Important information that must be included in all contracts

BASIC INFORMATION

Indication of who are the important parties involved (full names, birth dates, addresses).

Ex: donor, recipient and partner of recipient (if there is one). Can also include the name of the donor's partner, if this is relevant.

SEXUAL RELATIONSHIP

A sentence indicating that the donor has agreed to provide his sperm for the purpose of artificial insemination and that there has been no sexual relationship (if this is the case). It is necessary to include this because of the provisions of the Civil Code.

OBJECT

A sentence indicating that the recipient will receive the sperm in order to conceive a child.

PARENTAL PROJECT

IA statement about the lesbian individual or couple having a “projet parental” to start a family (or to enlarge the family) and that the donor's role is simply to provide genetic material in order to help the recipient to conceive a child.

A sentence indicating that all those involved understand that the Civil Code of Québec gives parental rights to the lesbian couple and not to the sperm donor.

DATE

PLACE OF SIGNATURE

SIGNATURES OF ALL INVOLVED

According to the specific situation the following information may also be added:

Donor declaration: A sentence indicating that the donor is providing semen for the sole purpose of helping the couple or individual to have a child and will not at any point demand or request guardianship, custody or visitation rights.

Donor responsibility: A sentence indicating that the individual or couple cannot at any point demand or request that the donor be held legally, financially or emotionally responsible for any resulting child(ren).

OTHER ITEMS TO CONSIDER ADDING INTO THE CONTRACT:

- 1 A statement about who will have the right to name the child.
- 2 A statement about whose names will go on the birth certificate.
- 3 A statement that the donor will not bring forward a paternity suit.
- 4 A statement about who will have the right to name a guardian in the event of sickness or death.
- 5 A statement about how the parties will deal with the identity of the donor: anonymous or open. If open, from what point in the child's life?
- 6 A statement about the donor's future contact with the child (ex: the parents' rights, the donor's rights and the child's rights to decide upon this). For example you can say that only the parents have a right to decide but when the child reaches 16 he/she can decide. Or you can say the donor and recipient have agreed to a contact of x hours per month, etc.
- 7 A statement about the right of the lesbian couple/individual to change the level of contact if they feel it is not in the child's interest.
- 8 A statement about the role of the donor's spouse and extended family (ex parents and siblings of the donor) in the child's life.
- 9 A statement about the role of the donor's partner and what this role would be should the donor and his partner separate. A statement about future partners of the donor.
- 10 A statement about what would happen in the case of a separation of the lesbian couple with regards to the donor (e.g. the donor will still not have parental rights or responsibilities, the donor will continue to have x hours of visitation, etc.).
- 11 A statement about future children (e.g. the donor agrees to be sperm donor should the couple decide to have more children).
- 12 A statement about the right of the lesbian couple and their child to move to another city, province or country.
- 13 In case of problems or divergence of opinions concerning the child, between the donor and the parents, a statement about how problems will be mediated between the different parties.
- 14 Etc.

