



BACKGROUND NO. 3

Consultation Paper on Parentage under Part 3 of the Family Law Act: Summary

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The subject of the consultation paper

Conclusively determining who a child's parents are is an important part of family law. Parentage is the foundation of many aspects of a child's identity, such as family name and relationships, nationality, and cultural heritage. Parentage can also determine important legal rights and responsibilities, such as a child's inheritance rights.

In British Columbia, parentage is determined by rules set out in part 3 of the *Family Law Act*. Part 3 is the first comprehensive legal framework for parentage in British Columbia legislation. It has rules that govern the parentage of children conceived by sexual intercourse. It also applies to children conceived by assisted human reproduction, that is for example, with the assistance of a sperm, egg, or embryo donor, or a surrogate.

Part 3 addresses the legal consequences for parentage of the use of assisted human reproduction after a person's death. And it has a provision empowering the court to make an order declaring a person to be (or not to be) a parent, in cases involving disputes over or any uncertainty about a child's parentage.

Part 3 has been in force for a little longer than 10 years. Now is a good time to take stock about how its rules have been working out in practice.

The consultation paper is a full-scale review of part 3. While it finds that part 3 generally provides BC with a suitable legal framework for parentage, there is also room for improvement.

The consultation paper contains a blueprint for improving part 3. It sets out 34 detailed policy proposals, called tentative recommendations for reform.

The purpose of the consultation paper is to give the public an opportunity to comment on these tentative recommendations. BCLI is interested in hearing from all perspectives on its proposals for reforming the law of parentage. Public comment is an important part of the law-reform process. It can have a major impact on the development of a project's final recommendations.

To ensure that your comments are considered when the final recommendations for this project are being formulated, BCLI must receive them by **31 March 2024**.



About the Parentage Law Reform Project

BCLI began the Parentage Law Reform Project in late 2020. It is part of the second phase of the broader *Family Law Act* Modernization Project.

The project committee and the project's supporter

In carrying out this project, BCLI has had the assistance of the Parentage Law Reform Project Committee. This expert project committee has had 25 members over the course of the project. It is made up of leading lawyers, doctors, counsellors, academics, and public officials. The committee's role is to assist BCLI in developing recommendations for this project.

This project has been made possible by funding from the Justice Services Branch, Ministry of Attorney General for British Columbia.

Content of the consultation paper

The organization of the consultation paper

The consultation paper is organized into 11 chapters. The bulk of these chapters is taken up with discussing tentative recommendations for reform in the areas of part 3 of the *Family Law Act* which the committee identified as areas for improvement.

Introduction

The consultation paper begins with a brief introductory chapter, which sets out the subject and goals for this project and provides an overview of the chapters that follow.

Defining parentage, the development of parentage in BC law, and recent developments in other provinces

Chapter 3 addresses three topics. It's primarily intended to provide basic information for readers who are new to the law of parentage.

The chapter begins with a discussion of parentage in law. It defines the concept primarily by distinguishing it from other, related areas of law: parental responsibilities, adoptions, vital statistics, and regulating assisted reproduction.

Then, the chapter traces the development of the law of parentage in BC. It



begins with a brief survey of Indigenous views on parentage. Then it describes the enactment of legislation, leading up to part 3.

Finally, the chapter looks at developments in other provinces after the enactment of part 3. These developments provide some options for reforming part 3.

Parentage if no assisted reproduction

Chapter 4 begins a series of chapters that look at the substantive provisions of part 3 and make tentative recommendations for reform. This chapter considers the parentage of children conceived by sexual intercourse.

Part 3 contains a bright line between the parentage of children conceived by sexual intercourse (which is determined by genetic connections) and the parentage of children conceived by assisted reproduction (which is determined by intention to be a parent). The committee explores ways to break down this division by allowing intention to be the determinative criterion for some children conceived by sexual intercourse.

In this vein, the committee proposes that children conceived by sexual intercourse be allowed to have more than two parents, so long as all intended parents enter into a written pre-birth parentage agreement.

The committee also considers a proposed reform in which a perpetrator of a sexual assault would be denied parentage of a child born as a result of that assault, despite the genetic connection. The committee does not endorse this proposed reform.

Donors and parentage

The committee expanded the role of intention-based parentage by proposing that part 3 enable sperm donation by sexual intercourse, so long as there is a written pre-conception agreement setting out the intentions of the parties on parentage.

The committee tentatively recommends a number of fine-tuning adjustments to the definition of *donor* and provisions on donors and parentage.

Finally, the committee proposes that British Columbia end its system of donor anonymity by adopting the principle that donor--conceived people should have access to identifying information about their donors.



Parentage if surrogacy arrangement

This chapter tackles two discrete issues with parentage in surrogacy arrangements.

First, the committee considers a proposal to allow traditional surrogacy by way of sexual intercourse. This proposal would, in a sense, be a parallel to the committee's tentative recommendation to allow sperm donation by sexual intercourse. But the committee declines to endorse it, citing significant differences between surrogacy and sperm donation.

Second, the committee examines a gap in decision-making for children born by surrogacy, which may appear in the period between the child's birth and the surrogate's consenting to relinquish the child to the intended parents. The committee tentatively recommends a default rule (which could be modified in a surrogacy agreement) assigning decision-making responsibility to the intended parents in these circumstances.

Parentage if assisted reproduction after death

Part 3 contains rules for the parentage of so-called posthumously conceived children, who are conceived by the use of assisted reproduction after a person's death. These rules are more restrictive than the rules that prevail in part 3 for the parentage of all other children conceived by assisted reproduction.

The committee tentatively recommends that these rules be liberalized in three ways: (1) by eliminating the requirement that there must be a genetic connection between a posthumously conceived child and this child's parent; (2) by eliminating the requirement that the parents of a posthumously conceived child must be in a spousal relationship; (3) by allowing a posthumously conceived child to have more than two parents.

The committee also tentatively recommends that corresponding changes be made to the *Wills, Estates and Succession Act*.

Declarations of parentage by the court and parentage agreement

The committee thoroughly reviews the court's power to make an order declaring parentage. It decided that there was scope to clarify and expand this power.

First, the committee tentatively recommends that a simplified process be established for cases in which the parties: (1) all consent to the order, and (2) have complied with all statutory requirements. Second, the committee



tentatively recommends that legislation make it clear that the court retains the power to make an order declaring parentage under its common-law protective *parens patriae* jurisdiction. Third, the committee tentatively recommends removing the conditions (a dispute over or any uncertainty about a child's parentage) that currently apply to the court's statutory power to make an order declaring parentage.

The committee considers a declaratory provision setting out that the best interests of the child is a factor (or is the sole factor) in making an order declaring parentage. This would be a departure from the approach found in Canadian parentage legislation, and the committee declines to endorse it.

Finally, the committee tentatively recommends that part 3 does not need to be amended to require a witness to agreements, if independent legal advice is legislatively required.

Independent legal advice and counselling

The committee tentatively recommends that independent legal advice should be required for all parties to agreements required under part 3. These parentage agreements are complex and there may be significant vulnerabilities among their parties. In the committee's view, independent legal advice is the best safeguard against potential abuses.

The committee wrestles with a potential similar requirement for psychosocial counselling. While the committee acknowledges the value of counselling, it declines to endorse legislation making it mandatory in all cases.

Language, definitions, and list of purposes

To allay concerns about the legislation excluding trans and non-binary people and to better align it with government policy, the committee tentatively recommends redrafting part 3 in gender-neutral language.

The committee considers whether part 3 would benefit from a provision declaring the part's legislative purposes. The committee declines to endorse this proposal.

Conclusion

The consultation paper ends with a brief concluding chapter, summing up the tentative recommendations.



Conclusion

BCLI encourages readers to respond to the consultation paper. Readers' responses assist the committee in crafting the final recommendations for reform for the Parentage Law Reform Project.