



Determining Parenthood in Cases of Assisted Conception: Provincial Abdication of Responsibility

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Questions of Parental Status

- In cases of assisted reproduction, how does the law sort out the rights and responsibilities of all of the parties involved in the conception, birth and care of children? What is the significance of: genetic contribution? gestational contribution? intention to parent? actual care-giving?
- Focus here will be on legal determination of parental status, which is important for:
 - identity: citizenship, kinship
 - assigning responsibility for the care of the child (“guardianship”, “custody” “access”): where will the child live? who will make decisions about the child? who can have a relationship with the child? (parental status not determinative, but a presumptive starting point)
 - obligation of financial support: child support

Provincial Jurisdiction

- No uncertainty about jurisdiction even before the reference: these issue of parental status fall within provincial jurisdiction over family law
- Federal government never attempted to legislate on these matters
- Yet majority of provinces have not reformed their laws of parentage to deal with cases involving assisted reproduction (only 3 QC, AB, PEI); many of existing laws anachronistic
- Why not? Something of a mystery:
 - jurisdictional uncertainty?
 - legal doctrines recognizing social parenthood mean less pressure to change laws of legal parenthood?
 - lack of concern for children rights? children not a political priority—leave it to the courts to sort out?

Impact of Reference

- federal laws respecting donor anonymity now invalid
- pressure on provinces to legislate at least re disclosure of donor information
- possibility of more identified donors will lead to more issues of who is a parent
- hopefully will see comprehensive provincial legislation, including parentage in cases involving assisted reproduction
- some models for new parentage legislation have emerged:
 - Uniform Law Conference of Canada (ULCC), *Uniform Child Status Act, 2010*
 - AG BC, *White Paper on Family Law Reform Act Reform, 2010*

Becoming a Parent in the Eyes of the Law: Three Paths

1. “Legal” parenthood assigned at birth: formal legal “status” “filiation”
2. Adoption: formal legal process to change formal legal status
3. Recognition as a social parent:
 - broad doctrine of “*in loco parentis*” (except in Quebec)
 - law will treat persons who have acted as parents as parents for the purposes of determining custody and access and child support; not full legal status
 - allows for recognition of more than 2 adults as child’s parents

Focus of reforms is on legal parenthood—to provide certainty of parental status at birth without resort to adoption

Legal Parentage

- many provincial laws date from the 1970s or 80s
- main concern to remove status of illegitimacy; base parental status on biology:

“a person is the child of his or her *natural* parents and his or her status as their child is independent of whether the child is born within or outside marriage.”

Ontario *Children’s Law Reform Act*, s. 1(1)
- assume main issue in dispute will be paternity
 - provide (rebuttable) presumptions of paternity based largely upon relationship (marriage, cohabitation) with mother and identification on birth registry (Vital Statistics legislation)

Challenges Posed By Assisted Reproduction

- Even biological parenthood is no longer clear: gestational vs. genetic
- Should biology (genetics, gestation) be given so much weight? should intention to parent be given more significance?
- Should families using assisted reproduction have to rely upon adoption to formalize parental status for child's intended care-givers? Is this discrimination against parents and children in families relying upon assisted reproduction?
- Can a child have more than two “legal” parents?

Existing Legal Framework

- Only 3 provinces have legislated in even a semi-comprehensive fashion to deal with issues of parenthood in cases of assisted reproduction (QC, AB, PEI)
- In remaining provinces
 - uncertainty
 - litigation
 - some courts willing to creatively interpret existing parentage laws to confer legal parenthood on intended or social parents
 - some successful charter challenges
 - unpredictable, especially when gamete donors identified
- Legislative reform clearly the better route

Models for Reform

ULCC, *Uniform Child Status Act, 2010* and BC White Paper
(some modifications of ULCC):

- the birth mother is always the child's legal mother, subject to change through adoption or surrogacy
- in cases where assisted reproduction is used (except surrogacy) the birth mother's partner (whether married or unmarried, opposite sex or same-sex) is recognized as the other legal parent unless there was no consent (there is a rebuttable presumption of consent)
- egg, sperm, or embryo donors are not parents merely by virtue of their donation of genetic reproductive material.

Possibility of More Than Two Legal Parents

- Both ULCC *Uniform Act* and BC *White Paper* contemplate that a child may have more than two legal parents in circumstances where prior to the assisted conception the parties agree in writing that they will all be the child's parents (eg. the birth mother, birth mother's partner, gamete donor)
- Builds on decision of Ont C.A. in A.(A.) v B.(B.) 2007 ONCA 2
 - court used *parens patriae* power to recognize a third legal parent—the mother's lesbian partner—in addition to the child's birth mother and his genetic father (a known sperm donor who continued to play a parental role in the child's life).

Surrogacy

- Provisions of ULCC Uniform Act and the B.C. White Paper differ in some details
- Are consistent in providing that:
 - surrogacy agreements are not enforceable
 - the birth mother may refuse to relinquish the child at birth and will then be recognized as the child's mother, whether arrangement is traditional surrogacy or gestational carrier
 - however if the birth mother does agree after the child's birth to relinquish her parental status and the child is placed in the care of the intended parents they should be recognized as the child's legal parents
- Recent Sask. decision declaring that gestational carrier is not the legal mother: W.J.Q.M. v A.M.A. 2011 SKQB 2011