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## **Law, Blood, and Custody: Sexual Minority Mothers and Heteronormativity**

Emilie Biland, Joanie Bouchard, Kévin Lavoie, Hélène Zimmermann

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### **Accepted Manuscript**

#### **Abstract**

This article analyzes how couples made up of two mothers redefine their roles when they break up as well as how legal professionals frame the custodial arrangements of these former same-sex couples. To do so, we focus on the case of Quebec, Canada, where parentage equality between mothers was attained as early as in 2002. We rely on individual semi-structured interviews with mothers' (N=17) and legal professionals' accounts (N=23) as well as on court records regarding physical custody arrangements. We find that the legal recognition of both mothers favors coparenting practices, and especially joint physical custody. However, the heteronormative frame of custody arrangements lingers. Sexual minority mothers struggle with the valorization of birth motherhood and with the standard of gendered parental complementarity. Indeed, professionals can still fall back on heteronormative norms, notably by assigning to non-birth mothers a “paternal” role. In the end, the inexperience of many professionals on LGBTQ+ issues, the embeddedness of heteronormativity in day-to-day relations, as well as the permanence of heteronormative legal categories and professional practices are all factors that set these families apart.

**Keywords:** Motherhood, Heteronormativity, Divorce, Same-sex couples, Canada, Law, Lesbian mothers

## **Introduction**

In the 1970s and 1980s, the first wave of research on lesbian mothers focused on the effects of sexuality disclosure at the end of straight intimate relationships (Johnson, 2012). In several countries, homosexuality could be considered a fault in divorce proceedings (Arnup, 1995). Many lesbian or bisexual mothers lost custody of their children because judges assumed that their sexuality would corrupt their children who would face social stigma, or that the absence of a father figure would be prejudicial to them (Rivers, 2013). Because these mothers often had to prove their parenting abilities through psychological assessments (Hitchens & Price, 1978), custody disputes took part in structuring the emerging field of research on same-sex families. In conjunction with the tragic effects of the HIV-AIDS epidemic on gay couples, they also led the gay and lesbian movement of the time to place marital and parental rights at the center of their activist agenda (Barclay, Bernstein & Marshall, 2009).

With the rise of assisted reproductive techniques (ARTs), a “lesbian baby-boom” was observed as early as the 1990s in the United States (Patterson, 1995). Since lesbian partners could more easily become mothers (Patterson & Tasker, 2007), the lack of legal status for non-birth mothers became a major issue as, in the event of a separation or death, the biological and legal asymmetry between parents could penalize non-birth mothers (Butterfield & Padavic, 2014; Kazyak & Woodell, 2016). Second-parent adoption therefore became a way to achieve legal equality between mothers (Zuckerman, 1986). However, this route has been criticized by lesbian scholars for requiring these mothers to engage in litigation (not readily available to low-income lesbians) and to conform to the heteronormative expectations of judges (Connolly, 2002; Shapiro, 1999). However, in some jurisdictions, such as Quebec, Canada, legislation has evolved to allow both mothers to be legally recognized as soon as the child is born. Other examples include Spain (2006) (Platero, 2007), Belgium (2014), and the Netherlands (2014) (Swennen & Croce, 2016). Studies notably show that the legal recognition of lesbian motherhood has a positive impact on these couples, notably by favoring a more equitable distribution of parental roles (Chbat & Côté, 2022). Compared to their American counterparts, Canadian lesbian mothers also report fewer family concerns about legal status and discrimination (Shapiro, Peterson & Stewart, 2009). These observations justify taking the legal context in which sexual minority mothers operate seriously.

Between 2000 and 2024, nearly 40 countries legally recognized same-sex marriage (Buchholz, 2024), and a growing proportion of these same-sex couples - especially those composed of two women - raise children (Statistics Canada, 2021). Nevertheless, to date, little research has documented the custody arrangements of former same-sex couples. They remain

“the great unknown” (Jiménez-Cabello et al., 2022). We ask how both mothers redefine their roles after separation and how legal professionals, who have based their intervention routines on heterosexual couples, frame these roles.

## **Literature Review**

### *Understanding the Quebec Case: Twenty Years of Recognition of Mothers' Couples*

We consider the case of Quebec given its long-standing recognition of same-sex parents. While the Quebec Charter of Human Rights and Freedoms has prohibited discrimination based on sexual orientation since 1977, it took until 1999 for the Supreme Court of Canada to hand down its first ruling in favor of same-sex couples. In 2002, the adoption of the *Act instituting civil unions and establishing new rules of filiation* created a “pioneering regime” (Leckey, 2009) by amending the Civil Code to recognize same-sex families. Since then, same-sex parents can be legally identified as the parents of a child and are granted the same rights and duties as different-sex parents. Moreover, the children of female couples who rely on assisted reproductive technologies are legally related to both their mothers. While couples in a civil union or those who are married can rely on a presumption of maternity, the parental status of *de facto* partners can be registered before the Registrar of Civil Status.

In the event of a breakup or divorce, sexual minority parents depend on provisions that were initially designed for straight couples. While divorces fall under the jurisdiction of the courts and are governed by a federal law, the Civil Code of Quebec oversees *de facto* couples as well as parenting provisions after breakups. Notably, article 605 states that non-custodial parents “retain the right to supervise the maintenance and education of the children”. Besides, since the mid-1990s, the public funding of family mediation has encouraged out-of-court settlements, instead of lengthy, costly, and intrusive divorce trials (Farrow & Jacobs, 2020). As a result, “bargaining in the shadow of the law” (Mnookin & Kornhauser, 1978) - through the anticipation of the likely court ruling - has become the most common mode of settlement as custody trials are rare (Reignier-Loilier, Baude & Rouyer, 2023). Research shows that nowadays, legal professionals share the belief that joint physical custody is usually in the best interests of the children born from straight couples (Godbout, Parent & Saint-Jacques, 2015). Already in the late 2000s, about one in five minors whose parents are separated lived in joint physical custody in Quebec, a proportion that has most likely increased over the past decade (Reignier-Loilier, Baude & Rouyer, 2023).

### *Motherhood and Separation Among Female Couples*

Before considering their separation, we first need to understand how female couples became mothers and raised their children while they were still together. The literature shows that various factors come into play to decide who will carry the child, including the age of each partner, their respective employment status and professional stability, the possibility of accessing and sharing parental leave, and whether or not they wish to experience pregnancy and childbirth (Golombok, 2015). Once the child is born, mothers lean toward a more equal division of domestic and parenting responsibilities than different-sex couples do (Ascigil et al., 2021). Overall, they tend to base their family involvement on their respective interests, talents, and availability (Rostosky & Riggle, 2017) rather than on gender stereotypes (Kelly & Hauck, 2015). Nevertheless, birth mothers are found to be more involved than their partners in “procreative work”, i.e., “the work involved in producing new human beings” (Hertzog & Mathieu, 2021), through pregnancy, breastfeeding, infant care, and maternity leave for example (Biblarz & Savci, 2010).

While authors have mainly studied how legal rules enable or prevent the formation of same-sex couples and families (Rothblum, Balsam & Solomon, 2008), this study considers instead how mothers and legal professionals reshape caring arrangements after divorce or separation. We already know that joint physical custody is a frequent arrangement among separated lesbian mothers (Gartrell et al., 2011; Zhu, Alschech & Pruett, 2022) and that same-sex divorcing parents are more reluctant to seek the services of professionals, for fear of being unwelcomed and unsupported (Gash & Raiskin, 2018). Negative experiences with family mediators and lawyers have also been documented, particularly on the part of non-birth mothers who felt invisible and sidelined (Gahan, 2017). Legal professionals’ lack of knowledge about LGBTQ+ families (Langenbrunner et al., 2020) and the heteronormativity of family services were the main pitfalls identified by separating same-sex parents. In the context of the 20-year-old legal recognition and at the time of divorce or separation, this article asks how sexual minority mothers from Quebec deal with the heteronormative family model. To address this question, we focus on their physical custody arrangements, which is considered, by parents and legal professionals alike (Biland, 2023), as the most crucial issue at the time of parental separation.

### **Theoretical Framework**

To assess how these mothers, along with legal professionals that work with them, view and embody their maternal roles, this study combines three primary analytic frameworks: the anthropology of kinship, gender & sexuality studies, as well as socio-legal studies.

### *Euro-American Kinship and the Naturalness of Family Bonds*

The anthropology of kinship shows that, during the 20<sup>th</sup> century, Euro-American kinship rested on three cultural pillars: bilaterality (father/mother), duality (*only one* father/mother) and nature (father and mother are presumed to be the progenitors of their child) (Déchaux, 2014). The naturalness of family bonds - through the metaphor of blood - predominated in the way these societies conceive kinship, and even more so as parentage law itself kept “it all within the realm of nature and based on nature” (Schneider, 1980: 110). Nowadays, single mothers, heterosexual couples using adoption, ARTs or surrogacy, as well as stepparents do not conform with at least one of these cultural pillars and are relatively common examples of discrepancy between the biological, legal, practical dimensions of kinship (Weber, 2005). In any case, cultural beliefs, supported by the legal system, still value biological bonds between parents and children (Strathern, 2005), and same-sex parents still challenge this “bio-essentialism” (Wilson, 2016). Indeed, same-sex parents do not necessarily share a biological bond with their child(ren) and most do not raise them with a different-sex parent or, when they do (in elective coparenting arrangements), they challenge the duality of parenthood (Herbrand, 2018). However, the cultural pillars of kinship have been evolving for the last decades: the contemporary norm for access to parenthood now values planned pregnancy and the involvement of both partners in this project (Boltanski, 2004). In fact, since all the parents who took part in our project planned to have children with their former partner and that most of their children were born within a context of conjugal cohabitation, they also partially conform to the dominant model of parentage. Nevertheless, the assimilationist effect of same-sex marriage and parentage, which has long been debated by queer scholars (e.g. Robson, 2002), cannot be taken for granted. Rather, we consider that sexual minority mothers deviate in part from normative kinship standards while also conforming to certain aspects. While this ambivalence may help their acceptability, it could also contribute to restricting their gender and parenting agency.

### *Gender and Sexuality Studies: Motherhood, Heteronormativity and Intersectionality*

This idea is supported by gender studies, which complement the anthropology of kinship by showing that the naturalist view of parentage mainly targets mothers. “The mother is the woman who gives birth” and “The mother is always certain” (*Mater certa est*, as the Latin maxim puts it) are assertions that are firmly rooted in Western legal norms (Iacub, 2004) and impact expectations toward women to become loving and caring mothers in order to be “fully” and “truly” feminine (Damant, Chartré & Lapierre, 2012). To that respect, while

lesbians who become mothers meet these gendered expectations in part, they nonetheless also deviate from expectations due to their sexual orientation, their couple configuration, and their route to parenthood. More precisely, queer studies show that this kinship system takes part in the “heterosexual matrix” (Butler, 1990): to be fully recognisable, motherhood should derive from coherent and stable female identities, as well as from heterosexuality. People who depart from this matrix are likely to face heterosexist reactions, which stigmatize and marginalize LGBTQ+ people (Herek, 2004). Our project examines the impact of the biological, gendered, and heteronormative model of kinship on the way sexual minority mothers adapt their role once they separate from the other parent of their child(ren).

To that purpose, we acknowledge that all sexual minority mothers do not face heteronormativity with the same resources. Indeed, the concept of stratified reproduction (Colen, 1995) highlights social-economic hierarchies based on class, race, sexual orientation, gender identity, place of residence and citizenship in relation to reproductive health and access to ARTs, which require substantial financial resources in many places (Scala, 2014). While the public coverage of the assisted reproduction program offered in Quebec from 2010 to 2015 enlarges access to ARTs, its overhaul raised barriers for the less well-off and those who did not meet the eligibility criteria. Moreover, parenting practices depend on intersectional factors, both before and after the breakup: for instance, in Quebec as in other places (e.g., Donnelly & Finkelhor, 1993), joint physical custody is more frequent among middle and upper-class parents than among lower-class ones, notably due to the cost of maintaining two households. Middle-class parents are also more likely to seek professional advice while separating from their partner (Poitras et al., 2023).

### *LGBTQ+ Legal Consciousness*

These observations regarding post-breakup arrangements encourage us to consider how family practices (who cares for children?) relate to legal experiences (how do mothers think about their rights? how do legal professionals advise or decide about them?). Consequently, the legal consciousness scholarship is the third analytic framework that inspires our project. It highlights the part legality takes in everyday life (e.g., Ewick & Silbey, 1998). Given the “tectonic shifts in the legal regulation of sexuality” over the last decades (Harding, 2011: 7) and “the central role the law plays in LGBT lives” (Knauer, 2012: 755), authors have shown that “the law can be, at times, embraced, manipulated, modified, or rejected” by LGBTQ+ families (Baumle & Compton, 2015: 3). Even before same-sex marriage bills, some same-sex couples aspired to formal equality (Harding, 2006) through commitment ceremonies as

attempts to enact legality (Hull, 2003). However, this “legalism” does not mean that sexual minority individuals agree with heterosexual norms that are founded on binary, complementary and hierarchical roles. On the contrary, they can engage in resistance while still seeking legal recognition (Harding, 2011).

Overall, these parents must face “legal status ambiguity” (Gash & Raiskin, 2018), which comes from “legal indeterminacy” (Richman, 2009), but also from long-lasting negative attitudes toward LGBTQ+ people. LGBTQ+ parents enact their legal status depending on their social and economic resources (e.g., did they study law? can they afford to get a lawyer?), and on the way legal intermediaries – from relatives to community groups – give them advice about their rights. Family mediators, lawyers and judges are legal intermediaries of a particular kind, since their legitimacy, based on their knowledge and their institutional position, is usually higher than others (Sarat & Felstiner, 1995). They play a key part in informing parents about legal provisions, which, in return, “construct sexual and parental identity” (Richman, 2009: 17).

Previous scholarship gives rise to the following expectations for this study: firstly, legal recognition of Quebec sexual minority mothers favors coparenting practices, both during their relationship and after it ends. However, parentage equality is not enough to erase the heteronormative frame of custody arrangements, which is based on two pillars: on the one hand, the valorization of birth motherhood, and on the other, the gender complementarity of parents, meaning the assumption that, because of gender, the input of mothers and fathers in childcare is expected to be different, necessary, and complementary. As a result, the role played by legal professionals toward them is ambiguous: they may support their distancing from the heterosexual matrix, or, conversely, seek to assimilate them into the normative framework constructed for straight parenthood.

## **Methods and Data**

Following previous legal consciousness studies on LGBTQ+ parents (Baumle & Compton, 2015; Gash & Raiskin, 2018), the methodological design of our project relies on qualitative data gathered in two studies. It therefore combines mothers’ accounts (study 1) and legal professionals’ accounts (study 2) on custody issues after breakups. The combination of these two studies aims to assess the similarities or discrepancies in lay people’s and professionals’ legal experiences after breakups. It also enables us to study how mothering norms circulate between them. Individual semi-structured interviewing was used to capture those narratives.

They are supplemented by a study of four court records in which some interviewees were involved.

### *Study 1: Mothers*

#### *Sample Description*

From October 2018 to November 2019, 17 mothers who had their child(ren) with a woman and were separated were interviewed individually, usually at their home by either one of the authors or a research assistant. These interviews lasted between 45 minutes and 2.5 hours (with an average length of 1.8 hours). All of them identified as mothers. The majority also identified as cisgender women, while two participants identified as queer and one as non-binary. In terms of sexual orientation, fifteen participants identified as lesbians, one as queer, and one as pansexual. The participants were residents of the province of Quebec, including the greater Montreal area and several other regions. They ranged in age from 28 to 47 years (average age: 38). Fourteen are white, one is Latina and two are Black. Most of them (13) had university degrees (usually a bachelor's), while the others had completed professional training. All of them had middle-class jobs at the time of the interviews, in sectors such as administration (4), social work (3), health (3), education (2), etc.

Seven of the interviewees had been married prior to their separation, while the rest lived with a *de facto* partner when they had their child(ren).<sup>1</sup> These former couples had lived together for ten years on average (from 3 to 22 years), and they separated two and half years prior to the interview on average (from 1 to 8 years). Most interviewees (12) used insemination at a fertility clinic to become mothers. In one case, the woman who carried the child received an egg donation from her partner. Four respondents used home insemination instead. Of the respondents, five carried all their children, eleven did not, and one carried a single of her two children. Finally, one participant chose adoption. Twelve respondents had one child and five had two. At the time of the interview, these children ranged in age from one to thirteen years old. Most mothers (13) shared joint physical custody with their ex-partner, while two respondents had sole physical custody and two others did not have physical custody (but had visiting rights).

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<sup>1</sup> In 2021, 42% of couples were formed by *de facto* partners in Quebec, compared to 16% in the rest of Canada (Institut de la statistique du Québec, 2023).

### *Recruitment and Interview Guide*

Participants were recruited through an online advertisement posted by a research group on parental separation. In particular, parents who identified as LGBTQ+ and had gone through a separation were targeted as this project specifically focused on mothers who had children whilst in a same-sex relationship. The announcement was shared by the Quebec Ministry of Justice and by the main community organization dedicated to LGBTQ+ parents of the province. Nine participants heard about the study through these organizations. Eight others were recruited through referrals from previous respondents (including the former partner of a mother). Respondents were compensated 25 CAD for their participation.

The interview guide focused, first, on the respondents' trajectory with respect to their sexual orientation. Next, it discussed their marital and parental history, including both their separation and their current situation. Particular attention was paid to the place of the law in this narrative, including legal issues and legal interventions related to child custody. However, the main questions did not explicitly mention the law and left it open to respondents to address it or not in their own words. It was only in the follow-up questions that legal matters were directly mentioned by the interviewer. The last part of the interview guide focused on respondents' opinions on the justice system, family law, and LGBTQ+ rights. Questions regarding socio-demographic information followed. At the end of the interview, participants who had adjudicated their separation through the court were also asked if they consented to their judicial records being accessed. In the end, four judicial cases involving these mothers were included in the study.

### *Study 2: Legal practitioners*

#### *Sample Description*

The second study focuses on legal practitioners, including family lawyers (14), trial judges (6) and non-lawyer family mediators (3) (a social worker, a psychologist, and a psycho-educator). A total of 23 interviews were conducted by the authors, most of them remotely using the Zoom platform, given that the study took place during the pandemic between November 2020 and December 2021. On average, interviews lasted 1.5 hours. All but one of the participants were white and all of them were cisgender as well (thirteen women; ten men). Seventeen were heterosexual and six (all men) were homosexual. Insofar as appointment to the judiciary follows a first career as a lawyer, all judges were over 50, while lawyers and mediators were usually in their 30s or 40s. Like mothers in Study 1, they lived and worked in various places

in Quebec. Given their professional status, all of them had a university degree (bachelor's: 16; master's: 7).

### *Recruitment and Interview Guide*

Trial judges were interviewed following a call for participation from the Chief Justice of the Superior Court of Quebec, which is in charge of the adjudication of divorce and separation. Some lawyers were also identified in judicial records accessed during Study 1 while others had been involved in cases that had received media attention or were contacted by referral from colleagues who knew them to be gay. Mediators were approached through professional acquaintances.

The interview guide had four themes. First, respondents were asked to describe their general professional practice, including the place of family cases involving LGBTQ+ parents within it. Second, they were asked to concretely describe their professional practice with respect to LGBTQ+ parents. Third, respondents were asked about their personal and professional trajectories. Eventually, they were asked about their representations of the law and families. The specific questions were adjusted according to the duty of confidentiality in certain professions, especially within the judiciary.

### *Data Analysis*

Coding categories emerged through an inductive process that took place both during the data collection process as well as following the completion of the interviews and that involved all authors. The principal investigator was the one to review all coding. For Study 1, the interview transcriptions were coded through an inductive process using grounded theory's incident-with-incident coding (Charmaz, 2014), along a timeline, to be able to constantly compare, from one interview to the next, the major stages of personal, romantic, and parental life (coming out, committed relationship, birth of children, separation, etc.), how they happened and what were their consequences. Additionally, we systematically identified, for each of these events, if and how people refer to law and to legal practitioners (regarding administrative forms; perceptions of legal provisions, of LGBTQ rights and of the justice system, etc.).

Four court records were also analyzed in Study 1. They were accessed in court houses and coded by the principal investigator, who paid attention once more to the chronology and the incident of the proceedings, as well as to the narratives appearing in lawyers' submissions and judgments. When compared to incidents coded in the interviews, such written documents are heuristic to study the adjudication of custody disputes by courts.

In Study 2, interviews were coded line-by-line (Charmaz, 2014) to get at respondents' views about LGBTQ+ parents and family law, as well as the nature and perceived meaning of their work with LGBTQ+ parents and their interactions with them.

### *Ethical Considerations*

The methodological design was approved by the ethics committee of the principal investigator's university (approval number 2018-227 (Study 1) and 2020-183 R-1/10-09-2021 (Study 2) respectively). In order to preserve the anonymity of the participants, practitioners are not named, and a pseudonym is used in the case of the mothers. Pronouns used by participants are the ones we used here.

## **Results**

### *Mothering together: legal equality and procreative asymmetry during common life*

The post-breakup care of children depends on the parental route of these mothers from the beginning of their shared maternal project to their daily life during their time together. At each of these stages, legal parentage equality favors their mutual maternal commitment and recognition, without making their procreative asymmetry disappear in their subjectivities and practices. Several women mentioned that the right to be two mothers on the birth certificate of their children is a major dimension of sexual citizenship. Anne-Marie, a 33-year-old social worker whose ex-wife gave birth three years earlier, believes, for example, that "*the bottom line is there*"<sup>2</sup> in terms of LGBTQ+ rights, because "*you can put two moms on the legal papers of children at birth*" and "*share parental leave.*" Karen, a 38-year-old lawyer and the non-birth mother of a five-year-old, explains how important it was for her partner to give birth in Quebec: "*I wanted to be able to be recognized as soon as my son was born on official government papers. Otherwise, I probably would have been hesitant to have a child.*" The double access of female couples to ARTs and to kinship facilitates their projection into motherhood. It institutionalizes the lesbian couple as a favorable setting for motherhood, limiting the need for these women to have to hide their sexual orientation, to involve a man as a father in their maternal project, or to engage in long and uncertain steps to have their parentage recognized.

Their legal equality is related to their mutual commitment to the maternal project, while accommodating disparities in the procreative work. Mothers insisted on the involvement of both partners in their journey to parenthood, notably by their co-presence at medical

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<sup>2</sup> All interview excerpts were translated from French by the authors.

appointments, before, during and after the birth. Non-birth mothers mentioned the support and care they gave to their partners (and then to their babies), especially when the duration of the ART process, complications from the pregnancy or a premature birth made it more difficult. However, inequalities in procreative work remain marked, insofar as they are often extended after childbirth through parental leave. In fact, many couples had decided that the woman whose position of employment allows her to spend more time with her baby would also be the birth mother. In our sample, birth mothers were always the ones who took the longest parental leave and who were consequently the most involved with their infants. For some non-birth mothers, the non-experience of pregnancy is compounded by less infant care, which affects the way they perceive and embrace their maternal role.

Catherine, the 31-year-old mother of a three-year-old girl, who self-identified as queer and gender nonconforming, did not want to be pregnant. But because her partner's health condition did not allow pregnancy, she was the one who finally carried the child. Giving birth while unemployed, she was also the one who stayed at home during their daughter's first months. According to her, her partner, disappointed at not having given birth and having worked outside the home, adopted parenting practices that were opposed to hers ("*soft*" vs. "*rigid*"), which fueled their disagreement.

The fact that she didn't give birth, for her, it's like she was a father, and she was like less close, and she wasn't like the all-powerful mother. So, she felt like she had to be more flexible with [their daughter] to be loved, and she felt like I was too rigid, and she was right. We didn't get along.

In fact, most of the mothers interviewed testified to their belief in the importance of the biological bond - and more precisely of pregnancy and childbirth - as a vector of attachment to the child and of differentiation between the mothers. Three women mentioned fears that the child would become more attached to the "*belly mommy*" than to the "*heart mommy*" (according to the categories used by Cynthia, a 35-year-old civil servant), or that non-birth mothers would fail to develop, as another respondent puts it, their "*animal instinct*." Pregnancy, birth, and even the early stages of life crystallized these fears, but many quickly outgrew them through their investment in newborn care. Myriam, a 43-year-old woman who works in the LGBTQ+ community and non-birth mother of a 10-year-old, explains that while she and her partner initially believed the biological bond between a mother and a child to be "*inspiring*", "*as soon as I had my daughter in my hands and we were talking about having a second child, the idea of the [biological] bond made no sense to me anymore*".

Nevertheless, their entourage and the professionals who accompany them still mobilize the model of procreative motherhood. Procreative status is a practical operator used by others to perceive mothers and differentiate between them. These interactions thus reveal difficulties in conceiving kinship outside heterosexual coupledness, as the role of non-birth mothers is often ignored, minimized or even assimilated to the role of fathers. Some women talk about these episodes in a humorous way, but the mothers who have most internalized the heterosexual and procreative representation of kinship take these discourses seriously, whether they reinforce their status (if they have given birth) or, on the contrary, weaken them – if, as Karen, they are non-birth mothers:

One is asked the question: who is the real mother? Instead of using the words “who carried the child”, people, probably out of awkwardness, or just because they are not aware of what it can do, will ask: who is the real mother? (...) I think it is more sensitive for the woman who did not carry the child, because it seems that even if I have my name on a piece of paper, the role is a little bit more fragile.

These interactions return these mothers to their minority status. When professionals misunderstand their relationship or their motherhood, they show that family configurations that depart from heterosexuality can still be hardly intelligible. Monique, a 42-year-old teacher who gave birth four years earlier, recalls the inability of the maternity home staff to correctly identify her partner: “*She was not recognized as my wife. A hospital orderly came in and said, “Who are you? Her mother? (...) Who are you? The sister? It’s not the father: get out!”*”

Moreover, in the various procedures that punctuate their lives as mothers (registering their children at the daycare center, at school, filling out a medical form, etc.), these women experience the inaccuracy of official modes of identification regarding their family setting. We find that the criticism of forms that require to fill out the names of “the father” and “the mother” is omnipresent in the interviews (“*it’s getting tiring*”, said an interviewee) and gives rise to practices of resistance (“*It’s very funny to cross out, to put ‘mother and mother’*”). Even when mothers make fun of them, these repeated microaggressions further marginalize them and are far from harmless (Nadal, 2019): this mode of identification can further reaffirm the practice of assigning non-birth mothers to the “father” category and thus reinforce this heteronormative analogy. Moreover, it can lead to mothers doubting their rights. For example, Sonia, a 47-year-old civil servant whose partner gave birth three years earlier, thought she was not eligible for the parental leave plan because the application form referred to a “father” and a “mother”.

Sometimes, practitioners explicitly use heterosexist stereotypes, either disqualifying same-sex couples or assimilating them with different-sex couples. Véronique, a 33-year-old social

worker, explains that her then-partner, who was very committed to being pregnant, had to be inseminated more than a dozen times before carrying their twins. The nurse they first met told them that “*same-sex couples have a higher divorce rate than straight couples, so you have to think about that before your insemination*”. Myriam (mentioned above) also noted the lack of seriousness with which the police treat violence within lesbian couples. She claims that a police officer, responding to a call related to her then-partner and her, concluded that “*it’s a conflict between two lesbians, it’s not important*.” For her part, Claire, a 38-year-old civil servant and mother of two children aged 6 and 8, met several times with a social worker from the Director of Youth Protection, because her former partner could have been a danger to their two children:

[This social worker] was trying to explain to me that generally the feeling of attachment is going to be stronger towards the mother than the father. And then, [upon noticing she had compared Claire to a father] she was rambling on, then she was rambling on, then she was rambling on.

The interviews show that such interventions create dissatisfaction in these mothers and reduce their trust in professionals and institutions. These experiences, while they may appear mundane, do count to the interviewees as a breakup often forces them to expose their family life to the scrutiny of various professionals.

#### *When Mothers Live Apart: Between Coparenting and Heterosexism*

Most of the mothers we met (15 of 17) consulted with family mediators, lawyers and, more rarely, encountered judges. Both the frequency with which they resorted to these professionals and the rate of joint physical custody in our sample are congruent with their middle-class social status. Moreover, the mothers we met had a similar social position than their former partner, if not the same occupation. This proximity in their educational style can also be read as a class pattern. Their female socialization also makes it more likely that they will invest in the care of their children. This shared commitment facilitates the subjective and practical projection of the two mothers in the sharing of parental time after the breakup.

We find that these interactions with separation professionals bring them into contact with the norm of coparenting, which favors joint physical custody. During the interviews, lawyers, mediators, and judges emphasized their attachment to legal equality. As a family lawyer in his thirties claimed, “*the law is the same [for everyone], and it’s quite appropriate*.” He added that joint physical custody is practicable, regardless of gender. According to these professionals, the law guarantees equal rights and leads to the undifferentiated support of straight couples and of same-sex couples. For example, a trial judge in his sixties concluded that “*a same-sex couple*

*is almost commonplace in 2021,*” during his interview. These professionals, who are mostly heterosexual, thus seek to demonstrate their acceptance of sexual minorities. However, their discourse about legal equality, indifference, and trivialization contrasts sharply with that of the mothers. Although they conform to the norm of coparenting, most mothers feel that professional interventions risk confronting them with language and attitude that marginalize them.

Their fears refer, first, to their previous experiences. Myriam, mentioned above, describes the police officer’s refusal to recognize violence between lesbian partners as “*homophobic*” and concludes: “*I put everything in the same basket, judge/police*”. In general, the women who have already experienced unsatisfactory interventions are those who express the least confidence in the justice system. We find that these mothers’ fears are particularly directed toward judges, both because they have discretionary decision-making power and because they have a reputation for being conservative. Let’s continue with Myriam, who fears that judges will give birth mothers an advantage:

Two women who have had a child together who find themselves in a conflictual situation: would the birth mother not be considered in the end? Do we not come to the arguments of biology to decide in a case of conflict? (...) I think that biology is still very likely to be the argument to which one comes back when faced with an ultra-conflictual situation. (...) I didn’t want to end up in front of a judge who was going to show his or her impartiality... I didn’t trust him or her.

Myriam’s focus, as a non-birth mother, on “*biology*” shows concerns about the procreative asymmetry between mothers in the event of a separation. While the judges we interviewed sought to assert their progressiveness within their professional community, they openly mentioned the “*conservatism*” of their peers. This is a point of consensus between mothers and professionals that the interviewees attributed, in turn, to the advanced age of the judges, their gender (the majority of them are men) or their high social status<sup>3</sup>. Interviewees also noted that judges are part of the majority: almost all of them are white and were born in Quebec while very few of them are openly gay, lesbian or bisexual. It is therefore hardly surprising that these relatively young women, most of whom are middle class and whose family setting is part of a minority, seek to avoid legal proceedings that are long, costly and have an uncertain outcome. While trial avoidance practices are far from being unique to lesbian mothers, the intersection of sexual orientation and procreative asymmetry gives these mothers an additional reason to distrust this institution, even though it is supposed to ensure equal rights.

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<sup>3</sup> In 2020, judges from the Superior Court of Quebec earned 338,800 CAD.

Moreover, avoiding judges does not prevent mothers from being exposed to heterosexist interventions. In fact, the child support form, filled out by lawyers and mediators, requires “the father” and “the mother” to be identified. Both mothers and professionals criticized this requirement. The professionals we met were aware that these categories are unsuitable for certain parental configurations. For example, a lawyer and mediator in her forties said: *“I find it awkward; it shouldn’t be up to me to decide who’s who”*. Overall, we find that while some lawyers and mediators correct the form manually, even before their clients arrive, others did not anticipate the problem, are indifferent to it, or feel powerless to change the categories.

This variability in professional postures toward LGBTQ+ people can be explained by the fact few professionals specialize in queer family law. The early opening of rights for same-sex partners has probably limited the development of such a segment within the bar. As a result, the practitioners we spoke with, although they express openness to same-sex parents, have few opportunities to work with them. Conversely, insofar as their legal situation does not distinguish them from straight parents at first glance, only a handful of the mothers we interviewed consulted professionals known to belong to the community or to be allies. Between professionals who express their openness to “*diversity*” without having the experience of working with them and same-sex parents who ask to be treated “*like everyone else*” but without being assimilated to straight people, disappointments are frequent. In fact, we see that these professionals may apply schemas constructed for heterosexual couples and therefore fail to perceive the issues specific to these female couples. We met with Cynthia, who conflicted with the birth mother regarding the physical custody of their baby and was very disappointed by her lawyer: *“It’s still archaic in those terms sometimes (...) They are used to working with straight couples. Often, they have difficulty adapting what they say.”*

Some practitioners question the gender conformity of these mothers, particularly for those who are perceived as less feminine than their ex-partners. Daisy, a queer mother of young twins in her 30s, who works in a LGBTQ+ community organization, says she presented as androgynous (a suit, short hair, etc.) in a mediation meeting. She felt targeted when the mediator asked which of the two would “*take on the male parenting role.*” *“You wouldn’t ask the father [if he’s going to have] a more feminine touch when [he’s] going to be with [his] child”*. The analogy between the father figure and the non-birth mother that was frequently reported by respondents appeared more likely to be activated if the non-birth mother’s gender expression deviates from the expectations of femininity. Melanie, a 32-year-old nursing assistant who agreed to joint physical custody with her ex-partner after mediation, says that the mediator began the meeting

by looking for which woman had carried their daughter: “*My ex [the birth-mother] said, “well, that’s so not important.” She didn’t want there to be a bias anywhere in this story.*”

However, in other cases, practitioners must position themselves in relation to a differentiation made by the mothers themselves. A family mediator in her 60s, whose training was in social work, explains that she once encountered a birth mother of two daughters aged 5 and 7 who signed emails addressed to her ex-partner with the words “*real mother*”, to which the latter would reply by signing “*real mother too*”. The mediator had to work separately with them to ensure that these behaviors stopped, as procreative asymmetry could not be used as an argument in their dispute. In contrast, other professionals we met felt that their mandate is to advocate for their client (regardless of the relevance of her claims and arguments). Some even validated, based on their own parenting experience, the primacy of birth motherhood.

### *Custody Litigation: Legal Equality and the Coparenting Norm Give Rights to Non-Birth Mothers, While Maintaining Heteronormative Standards*

As in the general population, persistent physical custody disputes leading to litigation are uncommon among the mothers interviewed. In the four cases of physical custody disputes documented by our interviews and the court records we consulted, the birth mother initiated litigation by seeking sole physical custody, while the other mother responded by seeking joint custody. Procreative asymmetry was a significant, but never unique, source of these disputes.

The activation of procreative asymmetry in the context of a legal dispute is related both to the young age of the children and to the existence of other forms of asymmetry between the two mothers. All four separations occurred when their children were ranging from a few months to four years of age. The recent nature of pregnancy and childbirth means that procreative work is still very present in birth mothers’ subjectivities and bodies, which could explain their demand for sole custody. By contrast, non-birth mothers reported a high level of involvement, from the beginning of the parental project (search for a donor on the Internet, visits to the fertility clinic, etc.) to the care of the baby (getting up at night, diapering, bathing, sharing parental leave, etc.). They argued that this involvement justified joint physical custody.

In contrast to their ex-partners, birth mothers appeared to strongly value biological motherhood. Cynthia, mentioned above, explains that she had been preparing to adopt for a long time, while her ex-partner was keen to be pregnant:

She wanted to have a child; she wanted to reproduce. (...) I did not want to carry [a child]. I was ready to adopt, but I didn’t want anything to do with having a child in my belly. (...) I don’t have this need to give my genes to someone.

Besides, mothers' asymmetry in representations and experiences of motherhood was also associated, in this sample, with different sexual trajectories. The non-birth mothers came out while teenagers and had one or more homosexual relationships before meeting the mother of their child(ren). Birth mothers' coming out came far later, as they sometimes waited until they were pregnant to introduce their partner (often their first lesbian relationship) to their parents. This late announcement may have complicated their relationship. In the end, the relationship was ended in all cases by the non-birth mother, and in three cases out of four because she had entered an intimate relationship with another woman - the origin of the breakup feeding their dispute.

The last asymmetry between these mothers is economic. In three out of four cases, the birth mother is also the one who earns the most money, and in two of these cases, the wage gap is significant: a professional mother earns 70,000 CAD compared to 57,000 CAD for her ex, a civil servant; a nurse earns 80,000 CAD compared to 40,000 CAD for her ex, a social worker. These birth mothers had more resources to hire expensive lawyers, as well as to ensure favorable living conditions and housing for their child(ren). In these cases, we observed that procreative asymmetry and socioeconomic inequalities accumulated to the detriment of the non-birth mother. Conversely, when the non-birth mother had the most resources, she was able to neutralize the potential conflict by securing her rights. Anne-Marie, a social worker who was in a relationship with a garage worker, says she had no fear in this regard: *"My ex knew I had a 98% average [in a family law] class, so she knew she couldn't pull a fast one on my custody rights"*. In contrast, in the most affluent couple in our sample, the non-birth mother, a physician earning 650,000 CAD who initiated the breakup, has far greater financial resources than the one who gave birth (a computer engineer earning 110,000 CAD). This physician initiated the breakup, wanting to live with another woman. She did not, however, ask for joint custody of their two children, believing that her heavy work schedule prevented her from doing so. Thus, it appears that to crystallize into legal disputes, custody conflicts must combine a double condition: on the one hand, the commitment of both mothers to daily motherhood, and on the other hand, economic, sexual, and procreative asymmetries between them.

Three of the four cases studied have gone to trial (in the fourth one, a settlement on joint physical custody was reached right before the trial). In two cases, the court ordered joint physical custody between the mothers. In the third, while joint physical custody was deemed preferable, as the parents lived 100 kilometers apart, sole custody was awarded to the birth mother while the other was granted extended access rights. Legal parentage was the first legal argument used to support shared parenting. In that case, the court record we reviewed show that

the judge based his decision on the former version of article 538.1 of the Civil Code of Québec, which establishes “the relationship of filiation between the child, the woman who gave birth to the child and, where applicable, the other party to the parental project”. He stated: “*The parties have created a common parental project from which their son was born, and it is therefore jointly that this parental project must be carried out in the best interests of this child*”, taking care to italicize the terms “common” and “jointly”. In the case of the nurse and social worker, the judge who arbitrated the custody dispute was even more explicit in his ruling:

Although it was the plaintiff who gave birth, and the sperm that allowed the twins to be born obviously did not come from the defendant, the fact remains that both parties are the legal parents of the twins, in the same capacity.

The reason this judge took the time to explain this was because the birth mother was justifying her claim to sole physical custody based on her procreative status. A family lawyer in her 30s, who has been involved in similar litigation, confirmed that birth mothers emphasize the fact that they have given birth and that they are “*the real mother*”. In the eyes of judges, she said, this notion “*doesn’t make sense*”. But if a client asks her to raise this argument in court despite her warnings, she feels she must defend it. A similar claim was also present in another one of the court records we reviewed. This custody order, regarding a teacher [Mom] and a flight attendant [Ma], states:

Mom [*birth mother*] portrays herself as the parent who has always been there for the children. She is the one who knows the older child inside and out and knows how he feels [*he has a mild form of autism*]. She makes him secure. When they lived together, she was the one who got up at night for the children. In fact, Ma [*the name given by the children to the non-birth mother*] would be away at least 15 days a month for work. She has no maternal instinct and would not have changed the diapers or bathed the children. (...) Moreover, she claims that Ma does not like to be called “mom” and that this is the reason why she is entitled to this title given to her naturally by the children.

Contesting the parenting capacity of the other parent, while claiming to be a “good parent” is a classic springboard for judicial disputes over custody (Biland, 2023). What is striking here is the overlap between the biological, practical, and symbolic dimensions of motherhood. In this birth mother’s claim, the non-birth mother does not possess a “maternal instinct”, she does not do as much parenting, and even that she is not a mother at all given that the children do not call her “mom”. We find that during the hearings, non-birth mothers often see their motherhood questioned. This is regularly done through an association or an assumed closeness to fathers, as Sandra [Mrs. S.], a 28-year-old daycare director and non-birth mother of a baby boy, recounts:

[*Her ex's lawyer*] said, "Judge, you know, Mrs. S. is like a ballpark at McDonald's: you like to go there for an hour or two, but after that, you're tired, and you want to go back home, back to your routine (...) Mrs. S. is really like a father. Why should she have more custody?" The judge was like, "Uh, do you have a problem with fathers?" (...) [*The lawyer replies*] "Judge, you know, fathers have much less custody." The judge said: "Well, get out of here, come to the 2000s, that's not the case anymore". [*The lawyer resumed*] "But you know, a father is not like a mother. And, you know, [*Sandra's ex*], she breastfed." [*The judge's response*] "But they can't both breastfeed. A father does not breastfeed. Is he less of a father?"

This lawyer/judge discussion highlights the reversal of the meaning given to the analogy between non-birth motherhood and fatherhood. While the lawyer seeks to use it as an argument to reduce the rights of the non-birth mother, the judge, on the contrary, uses it as a vehicle for her rights. Judges effectively mobilize the norm of coparenting to counter the hierarchization of mothers according to their procreative status. This norm was primarily intended to promote separated heterosexual fathers. In a period when the courts value fathers' rights, notably through joint physical custody, lawyers use them to recognize the rights of non-birth mothers. Cynthia, who is still at the beginning of the legal proceedings, is aware of the difficulty to escape from the analogy between non-birth motherhood and fatherhood and gendered assumptions of parental complementarity to get joint physical custody for her son carried by her former partner.

We [*she and her lawyer*] wanted to prove that the baby needed the "heart mother" [*non-birth mother*] as much as the "belly mother" [*birth mother*]. And these ties were parallel to daddy/mommy. They attached the heart mommy to the daddy.

But by linking the custody rights of non-birth mothers to fathers' rights, lawyers and judges risk perpetuating a conception of lesbian maternity based on the assumed complementarity of parental figures. Whether they are homosexual or not, not all women embody their womanhood and motherhood in the same way. But it is striking to note the assumptions and stereotypes related to femininity/masculinity and to procreation. In the ruling regarding the teacher [Mom] and the flight attendant [Ma], the latter appears as a quasi-paternal figure - which the judge sees as an advantage insofar as their two children are boys:

Ma... is athletic and loves hockey. What more could you ask for from the two boys? She is manual and the children like to be shown how to use tools. She tries to keep them surrounded by a male presence, considering that it is important for their balance. She is rigorous and able to supervise the children well, who feel safe in such an environment, whereas discipline leaves something to be desired at Mom's.

But even when assimilated to fathers, non-birth mothers do not cease to be held to gendered standards. Some joint custody orders between fathers and mothers assume that fathers will invest their parenting role once they get physical custody, even though most of the parenting and domestic work was done by women when they lived together (Biland, 2023). In contrast, women who became mothers with women do not seem to benefit from this indulgence, especially when their children are young. In a previously mentioned court record, while the birth mother feels that she has been “*the primary caregiver for the children since they were born,*” the judge recognizes the importance of the non-birth mother’s involvement, even adding that the non-birth mother would have wanted to breastfeed.

The evidence showed that during the entire pregnancy, the defendant [*non-birth mother*] helped and supported the plaintiff and was present at the time of childbirth. Immediately thereafter, the defendant took vacation time and part of her parental leave to help the plaintiff recover from the delivery. Even if she had not given birth to the twins, the defendant wanted to breastfeed them herself, which is possible by taking medication, which she did, but unfortunately it seems that it did not work.

In short, in legal reasoning, the role of non-birth mothers is ambivalent: it oscillates between a logic of difference and complementarity - based on fatherhood - and a logic of identity and similarity - according to which these mothers would be like birth mothers, devoting time and energy to the children and even seeking to mobilize their bodies and fluids in their maternal caring. In these arguments, non-birth motherhood is heteronomous, defined from a model that is both naturalized and gendered. It reveals the persistence of the heteronormative framing of sexual minority motherhood.

## **Discussion**

In Quebec, the legal recognition of both mothers since childbirth, their shared involvement in parental work, and their close positions on the social ladder are all factors that limit the inequalities that arise when they separate. As a result, their rate of joint physical custody is higher than in the general population (Reignier-Loilier, Baude & Rouyer, 2023).

Consequently, to some extent, these mothers embody the ideal of coparenting that is promoted by legal professionals and case law. However, the maternal role of non-birth mothers appears more fragile than that of birth mothers in the event of a separation, which could contribute to explain why they were more willing to take part in this project. Indeed, we find that recourse to ARTs and legal parentage equality do not erase the social narratives around birth motherhood. While some mothers may have internalized it, most respondents testified that

their relatives as well as the professionals they encountered assigned heightened value to it. In particular, the fact that one experienced pregnancy and giving birth appears to be a more valorized aspect of the biological bond than transmitting one's genes. These two experiences constitute procreative work, which is unequally assumed by each mother. Moreover, we find that sexual minority mothers are more likely to mobilize the norm of birth motherhood when ex-partners differ in their sexual trajectory, class position, etc.

Additionally, these mothers are also exposed to the presumption of heterosexuality, notably through binary administrative forms, as well as the interventions of certain professionals. Indeed, professional interventions can reinforce or challenge heteronormative standards. The practitioners we met approved of the advances in LGBTQ rights while still struggling to improve the way they inform and advise these clients about their rights. Given these professionals' widespread belief in the equal nature of the Quebec law, they were not "cautious, fearful, or mistrustful" as was observed among LGBT family lawyers in the US due to the "evolving nature of the law" (Baumle, 2018: 2064). However, as in the US in the late 2000s, the mothers we met notably noted that their "attorneys' knowledge surrounding LGBT family matters was less sophisticated than they anticipated" (Baumle & Compton, 2015: 63-65). Indeed, it appears that while their interventions are not as heterosexist as in the past, they nonetheless often remain heteronormative. This is particularly noticeable through verbal and written references to a father figure used to acknowledge non-birth mothers. These words further reinforce the standard of gendered parental complementarity.

### **Limitations and Future Directions**

Our main limitation is a result of our sample's composition. Indeed, while most of the mothers we met reported an overall positive experience of motherhood (granted that professionals recognized their rights), this is probably in part because their individual positions and their family settings depart only moderately from heterosexual standards. Noting that she is white, middle-class, and that her relationship with her then-partner has been stable prior to their breakup, Catherine, one of the mothers we interviewed, concludes: "My reality is like straight, (...) we're quite normative". Given that most of our interviewees were white, francophones, cisgender, and had a single partner, our knowledge of the experiences and particular challenges of all mothers who identify as LGBTQ+ remains limited. Consequently, to build upon this analysis, accounting for the experiences of sexual minority mothers who face several disadvantages (because they are transgender, disabled, non-white or have had their children outside conjugal cohabitation or with more than another coparent)

would be an important avenue for future research. Furthermore, more remains to be told about the experiences of sexual minority mothers in other jurisdictions, and how different legal contexts may influence these experiences.

Overall, this study of sexual minority mothers and legal practitioners confirms that legal recognition is a necessary, but not sufficient, condition for equality and inclusion (Leckey, 2015). The inexperience of many professionals on LGBTQ+ issues, the embeddedness of heteronormativity in day-to-day relations, as well as the permanence of heteronormative legal categories (McCabe, 2021) remain factors that set these families apart.

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