BRITISH COLUMBIA LAW INSTITUTE

Consultation Paper on Parentage:

A Review of Part 3 of the Family Law Act

Prepared by Review of Parentage under Part 3 of the *Family Law Act* Project Committee

February 2024

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The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its purposes are to:

- promote the clarification and simplification of the law and its adaptation to modern social needs,
- promote improvement of the administration of justice and respect for the rule of law, and
- promote and carry out scholarly legal research.

This project was made possible with the sustaining financial support of the Law Foundation of British Columbia and the Ministry of Attorney General for British Columbia. The Institute gratefully acknowledges the support of the Law Foundation and the Ministry for its work.

Parentage Law Reform Project Committee

The Parentage Law Reform Project Committee contains experts in fertility and family law, medicine, counselling, and academia. The committee's mandate is to assist BCLI in developing recommendations to reform part 3 (parentage) of the *Family Law Act*. These recommendations will be set out in the project's final report, which is planned to be published in 2024.

The members of the committee are:

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BCLI also wishes to acknowledge:

Bruce Klette- liaison to the committee
(Director, Vital Statistics Agency of BC)

Dr. Rachel Olson
(President and Director, The Firelight Group)

For more information, visit us on the World Wide Web at
https://www.bcli.org/project/review-of-parentage-under-part-3-of-the-family-law-act/

Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the tentative recommendations set out in this consultation paper, but it is not necessary. General comments on parentage under part 3 of the *Family Law Act* are also welcome.

A helpful way to submit a response is to use a response booklet. You may obtain a response booklet by contacting the British Columbia Law Institute or by downloading one at **https://www.bcli.org/project/review-of-parentage-under-part-3-of-the-family-law-act/.** You do not have to use a response booklet to provide us with your response.

Responses may be sent to us in any one of three ways—

by email:	consultations@bcli.org
by online survey:	link from https://www.bcli.org/project/review-of-parentage-under-part-3-of-the-family-law-act/

If you want your response to be considered by us as we prepare our report on parentage, then we must receive it by **31 March 2024**.

Privacy

Your response will be used in connection with the Parentage Law Reform Project. It may also be used as part of future law-reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name, title, and organization in the final report for the project, unless they expressly advise us to keep this information confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: https://www.bcli.org/privacy.

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EXECUTIVE SUMMARY

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 a child's parentage or any uncertainty about it.

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.

This 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.

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

The purpose of this 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 about a child's parentage or any uncertainty regarding it) 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 this consultation paper. Readers' responses assist the committee in crafting the final recommendations for reform for the Parentage Law Reform Project.

Chapter 1. Introduction

Why Is BCLI Consulting with the Public on Parentage?

18 March 2013 was a landmark date for family law in British Columbia. On this day the *Family Law Act* came into force.[1]

This act was the product of a major, multi-year law-reform effort. That effort featured contributions from government and non-government legal organizations in BC.[2]

The *Family Law Act* remade vast swathes of family law in this province. Property division on the breakdown of a spousal relationship, dispute resolution (favouring out-of-court settlements), and protection orders were among the areas seeing major reforms.[3]

Parentage, the subject of this consultation paper, was also fundamentally reformed by the advent of the *Family Law Act*. These reforms had two main features.

First, the *Family Law Act* dealt with parentage in a comprehensive way. Prior to the act, BC's law on parentage was scattered and disconnected, found in a handful of provisions in various acts and a few leading court decisions. The *Family Law Act* gathered the law into a comprehensive, cohesive legal framework.

1. SBC 2011, c 25.
2. The *Family Law Act* implemented recommendations from four BCLI reports. See *Report on the Parental Support Obligation in Section 90 of the Family Relations Act*, Report 48 (2007), online: <bcli.org/publication/48-report-parental-support-obligation-section-90-family-relations-act/>; *Report on Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*, Report 44 (2006), online: <bcli.org/publication/44-pension-division-marriage-breakdown-ten-year-review-part-6-family-relations-ac/>; *Report on Appointing a Guardian and Standby Guardianship*, Report 30 (2004), online: <bcli.org/publication/30-report-appointing-guardian-and-standby-guardianship/>; *Report on the Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings*, Report 1 (1998), online: <bcli.org/publication/1-report-need-uniform-jurisdiction-and-choice-law-rules-domestic-property-proceed/>.
3. See British Columbia, Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (July 2010) at i–iii [*Proposals for a new Family Law Act*].

Second, the *Family Law Act* was the first BC statute to deal with the parentage of children conceived by assisted human reproduction. From the birth of the first child conceived in British Columbia by in-vitro fertilization (in 1983)[4] to the coming-into-force of the *Family Law Act* (in 2013), British Columbia's legislation had no provisions that addressed the parentage of the ever-increasing number of children conceived through advances in medical technology. It was a major gap in the law, which courts struggled to fill. The *Family Law Act* filled it with modern provisions.

How have these reforms fared in practice? Does BC's legal framework on parentage require updates? Are there lessons that have been learned in practice that should be applied to the *Family Law Act*? Are there developments in other jurisdictions that should be considered for BC? The ten-year anniversary of the *Family Law Act*'s coming into force, a date which has just passed, is a good time to take stock and reflect on these questions.

About the Parentage Law Reform Project

Beginning project as part of Family Law Act Modernization

BCLI began planning for the project in summer 2020, when it was approached by the Ministry of Attorney General. The ministry was, at that time, planning for the second phase of its broad review of the *Family Law Act*.[5]

BCLI had participated in the first phase of this review, by examining pension division under part 6 of the *Family Law Act*.[6] As the final report for that project was being completed,[7] BCLI agreed to begin a new project, which would review parentage under part 3 of the act.

4. See Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol 1 (Ottawa: Minister of Government Services Canada, 1993) at 508.

5. See British Columbia, Ministry of Attorney General, "Family Law Act Modernization" (last visited 3 August 2023), online: *govTogetherBC* <engage.gov.bc.ca/govtogetherbc/engagement/family-law-act-phase-1/>. Phase one of this multi-year project has wrapped up, resulting in targeted changes to the *Family Law Act*. See *Family Law Amendment Act, 2023*, SBC 2023, c 12.

6. See *supra* note 1, ss 110–145.

7. See *Report on Pension Division: A Review of Part 6 of the Family Law Act*, Report 91 (2021), online: <bcli.org/publication/report-on-pension-division-a-review-of-part-6-of-the-family-law-act/>.

Parentage Law Reform Project Committee

As part of the project's early-stage planning, BCLI formed a committee of experts in fertility law and parentage matters. This 18-person committee includes many of the leading lights in fertility law, family law, and assisted reproduction in British Columbia, including members of the legal and medical professions, as well as representatives from government and academia.[8]

The project committee has played a leading role in helping BCLI to carry out this project. The committee has assisted BCLI in issue identification, consideration of options for reform, and development of proposals.

Committee meetings at the outset of the project focused on organization and issue identification

The committee began meeting in December 2020. Early committee meetings were focused on the organization of the project and on identifying issues for reform for inclusion on the project's work plan.

The committee also took time during its meetings over the course of winter and spring 2021 to consider potential new and emerging issues in the law of parentage. These discussions were based on the widely noted phenomenon of the law trailing developments in medical technology and social attitudes on the construction of families.[9]

Early committee meetings grappled with forming a common understanding of social dynamics and assisted reproduction. The committee closely examined the roles of professionals in this process—including lawyers, doctors, counsellors, and government officials—and how these professionals interact with patients and families.

The committee considered at length how the language of and assumptions built into part 3 of the *Family Law Act* may be alienating to transgender and non-binary people. This discussion also tackled the implications of a recent BC court case

8. See, below, appendix C to this consultation paper, at 273–280, for biographies of project-committee members.

9. See e.g. New Zealand Law Commission, *New Issues in Legal Parenthood*, Report No 88 (2005) at xv ("[t]he legal status of parent–child relationships has not kept pace with increasing diversity in family form arising from social change and new birth technologies").

involving a polyamorous family, which acknowledged the failure of part 3 to accommodate polyamory.[10]

These early meetings set the tone for the committee's approach for identifying issues for reform. The committee realized that a complete overhaul of parentage law and part 3 wasn't called for in this project. Instead, the focus should be on addressing targeted issues. In particular, there was a pressing need to ensure that the part applied equally and comprehensively to all children.

Policy development, consideration of options, and tentative recommendations for reform

After these initial committee meetings were complete, the committee began to proceed through its work plan. It largely kept to a monthly meeting schedule and worked its way through the major provisions of part 3 as well as emerging areas of concern.

These meetings occurred from fall 2021 to spring 2023. After they were complete, the committee had formulated 34 tentative recommendations for reform, which make up the core of this consultation paper.

About the Public Consultation

Summary of tentative recommendations

Tentative recommendations are meant to be highly specific statements of policy. In many cases, they propose detailed changes in wording to a provision. They are intended to give the public the clearest and fullest picture of potential reforms. In this consultation paper, tentative recommendations mainly propose specific changes to part 3 of the *Family Law Act*—or, in a handful of cases, record the committee's decision to propose remaining with the status quo in the face of a proposed reform.

10. See *British Columbia Birth Registration No 2018-XX-XX5815*, 2021 BCSC 767 [*Birth Registration Case*]. In this case, "[t]he petitioners, Olivia, Eliza, and Bill, have been living together in a committed polyamorous relationship since 2017. In the fall of 2018, the petitioners had their first child, Clarke. Eliza and Bill are Clarke's biological parents and therefore, by reason of provisions in the *Family Law Act*, are the only legal parents named on Clarke's birth registration. The petitioners seek a declaration that Olivia is Clarke's third legal parent and that his birth registration be amended accordingly" (*ibid* at paras 1–2, Wilkinson J) [citation omitted]. In considering the application for a declaration of parentage, the court made the point that "[p]ut bluntly, the legislature did not contemplate polyamorous families" in enacting part 3 (*ibid* at para 68).

The committee's mandate is to review part 3 of the *Family Law Act* and to recommend such reforms as it determines to be necessary. As readers will see, the committee's proposals don't call for a fundamental reworking of part 3. Instead, the committee is proposing focussed reforms that mainly build on the existing legal framework in part 3.

The bulk of the committee's attention focused on a handful of areas in part 3. In particular, the committee examined the rules for parentage in cases in which assisted reproduction isn't used (because the child has been conceived by sexual intercourse). These rules were recorded in part 3, but they didn't receive much substantive attention when part 3 was developed. At that time, the government was more focused on developing a framework for parentage of children conceived through assisted reproduction. As will be seen, there are aspects of this new framework that could be usefully integrated into the rules for parentage of children conceived by sexual intercourse.

The committee also paid particular attention to expanding and clarifying the rules applicable when a donor (sperm, egg, or embryo) has been used to conceive a child.

Finally, one of the major reforms of part 3 was to create a process for determining parentage that mostly functions outside the court. But a residual jurisdiction for the court was retained in part 3. The committee has a number of proposals to refine and clarify that court jurisdiction.

The chapters of this consultation paper largely track the substantive sections part 3:

- parentage if no assisted reproduction;
- donors and parentage;
- parentage if surrogacy arrangement;
- parentage if assisted reproduction after death;
- court declarations and orders;
- independent legal advice and counselling; and
- language and interpretation.

Issues under these subjects are taken up in a consistent fashion. First, some background information about the development of the current law applying to the subject is set out. Background information on recent reforms in other Canadian jurisdictions is also discussed. This information is followed by a brief statement of the issue for reform. Then, there is discussion of various options that the committee

considered in addressing the issue for reform. This discussion is largely taken up in noting the advantages and disadvantages of adopting an option for reform. Finally, the committee makes its tentative recommendation for reform of the issue.

Invitation to respond

BCLI invites all members of the public to comment on the tentative recommendations for reform in this consultation paper. Responses agreeing and disagreeing with tentative recommendations are equally valued, as BCLI wishes to hear from all perspectives on its proposed reforms. In addition to comments on specific tentative recommendations, BCLI will also accept general comments on parentage under part 3 of the *Family Law Act*.

Responses must be in writing and may be sent to BCLI by a variety of means.[11] If you want your response to be considered as BCLI develops the final recommendations for this project, then BCLI must receive it by **31 March 2024**.

11. See, above, at the unnumbered fourth page of this consultation paper, headed "Call for Responses," for more detail on how to respond to this consultation paper.

Chapter 2. Tentative Recommendation Summaries

Child conceived by sexual intercourse

More than two parents

Should part 3 of the Family Law Act be amended to provide for more than two parents for a child conceived by sexual intercourse?

What the law says now	What the committee is proposing
In brief: • British Columbia's (BC) current law limits the number of parents for a child conceived by sexual intercourse to two. More than two parents is only provided for with assisted reproduction. • If a child is conceived by sexual intercourse, the "birth mother" and "biological father" are automatically the legal parents. Text of the section: ***Parentage if no assisted reproduction*** **26** (1) On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father. (2) For the purposes of this section, a male person is presumed, unless the contrary is proved or subsection (3) applies, to be a child's biological father in any of the following circumstances: …	In brief: • The legislation should allow for more than two parents where a child is conceived through sexual intercourse. Text of the tentative recommendation: Part 3 of the *Family Law Act* should be amended to create a provision allowing for more than two parents where a child is conceived by sexual intercourse.

To see the text of the presumptions- Text of s. 26.	

Why this change?
In brief: • This change decreases barriers to creating a family, by not requiring assisted reproduction for multiparent families. • It also keeps pace with recent BC court decisions, and legislative amendments in other provinces. • Further, this aligns with values underpinning the *Family Law Act*, including providing out of court options for resolution. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces		
Saskatchewan	**Ontario**	**Manitoba**
In brief: • Up to four individuals may be legal parents, subject to certain requirements, namely, a pre-conception agreement.	• Up to four individuals may be legal parents, subject to certain requirements, namely, a pre-conception agreement.	• The legislation limits the number of legal parents to two.

Pre-conception or pre-birth agreement

Should a provision allowing for more than two parents for a child conceived by sexual intercourse require a pre-conception or a pre-birth agreement?

What the law says now	What the committee is proposing
In brief: • As shown above, only two parents are allowed for when using conception by sexual intercourse. • For conception by assisted reproduction, more than two parents are allowed if a pre-conception agreement is made. Text of the section: Text of s. 26.	In brief: • A pre-birth agreement (as opposed to pre-conception) should be required for more than two parents where a child is conceived through sexual intercourse. Text of the tentative recommendation: A provision allowing for more than two parents where a child is conceived by sexual intercourse should require a pre-birth agreement.

Why this change?
In brief: • Unlike assisted reproduction, where pregnancy is planned and roles can be clarified before conception, this change contemplates situations where parties' roles do not become clear until after conception (e.g. unexpected pregnancy in multi-parent family). • It provides contractual protections where parties may change their minds or attempt to avoid responsibilities post birth. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces	
Saskatchewan	**Ontario**
In brief: • Up to four individuals may be legal parents (regardless of method of conception), subject to certain requirements, namely, a pre-conception agreement.	• Up to four individuals may be legal parents (regardless of method of conception), subject to certain requirements, namely, a pre-conception agreement.

Parties to the agreement

Who should be required to be a party to the pre-birth agreement?

What the law says now	What the committee is proposing
In brief: • As shown above, the law currently does not allow for parentage by agreement where a child is conceived by sexual intercourse. • For conception by assisted reproduction, the preconception agreement for multiple parents includes either i) intended parent(s) and birth mother or ii) birth mother, their spouse (if applicable) and donor(s). Text of the section: Text of s. 26.	In brief: • A pre-birth agreement should include: ○ The birth parent; ○ The spouse of the birth parent; ○ The person whose sperm is used to conceive the child; ○ Any other person who intends to be a parent. Text of the tentative recommendation: A provision allowing for more than two parents where a child is conceived by sexual intercourse should require, at a minimum, that the following people must be parties to the pre-birth agreement: (a) the intended birth parent, who is not a surrogate; (b) the spouse of the intended birth parent;

	(c) the person whose sperm is used to conceive the child, if that person is not a donor and is not the same as the party listed at (b); (d) any other person who intends to be a parent to the child.

Why this change?
In brief: • This considers and requires input from the parties most likely to be impacted by the birth of a child. Both people who are genetically involved in the conception of the child must be in agreement before any additional parent is added. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces	
Saskatchewan	**Ontario**
In brief: • Up to four individuals may be legal parents (regardless of method of conception), subject to certain requirements, namely, a pre-conception agreement. The legislation sets out who must be party to the agreement in various circumstances.	• Up to four individuals may be legal parents (regardless of method of conception), subject to certain requirements, namely, a pre-conception agreement. The legislation sets out who must be party to the agreement in various circumstances.

Who should be parents

Who should be made a parent through the pre-birth agreement?

What the law says now	What the committee is proposing
In brief:	In brief: • Under a pre-birth agreement, the following parties should have to be parents:

• As shown above, the law currently does not allow for parentage by agreement where a child is conceived by sexual intercourse. • For conception by assisted reproduction, parents can be either i) intended parent(s) and birth mother or ii) birth mother, their spouse (if applicable) and donor(s). Text of the section: Text of s. 26.	○ The birth parent, if they are not a surrogate; ○ The person whose sperm is used to conceive the child, unless there is a pre-conception agreement stating that they are not a parent; ○ Any other person who intends to be a parent. Text of the tentative recommendation: A provision allowing for more than two parents where a child is conceived by sexual intercourse should provide that the child's parents are: (a) the intended birth parent, who is not a surrogate; (b) the person whose sperm is used to conceive the child, unless the parties made a pre-conception agreement under the section for sperm donation by sexual intercourse, (c) the other parties to the pre-birth agreement who agree to be parents of the child.

Why this change?
In brief: • This allows for flexibility for people to decide who will become a parent. • It also provides protections against using this section to get around surrogacy or donor rules. • Finally, it guards against parties trying to avoid responsibility by contracting out of parentage after conception (that is, a person can opt in after conception, but can only opt out before conception).

To learn more, go to the In Depth on this Topic

Number of parents

Should a provision allowing for more than two parents for a child conceived by sexual intercourse limit parents to a specific number?

What the law says now	What the committee is proposing
In brief: • As shown above, the law currently does not allow for more than two parents where a child is conceived by sexual intercourse. Text of the section: Text of s. 26.	In brief: • The legislation should not limit how many individuals can become parents when a child is conceived through sexual intercourse. Text of the tentative recommendation: A provision allowing for more than two parents where a child is conceived by sexual intercourse should not limit the number of potential parents.

Why this change?
In brief: • This change provides flexibility and inclusivity to different family models. • It also avoids arbitrary limits. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces	
Saskatchewan	**Ontario**
In brief: • The legislation limits the number of potential parents to four individuals.	• The legislation limits the number of potential parents to four individuals.

Perpetrator of sexual assault

Should part 3 be amended to prevent a perpetrator of sexual assault from becoming a parent to a child born through the perpetration of that assault?

What the law says now	What the committee is proposing
In brief: • Currently, if a child is conceived through sexual assault, the same rules apply as for all children conceived through sexual intercourse. • Part three of the *Family Law Act* does not address violence or sexual assault. Text of the section: Text of s. 26.	In brief: • No change—parentage legislation is not the best place to deal with this issue. Text of the tentative recommendation: Part 3 of the *Family Law Act* should not be amended to deny a perpetrator of sexual assault parentage to a child conceived through that sexual assault.

Why no change?
In brief: • The committee expressed concerns around penalizing individuals where no conviction has been made. • There were additional concerns around provincial versus federal powers to make legislation on this topic. • *Family Law Act* sections about guardianship, parenting time and parenting responsibilities can be used instead.

To learn more, go to the In Depth on this Topic

Law reform in another province
Quebec
In brief: • After the committee had considered this issue, and as this consultation paper was being drafted, Québec amended its parentage legislation to allow for a court to order that a perpetrator of a sexual assault is not a parent of a child born as the result of that sexual assault.

Sperm donation by sexual intercourse

Should part 3 allow sperm donation by sexual intercourse?

What the law says now	What the committee is proposing
In brief: • Sperm donation is only available for children conceived by assisted reproduction. • If a child is conceived by sexual intercourse, the "birth mother" and "biological father" are automatically legal parents, even if a donation was intended. Text of the section: ***Parentage if no assisted reproduction*** **26** (1) On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.	In brief: • If – and only if – a pre-conception written agreement is made, then the sperm provider can be a donor not a legal parent. Text of the tentative recommendation: Part 3 of the *Family Law Act* should be amended by adding a provision that permits sperm donation by sexual intercourse where a written pre-conception agreement is in place.

(2) For the purposes of this section, a male person is presumed, unless the contrary is proved or subsection (3) applies, to be a child's biological father in any of the following circumstances: … To see the text of the presumptions- Text of s. 26.	

Why this change?
In brief: • This change decreases barriers to creating a family by not requiring assisted reproduction. • A pre-conception agreement requires people involved in conception to clarify their intentions before conception. It also avoids coercion after conception to avoid responsibility, as well as future disputes. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces		
Saskatchewan	**Ontario**	**Manitoba**
In brief: • "Insemination by a sperm donor" can include via sexual intercourse if there is an agreement in writing before the attempt to conceive.	• Similarly, "insemination by a sperm donor" can include via sexual intercourse if there is an agreement in writing before the child is conceived.	• By contrast, sperm donation cannot be via sexual intercourse. In that case, legal parents are the birth parent and the person whose sperm resulted in conception.

Donors

Definition

Should the definition of "donor" in part 3 of the Family Law Act be amended to align with the definition in the Assisted Human Reproduction Act?

What the law says now	What the committee is proposing
In brief: • The provincial *Family Law Act* discusses donors with respect to who is and is not a parent. • The federal *Assisted Human Reproduction Act* addresses donors with respect to whose consent is required to use gametes (the person whose body the sperm or eggs came from) and embryos (the person(s) the embryos were created for, with conditions). Text of the section (*Family Law Act*): ***Interpretation*** **20** (1) "donor" means a person who, for the purposes of assisted reproduction other than for the person's own reproductive use, provides (a) his or her own human reproductive material, from which a child is conceived, or (b) an embryo created through the use of his or her human reproductive material.	In brief: • It does not make sense to align the two definitions. Text of the tentative recommendation: Part 3 of the *Family Law Act* should not be amended to align the definition of "donor" with the *Assisted Human Reproduction Act.*

Why no change?
In brief: • The federal and provincial laws have very different purposes. • As a result, the two laws have very different ideas about what a donor is. • For these reasons, it does not make sense to align the two definitions. To learn more, go to the In Depth on this Topic

Definition for embryos

Should the definition of "donor" in part 3 of the Family Law Act be amended for embryo donors by removing the reference to the embryo being created through the use of the donor's human reproductive material?

What the law says now	What the committee is proposing
In brief: • A person is only a "donor" of an embryo if they provided genetic material to create the embryo, that is, they must have a genetic connection to the embryo. Text of the section: Text of s. 20 & 24.	In brief: • The law should not require a genetic connection to an embryo in order to preserve donor status. Text of the tentative recommendation: The definition of "donor" in section 20 of the *Family Law Act* should be amended to eliminate the requirement that an embryo donor must have a genetic connection to the donated embryo by striking out "created through the use of his or her human reproductive material."

Why this change?
In brief: • Embryos created for people do not always include their genetic material (for example, embryos created for a couple may include eggs from one of them but sperm from a third-party donor). • The current wording creates a nuanced distinction that has the potential to create litigation. • Other provinces do not require a genetic connection to an embryo for a person to be a donor. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces		
Saskatchewan	**Ontario**	**Manitoba**
In brief: • Like Ontario, Saskatchewan's parentage legislation doesn't contain a definition of donor. Instead, one of Saskatchewan's "rules of construction" (i.e., interpretation) describes an embryo donor in language similar to Ontario's legislation.	• Ontario's parentage legislation does not contain a definition of donor, but its substantive provisions on donors and parentage describe embryo donors without BC's reference to the embryo being "created through the use of his or her [i.e., the donor's] human reproductive material."	• Manitoba's definition does not place any qualifying language on embryo donors. But a subsequent provision in Manitoba's act imposes a genetic-connection requirement similar to the one found in British Columbia's definition of donor.

Contact

Should section 24 provide for a donor to have contact with the child, even though the donor isn't a parent?

What the law says now	What the committee is proposing
In brief: • The *Family Law Act* provides that a donor is not a parent, but does not specifically address whether a donor and parent(s) can make a written agreement about contact with a child. • The general contact sections of the *Family Law Act* allow any child's guardian(s) (generally the parent(s)) to make an agreement for a non-guardian to have contact with a child. Text of the section: ***Agreements respecting contact*** **58** (1) A child's guardian and a person who is not a child's guardian may make an agreement respecting contact with a child, including describing the terms and form of contact. (2) An agreement respecting contact with a child is binding only if the agreement is made between all of a child's guardians having parental responsibility for making decisions respecting with whom the child may associate. (3) A written agreement respecting contact with a child that is filed in the	In brief: • There should not be a specific section about contact agreements between parents and a donor. Text of the tentative recommendation: The *Family Law Act* should not be amended to allow for parents and a donor to draft an agreement for contact with a child.

court is enforceable under this Act as if it were an order of the court. (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting contact with a child if satisfied that the agreement is not in the best interests of the child. Text of s. 20 & 24.	

Why no change?
In brief: • There are other mechanisms already in the *Family Law Act* for people – which could include a donor, but also others – to make an agreement about contact of a child. • It is important to keep donor's non-parent status clear in order to protect and respect the intentions of both sides. Specifically, talking about donor contact could confuse donor status. To learn more, go to the In Depth on this Topic

Pre-conception agreement

Should section 24 be amended to require a written pre-conception agreement as part of the donor process?

What the law says now	What the committee is proposing
In brief:	In brief: • For assisted reproduction, donors should not be required to enter into a pre-conception agreement.

• Currently, the default for donors in assisted reproduction is that they are not parents. A pre-conception agreement is not required to confirm that they are not parents. Text of the section: Text of s. 20 & 24.	Text of the tentative recommendation: Part 3 of the *Family Law Act* should not be amended to require a pre-conception agreement as part of the donor process for children conceived through assisted reproduction.

Why no change?
In brief: • Unknown donors (for example, donors via sperm banks) may be difficult to locate, and the need for an agreement may discourage donation. Donors at sperm and egg banks are informed and sign forms that they will not be a parent. • While it is often recommended that known donors make a written agreement to confirm intentions and expectation, requiring a pre-conception agreement would confuse the default that a donor is not a parent. Known donors also have mechanisms already in place to become a parent under the *Family Law Act*. To learn more, go to the In Depth on this Topic

Conception via assisted reproduction (other than surrogacy)

Should section 27 be amended to require a standardized form for spouses of birth parents to demonstrate non-consent to parentage of a child conceived through assisted reproduction?

What the law says now	What the committee is proposing
In brief:	In brief:

- The *Family Law Act* currently states that the parents to a child who is conceived by assisted reproduction are the birth parent, and the birth parent's spouse.
- The birth parent's spouse can decide not to be a parent. But there must be evidence that they did not (or withdrew) consent to be a parent prior to conception.
- There is no standardized form or requirement for documenting non-consent.

Text of the section:

Parentage if assisted reproduction

27 (1) This section applies if

(a) a child is conceived through assisted reproduction, regardless of who provided the human reproductive material or embryo used for the assisted reproduction, and

(b) section 29 [parentage if surrogacy arrangement] does not apply.

(2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's birth mother is the child's parent.

(3) Subject to section 28 [parentage if assisted reproduction after death], in addition to the child's birth mother, a person who was married to, or in a

- The *Family Law Act* should include an optional form to document non-consent to become a parent.

Text of the tentative recommendation:
Part 3 of the *Family Law Act* should be amended to add an optional form which could be used for spouses of birth parents to demonstrate non-consent to parentage of a child conceived through assisted reproduction.

marriage-like relationship with, the child's birth mother when the child was conceived is also the child's parent unless there is proof that, before the child was conceived, the person (a) did not consent to be the child's parent, or (b) withdrew the consent to be the child's parent.	

Why this change?
In brief: • A set form provides clarity where a party does not want to be a parent. • Making the form optional means that people are not penalized for not completing it, and can make a more customized document if they wish. To learn more, go to the In Depth on this Topic

Donor conceived children, access to information

Should British Columbia enact legislation enabling donor-conceived people to have access to identifying information about their donors?

What the law says now	What the committee is proposing
In brief: • The *Family Law Act* does not have any provisions on donor conceived people's right to information about their genetic origins. Nor does any other BC or federal legislation. Text of the section:	In brief: • As a policy statement, the committee believes that a law should be made to allow for donor conceived people to obtain information about their donor. Text of the tentative recommendation:

There are no provisions on donor information.	British Columbia should enact legislation enabling donor-conceived people to have access to identifying information about their donors.

Why this change?
In brief: • Many international jurisdictions have moved to allowing access to donor information. • Adoption legislation in BC has moved to a more open system, whereby the default is that adult adoptees have the right to access information about their birth parent(s). • Donor conceived people experience harms from the current anonymity regime. To learn more, go to the In Depth on this Topic

Law reform in another province
Quebec
In brief: • After the committee had completed its review of this issue, Québec enacted legislation allowing donor-conceived people to have access to specified identifying information about their donors.

Surrogacy

Surrogacy by sexual intercourse

Should part 3 permit conception by sexual intercourse in a traditional surrogacy arrangement?

What the law says now	What the committee is proposing
In brief: • The *Family Law Act* does not allow for surrogacy by sexual intercourse.	In brief:

• Traditional surrogates are individuals who carry the child, and act as an egg donor. • If a child is conceived by sexual intercourse, the "birth mother" and "biological father" are automatically the legal parents. Text of the section: ***Parentage if no assisted reproduction*** **26** (1) On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father. (2) For the purposes of this section, **a male person is presumed, unless the contrary is proved or subsection (3) applies, to be a child's biological father in any of the following circumstances** [emphasis added]… Text of s. 26.	• The *Family Law Act* should not allow sexual intercourse as a conception method for traditional surrogacy arrangements. Text of the tentative recommendation: Part 3 of the *Family Law Act* should not be amended to allow for conception by sexual intercourse for traditional surrogacy.

Why no change?
In brief: • Surrogacy by sexual intercourse would have more opportunity for exploitation. • Surrogacy is more than egg donation. Thus, even though the committee recommended sperm donation by sexual intercourse, surrogacy is not equivalent. To learn more, go to the In Depth on this Topic

Decision-making after birth

Should part 3 contain a provision addressing decision-making for the child after the child is born but before the surrogate provides written consent to relinquish the child to the intended parents?

What the law says now	What the committee is proposing
In brief: • Surrogates must provide written consent to surrender the child after birth. • As a result, parentage is not finalized until after this consent is given. • This creates a gap between the birth of the child, and the finalization of parentage. • During this time, it is unclear who can make decisions for the child. Text of the section: ***Parentage if Surrogacy Arrangement*** **29** (1) In this section, "surrogate" means a birth mother who is a party to an agreement described in subsection (2). (2) This section applies if, (a) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and (b) the agreement provides that the potential surrogate will be the birth mother of a child conceived	In brief: • The *Family Law Act* should clearly state that the intended parents have decision making power for a child during the period between birth and finalizing parentage. Text of the tentative recommendation: Part 3 of the *Family Law Act* should be amended to create a provision assigning full decision-making power for the child to the intended parents for the period between birth and the granting of consent by the surrogate to relinquish the child, unless otherwise provided for in the surrogacy agreement.

through assisted reproduction and that, on the child's birth, (i) the surrogate will not be a parent of the child, (ii) the surrogate will surrender the child to the intended parent or intended parents, and (iii) the intended parent or intended parents will be the child's parent or parents. (3) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (2), a person who is an intended parent under the agreement is the child's parent if all of the following conditions are met: (a) before the child is conceived, no party to the agreement withdraws from the agreement; (b) after the child's birth, (i) **the surrogate gives written consent to surrender the child to an intended parent or the intended parents** [emphasis added], and (ii) an intended parent or the intended parents take the child into the intended parent's or parents' care. … Text of s. 29.	

Why this change?
In brief: • While this issue is often covered in surrogacy agreements, it may not always be. • Medical emergencies do not allow for time to make court applications. It is important that the legislation is clear on who can make decisions. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces		
Saskatchewan	**Ontario**	**Manitoba**
In brief: • The surrogate cannot give consent until 3 days after birth. During that time, the law states that the surrogate and intended parents share the ability to make decisions for the child. After 3 days, the intended parents take over responsibility.	• The surrogate cannot give consent until 7 days after birth. During that time, the law states that the surrogate and intended parents share the ability to make decisions for the child.	• The surrogate cannot give consent until 2 days after birth. During that time, the law states that the surrogate and intended parents share the ability to make decisions for the child.

Posthumous conception/Conception after death of a parent

Family Law Act—Genetic connection

Should section 28 of the Family Law Act continue to require a genetic connection between parent and child as a basis for parentage?

What the law says now	What the committee is proposing
In brief:	In brief:

- The law currently requires that the deceased person be genetically related to the child in order to be named a parent.

Text of the section:

Parentage if Assisted Reproduction After Death

28 (1) This section applies if

(a) a child is conceived through assisted reproduction,

(b) the **person who provided the human reproductive material or embryo used in the child's conception** [emphasis added]

(i) did so for that person's own reproductive use, and

(ii) died before the child's conception, and

(c) there is proof that the person

(i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,

(ii) gave written consent to be the parent of a child conceived after the person's death, and

- The *Family Law Act* should no longer require a genetic connection for a deceased person to be named a parent—so long as the person consented to be a parent.

Text of the tentative recommendation:

Section 28 of the *Family Law Act* should be amended to provide that, in order for a deceased person to be a parent of a child conceived after that person's death,

1. The human reproductive material or embryo used in the child's conception must be either

   a. the deceased person's own human reproductive material, which they provided for their own reproductive use either before their death or posthumously, or

   b. human reproductive material or an embryo which was obtained by the deceased for their own reproductive use prior to their death (eg., donor sperm, eggs or embryo which had been obtained by the deceased during their lifetime for their own reproductive use);

and

2. all other conditions of s. 28 must be met.

(iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death. (2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are (a) the deceased person, and (b) regardless of whether the person also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.	

Why this change?
In brief: • This change aligns with the values of the *Family Law Act* for assisted reproduction. • Several other provinces do not require a genetic connection. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces	
Saskatchewan	**Ontario**
In brief:	

• Saskatchewan does not require there to be a genetic connection between the deceased person and the child. The Saskatchewan legislation does not require a deceased person's sperm, eggs, or embryos to be used. The deceased person only has to have consented to being the parent.	• Ontario does not require there to be a genetic connection between the deceased person and the child. The Ontario legislation does not require a deceased person's sperm, eggs, or embryos to be used. The deceased person only has to have consented to being the parent.

Family Law Act—Spousal relationship

Should section 28 of the Family Law Act continue to require a spousal relationship between parents?

What the law says now	What the committee is proposing
In brief: • For a child who is conceived after death, the *Family Law Act* sets out specific requirements for when the deceased person can be named that child's parent. • The parents are the deceased person and their spouse. The parents can be married or in a marriage-like relationship. Text of the section: ***Parentage if Assisted Reproduction After Death*** **28** (1) This section applies if (a) a child is conceived through assisted reproduction,	In brief: • The *Family Law Act* should no longer require a spousal relationship for a deceased person to be named a parent. Text of the tentative recommendation: Section 28 of the *Family Law Act* should be amended, removing the requirement that, for a posthumously conceived child, the parents be in a spousal relationship.

(b) the person who provided the human reproductive material or embryo used in the child's conception (i) did so for that person's own reproductive use, and (ii) died before the child's conception, and (c) there is proof that the person (iv) gave written consent to the use of the human reproductive material or embryo, after that person's death, **by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died** [emphasis added] (v) gave written consent to be the parent of a child conceived after the person's death, and (vi) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death. (2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are (a) the deceased person, and (b) regardless of whether the person also provided human reproductive	

material or the embryo used for the assisted reproduction, **the person who was married to, or in a marriage-like relationship with, the deceased person when that person died** [emphasis added].	

Why this change?
In brief: • This requirement is likely to unfairly impact LGBTQ+ individuals and families, who may be more likely to co-parent in a non-conjugal relationship. This change fixes this issue. To learn more, go to the In Depth on this Topic

Number of parents

Should part 3 of the Family Law Act continue to limit the maximum number of parents of a posthumously conceived child to two?

What the law says now	What the committee is proposing
In brief: • For a child who is conceived after death, the *Family Law Act* states that the parents are the deceased person and their spouse. • Section 30, which allows for more than two parents, specifically excludes the situation where someone has died. Text of the section: Text of s. 28.	In brief: • A child who is conceived after the death of one of the parents should be permitted to have more than two parents if the deceased person consented to this while alive. Text of the tentative recommendation:

	Part 3 of the *Family Law Act* should be amended, allowing more than two people to be named as parents for a posthumously conceived child, provided the deceased person consents to be parent to a child conceived through assisted reproduction and lists the other intended parents.

Why this change?
In brief: • Allowing for more than two parents of a posthumously conceived child aligns with the committee's principle of recognizing multi-parent families based on consent and intention, and with existing *Family Law Act* recognition of multi-parent families in assisted reproduction. To learn more, go to the In Depth on this Topic

Wills, Estates and Succession Act – Genetic connection

Should section 8.1 of the Wills, Estates and Succession Act continue to require a genetic connection between the deceased person and the descendent as a basis for inheritance?

What the law says now	What the committee is proposing
In brief: • The *Wills, Estates and Succession Act* currently requires a genetic connection be-tween the deceased and the descendant. • Section 8.1 requires the deceased's sperm, eggs, or embryos be used to conceive a child.	In brief: • In light of the committee's previous recommendation to remove the genetic requirement from the *Family Law Act*, it is important to also update the *Wills, Estates and Succession Act.* Text of the tentative recommendation:

Text of the section (*Wills, Estates and Succession Act*): ***Posthumous birth if conception after death*** **8.1** (1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply: (a) a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that **the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction** [emphasis added]; (b) the descendant is born within 2 years after the deceased person's death and lives for at least 5 days; (c) the deceased person is the descendant's parent under Part 3 of the Family Law Act. (2) The right of a descendant described in subsection (1) to inherit from the relatives of a deceased person begins on the date the descendant is born. (3) Despite subsection (1) (b), a court may extend the time set out in that	Section 8.1 of the *Wills, Estates and Succession Act* should be amended to remove the requirement that there be a genetic connection between the deceased person and the posthumously conceived child.

subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.	

Why this change?
In brief: • This change reflects the committee's other recommendation to remove genetic connection requirements in the *Family Law Act*. • The *Family Law Act* and the *Wills, Estates and Succession Act* provisions work together and should be consistent. To learn more, go to the In Depth on this Topic

Wills, Estates and Succession Act – Spousal relationship

Should section 8.1 of the Wills, Estates and Succession Act continue to require that only the deceased person's spouse may use the human reproductive material of the deceased person to conceive a child through assisted reproduction?

What the law says now	What the committee is proposing
In brief: • The *Wills, Estates and Succession Act* follows the current *Family Law Act* requirement that the deceased person must have been a spouse of the surviving parent. • Section 8.1 states a posthumously conceived child has a right to inherit if the deceased person is a parent under part 3 of the *Family Law Act*.	In brief: • In light of the committee's previous recommendation to remove the spousal requirement from the *Family Law Act*, it is important to also update the *Wills, Estates and Succession Act*. Text of the tentative recommendation: Section 8.1 of the *Wills, Estates and Succession Act* should be amended to remove the requirement that there be a spousal relationship between the intended parents.

Text of the section (*Wills, Estates and Succession Act*): ***Posthumous birth if conception after death*** **8.1** (1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply: (a) **a person who was married to, or in a marriage-like relationship with, the deceased person when that person died** [emphasis added] gives written notice…. that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction; Text of s. 8.1.	

Why this change?
In brief: • This change reflects the committee's other recommendation to remove spousal connection requirements in the *Family Law Act*. • The *Family Law Act* and the *Wills, Estates and Succession Act* provisions work together and should be consistent. To learn more, go to the In Depth on this Topic

Parentage declarations

Simplified procedure

Should part 3 be amended to add a simplified procedure for obtaining an order declaring parentage?

What the law says now	What the committee is proposing
In brief: • As a matter of procedure, applying for a parentage declaration involves a full court procedure, including an oral hearing by a court. Text of the section: ***Orders Declaring Parentage*** **31** (1) Subject to subsection (5), if there is a dispute or any uncertainty as to whether a person is or is not a parent under this Part, either of the following, on application, may make an order declaring whether a person is a child's parent: (a) the Supreme Court; (b) if such an order is necessary to determine another family law dispute over which the Provincial Court has jurisdiction, the Provincial Court. (2) If an application is made under subsection (1), the following persons must be served with notice of the application:	Text of the tentative recommendation: A simplified desk-order process should be available for an order declaring parentage if all the parties consent to the order and have complied with the legislation.

(a) the child, if the child is 16 years of age or older; (b) each guardian of the child; (c) each adult person with whom the child usually resides and who generally has care of the child; (d) each person, known to the applicant, who claims or is alleged to be a parent of the child; (e) any other person to whom the court considers it appropriate to provide notice, including a child under 16 years of age. (3) To the extent possible, an order under this section must give effect to the rules respecting the determination of parentage set out under this Part. (4) The court may make an order under this section despite the death of the child.	

Why this change?

In brief:

- Unlike parentage declarations now, in some other areas of law, such as divorce and probate, a "desk order" can be obtained if the right documents are submitted; an oral court hearing is not required. This decreases pressure on the court and judicial time.
- In parentage declaration situations where the requirements are clear (for example, surrogacy and multi-parents by assisted reproduction), and all parties agree, a simplified process is practical.
- It also avoids the requirement to prove uncertainty of parentage as required by section 31.

To learn more, go to the In Depth on this Topic

Parens patriae (inherent) jurisdiction

Should part 3 contain a provision declaring that it isn't a complete code or otherwise acknowledging the court's parens patriae power in relation to parentage cases?

What the law says now	What the committee is proposing
In brief: • The *Family Law Act* has a general section which states that nothing limits the *parens patriae* (parent of the nation) capacity of the court. *Parens patriae* is an inherent jurisdiction of the court in certain situations to care for vulnerable individuals. • Part 3 of the *Family Law Act* does not state whether it is a complete code for parentage, which would oust the court's inherent *parens patriae* jurisdiction. Courts have interpreted some aspects of part 3 as a complete code (see *British Columbia Birth Registration* No. 2018-XX-XX5815, 2021 BCSC 767). Text of the section: ***Supreme Court Jurisdiction*** **192** (1) Subject to the Divorce Act (Canada), the Supreme Court has jurisdiction in all matters under this Act. … (3) Nothing in this Act limits or restricts the inherent jurisdiction	In brief: • The committee suggests a specific section in Part 3 to clarify that parens patriae applies to parentage declarations. Text of the tentative recommendation: Part 3 of the *Family Law Act* should be amended by adding a provision that declares that nothing in this part limits or restricts the inherent jurisdiction of the supreme court to make an order declaring parentage in its parens patriae capacity.

of the Supreme Court to act in a parens patriae capacity.	

Why this change?
In brief: • This change addresses an issue that has come up in court cases and caused uncertainty. • It also creates more flexibility for different family models that the law has overlooked. To learn more, go to the In Depth on this Topic

When parentage declaration is available

Should part 3 give the court an expanded range to make a declaration of parentage?

What the law says now	What the committee is proposing
In brief: • Section 31 only applies if there is a dispute or uncertainty as to parentage. Text of the section: ***Orders Declaring Parentage*** **31** (1) Subject to subsection (5), **if there is a dispute or any uncertainty as to whether a person is or is not a parent** [emphasis added] under this Part, either of the following, on application, may make an order declaring whether a person is a child's parent: (a) the Supreme Court; (b) if such an order is necessary to determine another family law	In brief: • Section 31 should be expanded to allow the court to make declarations of parentage in a range of situations—not just where there is a dispute or there is uncertainty around parentage. Text of the tentative recommendation: For cases that don't come within the scope of the proposed simplified process to obtain an order declaring parentage, section 31 of the *Family Law Act* should be amended as follows:

dispute over which the Provincial Court has jurisdiction, the Provincial Court. … Text of s. 31.	(a) by striking out the conditions that provide that an order declaring parentage is only available if there is a dispute or any uncertainty as to whether a person is or is not a parent; and (b) by adding a provision that any person having, in the court's opinion, an interest may apply to the court for an order declaring parentage.

Why this change?
In brief: • If a different issue comes up around parentage, or there is a reason for needing a court order other than uncertainty or dispute, there is no clear way for the court to deal with it. This change overcomes this problem, which has arisen in recent court cases. To learn more, go to the In Depth on this Topic

Law in another provinces
Ontario, Saskatchewan, Quebec, New Brunswick, and Manitoba
• Other provinces allow any person with "an interest" or "a sufficient interest" to apply for an order as to whether someone is or is not a parent.

Vital Statistics Agency

Should section 31 of the Family Law Act be amended to address when service of an application on the vital statistics agency is necessary?

What the law says now	What the committee is proposing
In brief:	In brief:

- Section 31 of the *Family Law Act* lists the parties that must be served with notice of an application for a declaration of parentage.
- The list does not include the Vital Statistics Agency, which is responsible for registering births in British Columbia.

Text of the section:

Orders Declaring Parentage

31 ...

(2) If an application is made under subsection (1), the following persons must be served with notice of the application:

(a) the child, if the child is 16 years of age or older;

(b) each guardian of the child;

(c) each adult person with whom the child usually resides and who generally has care of the child;

(d) each person, known to the applicant, who claims or is alleged to be a parent of the child;

(e) any other person to whom the court considers it appropriate to provide notice, including a child under 16 years of age.

Text of s. 31.

- Section 31 should be changed to require that Vital Statistics receive notice (be served) of a court application that may change birth registration.

Text of the tentative recommendation:
Section 31 (2) of the *Family Law Act*, which lists the people who must be served with notice of an application to court for an order declaring parentage, should be amended by adding a new paragraph, which reads as follows: "the vital statistics agency, if the order will result in a change of the registration of parentage."

Why this change?

In brief:

- The Vital Statistics Agency in practice has required parties to give notice, but this was not visible in the *Family Law Act* itself. This change provides clarity to people making court applications.
- The change is intended to include all those who may require notice.

To learn more, go to the In Depth on this Topic

Best interests of the child

What role should the best interests of the child test play in part 3?

What the law says now	What the committee is proposing
In brief: • Section 31 does not explicitly mention the best interests of the child as a factor a court should consider in making a parentage declaration.	Text of the tentative recommendation: Part 3 of the *Family Law Act* should not be amended to directly address how the best interests of the child is to be addressed by the court in making an order under the part.

Why no change?
In brief: • The best interests of the child has been considered by courts in parentage declaration cases. In cases where there is no dispute and all parties consent, the best interest of the child is a reason courts have made a declaration. This is consistent with the UN Convention on the Rights of the Child (see *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767).

- The committee expressed concern that explicitly adding best interests of the child to part 3 could be used to take parentage away from a person, and be based more on stereotypes than on facts. One member felt strongly that the best interests of the child is a critically important principle in all decisions involving children, as set out in the UN Convention on the Rights of the Child and is also "trite law" in BC as set out in recent parentage declaration cases. It is used legitimately to bolster recognition of parentage by consent.

To learn more, go to the In Depth on this Topic

Territorial jurisdiction

Should section 31 of the Family Law Act be amended to address the territorial jurisdiction of the court to make a declaration of parentage?

What the law says now	What the committee is proposing
In brief: • British Columbia has legislation dealing with its courts' territorial jurisdiction. This legislation is called the *Court Jurisdiction and Proceedings Transfer Act*. • However, section 31 is silent on the court's territorial jurisdiction. Text of the section: Text of s. 31.	In brief: • Section 31 should state that the court has territorial jurisdiction where the child is born in BC or an alleged parent resides in BC. Text of the tentative recommendation: Section 31 of the *Family Law Act* should be amended to address the territorial jurisdiction of the court to make an order declaring parentage by providing that the court has jurisdiction, in addition to any other basis of jurisdiction under the *Court Jurisdiction and Proceedings Transfer Act* (a) if the child is born in British Columbia or (b) an alleged parent resides in British Columbia.

Why this change?
In brief: • Part 3 of the *Family Law Act* contains a provision (section 31) that empowers the BC Supreme Court to make orders declaring parentage, but section 31 doesn't address the court's territorial jurisdiction to make such orders. This means that whenever a party to an application for an order declaring parentage resides outside BC or facts relevant to the application took place outside BC there is an issue concerning territorial jurisdiction, which has to be resolved by applying legislation of general application. This change would fix this issue and provide clarity for practitioners. To learn more, go to the In Depth on this Topic

Agreements

Non-written surrogacy agreements

Should part 3 address constructive or non-written surrogacy agreements?

What the law says now	What the committee is proposing
In brief: • Part 3 of the *Family Law Act* requires surrogacy agreements to be written agreements. Text of the section: ***Parentage if Surrogacy Arrangement*** **29** (1) In this section, "surrogate" means a birth mother who is a party to an agreement described in subsection (2). (2) This section applies if, (a) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate	In brief: • Section 29 should not be changed to include unwritten surrogacy agreements. Text of the tentative recommendation: Section 29 of the *Family Law Act*, which deals with surrogacy arrangements, should not be amended to address unwritten surrogacy agreements.

and an intended parent or the intended parents, and (b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth, (i) the surrogate will not be a parent of the child, (ii) the surrogate will surrender the child to the intended parent or intended parents, and (iii) the intended parent or intended parents will be the child's parent or parents. Text of s. 31.	

Why no change?
In brief: • Surrogacy has potential risks and vulnerabilities that are best suited to a written agreement. • In rare cases where it is needed, and the facts are clear, courts have used s. 31 (see *Family Law Act (Re)*, 2016 BCSC 598). To learn more, go to the In Depth on this Topic

Witnessing

Should part 3 contain provisions regarding the witnessing of written agreements?

What the law says now	What the committee is proposing
In brief: • Section 29 and 30 of the *Family Law Act* address agreements (on surrogacy and multi-parent arrangements, respectively). Neither of these sections require a witness when signing an agreement.	In brief: • If independent legal advice is required by the legislation, then Section 29 and 30 should not be changed to require witnesses to agreements. Text of the tentative recommendation: If independent legal advice is required for agreements under Sections 29 and 30 of the *Family Law Act*, which deal with parentage in cases of surrogacy arrangements and other arrangements, these provisions should not be amended to add a requirement that the signatures to the written agreements referred to in those sections must be witnessed by at least one other person.

Why no change?
In brief: • Requiring independent legal advice will protect vulnerable parties. • People may accidentally overlook getting a witness. By making this a legislated requirement, people would be required to go to court for a parentage order if they failed to have the agreement witnessed. To learn more, go to the In Depth on this Topic

Independent legal advice

Should part 3 contain a requirement for independent legal advice?

What the law says now	What the committee is proposing
In brief: • Part 3 of the *Family Law Act* does not require independent legal advice. Text of the section: ***There are no provisions on independent legal advice in part 3.***	Text of the tentative recommendation: Part 3 of the *Family Law Act* should be amended to require independent legal advice for all parties to legal agreements required under part 3.

Why this change?
In brief: • Independent legal advice can protect vulnerable parties. A lawyer providing independent legal advice explains the agreement to the person, explains the pros and cons, and can suggest revisions to make sure that a person is better protected and the agreement better reflects their intentions. • Matters covered by part 3 are complicated and difficult for lay people to understand. • While it can be expensive, the benefits of independent legal advice outweigh the costs. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces		
Saskatchewan	**Ontario**	**Manitoba**
In brief:		

• Saskatchewan's parentage legislation explicitly requires a surrogate and intended parents to receive legal advice "before entering into the surrogacy agreement." The act otherwise does not mention legal advice, but the Children's Law Regulations, 2021, set out contractual requirements for sperm donation by sexual intercourse, parentage agreements (under section 61), and surrogacy agreements. This includes "a certificate of independent legal advice for each party" in all the above situations.	• Ontario's act also only references independent legal advice with respect to surrogacy. The provision requires legal advice for the surrogate and intended parents but does not specify that it must be proven by a certificate or other method.	• Manitoba's parentage legislation requires independent legal advice for the surrogate and intended parents, "and a certificate to that effect must be attached to the agreement." The act otherwise does not mention independent legal advice.

Counselling

Should part 3 contain a requirement for counselling?

What the law says now	What the committee is proposing
<u>In brief:</u> • Part 3 of the *Family Law Act* does require counselling. <u>Text of the section:</u> ***There are no provisions on counselling in part 3.***	<u>Text of the tentative recommendation:</u> Part 3 of the *Family Law Act* should not be amended to require counselling.

Why no change?
In brief: • Counselling is always recommended, and fertility clinics normally have policies requiring counselling to make sure that people understand all aspects of being involved in a fertility process and prepare for explaining to a child in the future. • A legal requirement has the potential to create more confusion in the law, for example if this requirement is missed. • Counselling is another expense. To learn more, go to the In Depth on this Topic

Potential Law Reform
Quebec
In brief: • Québec's *Civil Code* currently does not require counselling. However, proposed reforms for the surrogacy provision would require the surrogate and the intended parents to "obtain information about the psychosocial consequences of the parental project and the ethical questions it raises." The professional conducting the assessment must be "a member of a professional order designated by the Minister of Justice."

General

Gender neutral language

Should the language of part 3 be made gender neutral?

What the law says now	What the committee is proposing
In brief: • Part 3 of the *Family Law Act* contains gender specific language, including "birth mother" and discussion of a male person as a "biological father".	In brief: • The *Family Law Act* should move to gender neutral language in part 3.

Text of the section (for example):	Text of the tentative recommendation:
Interpretation **20** (1) "birth mother" means the person who gives birth to, or is delivered of, a child, regardless of whether her human reproductive material was used in the child's conception.	Part 3 of the *Family Law Act* should be amended to use gender-neutral terminology.

Why this change?
In brief: • The law as written appears to exclude transgender and non-binary individuals. • This change is consistent with other provinces and the government of BC's initiative to move to gender inclusive language. To learn more, go to the In Depth on this Topic

Law reform in a few other provinces
Three provinces that have enacted parentage legislation since the advent of part 3 have employed gender-neutral terminology: Ontario in 2016, Saskatchewan in 2020, and Manitoba in 2021.

Language describing role in conception and birth

Should terms used in part 3 to identify people aim primarily to describe a person's role in conception and birth?

What the law says now	What the committee is proposing
In brief:	In brief:

• Part 3 of the *Family Law Act* contains gender specific language, including "birth mother" and "biological father". • These terms make assumptions about a person's role, which may not be accurate.	• The *Family Law Act* should use terminology that describes a person's role in conception and birth. Text of the tentative recommendation: Terms should be used which clearly describe a person's role in the conception and birth, such as "the person who gave birth to the child" and "the person whose sperm resulted in the conception."

Why this change?
In brief: • The law as written makes assumptions about people's roles. • Simply moving to gender neutral terms continues to make assumptions about people's roles (e.g. birth parent assumes the party giving birth intends to be a parent.) To learn more, go to the In Depth on this Topic

Use of the term parent

Should the term "parent" be limited in part 3 to just descriptions of the parent-child relationship?

What the law says now	What the committee is proposing
In brief: • In the *Family Law Act*, the word parent is used even in situations where the person may not intend to be a parent.	In brief: • The *Family Law Act* should only use the term parent where the person clearly intends to become a parent. Text of the tentative recommendation: The term "parent" should only be used where a parent-child relationship is intended.

Why this change?
In brief: • It is confusing where terminology in the *Family Law Act* implies a parent child relationship, but that may or may not be what is intended by the parties. • It would be clearer if the term parent was only used in situations where the party intends to become a parent. To learn more, go to the In Depth on this Topic

Purposes of part 3

Should part 3 of the Family Law Act be amended by adding a new section setting out the part's purposes?

What the law says now	What the committee is proposing
In brief: • Part 3 of the *Family Law Act* does not contain a purposes section. Text of the section: ***There are no provisions on purposes in part 3.***	In brief: • The *Family Law Act* should not contain a purposes section. Text of the tentative recommendation: Part 3 of the *Family Law Act* should not be amended by adding a new section that lists the part's purposes.

Why no change?
In brief: • The addition of a purposes section may further narrow the scope of the law.

- Most Canadian legislation does not contain lists of purposes.

To learn more, go to the In Depth on this Topic

Chapter 3. Defining Parentage in Law, the Development of Parentage Law in British Columbia, and Recent Reforms in Other Canadian Provinces

Introduction: The Purposes of this Chapter

This chapter has three goals.

First, it provides readers with a basic description of the law of parentage. It does this in part by referring to leading statements of the purposes of parentage found in the case law. It also distinguishes parentage from other areas of the law that may be seen as parentage's close relations: parenting responsibilities, adoption, vital statistics, and legislation governing assisted human reproduction.

Second, it gives a narrative account of how the law on parentage developed in British Columbia. It's aimed at readers who may not be familiar with these areas. The goal is to give these readers general information that forms a backdrop to the specific legal issues and tentative recommendations for reform that appear in the chapters that follow.

Third, it looks at reforms in other provinces. BC's *Family Law Act* was groundbreaking legislation when it came into force ten years ago. But since March 2013, four provinces have modernized their legislation on parentage. This chapter briefly introduces the changes in each of those provinces. This is foundational information because, as readers will see in subsequent chapters, the committee extensively considered reforms in other provinces as options for reform in this consultation paper.

Defining Parentage in Law

Parentage as a lifelong immutable status and foundational element of family law

In a leading Canadian case on the law of parentage, the Ontario Court of Appeal "summarize[d] the importance of a declaration of parentage from the point of view of the parent and the child" by listing parentage's definitional elements and its practical relevance:

- the declaration of parentage is a lifelong immutable declaration of status;
- it allows the parent to fully participate in the child's life;
- the declared parent has to consent to any future adoption;
- the declaration determines lineage;
- the declaration ensures that the child will inherit on intestacy;
- the declared parent may obtain an OHIP card [= a BC Services Card], a social insurance number, airline tickets and passports for the child;
- the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada;
- the declared parent may register the child in school; and
- the declared parent may assert her rights under various laws such as the Health Care Consent Act, 1996 [the equivalent BC legislation is the *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181].[12]

While this list contains a lot of detail, it makes a few key points that are essential to understanding the law of parentage.

First, it's worth noting that the parent-child relationship created by parentage law is a "lifelong" status. This is in contrast to how the status of child is more typically treated under other areas of the law, which conceive of it as a time-limited status. Typically, the status of child at law ends at the age of majority (in BC, the age of majority is 19 years).[13]

Second, the status created by parentage law is "immutable" (= "not liable or subject to change").[14] Essentially, this means that in the ordinary course, the parent-child relationship created by parentage law is unbreakable. It's close to being permanent.[15]

Parentage is likely best thought of as being foundational. The law on parentage largely operates out of sight. But it supports many important aspects of family law.

12. *AA v BB*, 2007 ONCA 2 at para 14, Rosenberg JA [*AA*] [footnote and citations omitted].
13. See *Age of Majority Act*, RSBC 1996, c 7, s 1.
14. Angus Stevenson, ed, *Shorter Oxford English Dictionary*, 6th ed, vol 1 (Oxford: Oxford University Press, 2007) sub verbo "immutable."
15. There's a qualifier to note here, one that's touched on in the third bullet point of the list: adoption. The process of adoption is the one legal way to alter a child's parentage after the child is born.

As this list brings out, parentage is crucial for establishing a child's identity, lineage, and heritage. It forms the basis of citizenship. Parentage is also crucial for a child's right to inherit from a parent. It's for these reasons that parentage is conceived of as a lifelong status, to allow these rights to persist beyond the age of majority, into adulthood.

"[T]he concept of legal parenthood," as a recent report put it, "is now, arguably, the gateway through which many of the rights of children, and obligations to children, flow."[16] These obligations form the core of the next section.

Parental responsibilities and the best interests of the child

Part 3 of the *Family Law Act* deals with "parentage." The act's next part, part 4, deals with "care of and time with children."

"[T]here is a detailed set of legal obligations and entitlements which arise out of the parent–child relationship," observed the authors of a law-reform report.[17] "Most of these obligations and entitlements are intended to protect children and ensure they are adequately cared for."[18]

In British Columbia, these obligations are called "parental responsibilities."[19] The *Family Law Act* contains a detailed list of parental responsibilities.[20] In essence, they deal with the functional aspects of being a parent to a child.

Over the preceding pages, the text has used a number of metaphors to describe the relationship with parentage and parental responsibilities. While the *Family Law Act* does not automatically grant parental responsibilities to parents, parentage is a "foundation" for guardianship, which is in turn a foundation for parental

16. Hague Conference on Private International Law, Permanent Bureau, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Agreements*, Prel Doc no 11 (March 2011), online: <assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf> at para 4 [footnote omitted].

17. Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007) at 124.

18. *Ibid*.

19. See *Family Law Act*, *supra* note 1, ss 41, 43. See also Gillian Douglas, *An Introduction to Family Law* (Oxford: Oxford University Press, 2001) ("[t]he use of the label *responsibility* is a deliberate shift of emphasis away from a focus on *rights*, intended to reinforce the view that parents (should) exercise their powers for the benefit of their children and not for themselves" at 50 [emphasis in original]).

20. See *supra* note 1, s 41.

responsibilities. These responsibilities "arise" from legal recognition of the parent-child relationship. Legal parenthood forms a "gateway" through which parental responsibilities will pass.

What these descriptions are trying to get at is the complex relationship between the two concepts. Parentage and parental responsibilities are obviously linked together in many ways. But they also remain conceptually distinct from one another.

Related issues and new developments

Related issues—as this section of the consultation paper has shown, there are a lot of grey areas in the law, places where parentage overlaps with another legal area, such as regulating assisted human reproduction or registering births. From time to time, the committee found itself in one of these grey areas, giving consideration to an issue that it in the end decided could only be addressed by reforming some other statute that wasn't part 3 of the *Family Law Act*. The committee kept a tally of these related issues. They will appear in a handful of text boxes next to the discussion of the issue for reform in this consultation paper that led to their investigation. The committee flagged these related issues in the hope that they can spur other legal organizations with a proper mandate to recommend reforms in areas related to parentage.

New developments—in a few places, there was a significant change in the law outside BC, relating directly to an issue for reform being considered in this consultation paper, which occurred after the committee had considered the issue and made its tentative recommendation. These new developments are also noted in text boxes.

It's this second point that's important to keep in mind while reading this consultation paper. Parentage is its own subject for analysis. It is the focus of this consultation paper. Parental responsibilities, on the other hand, were outside the committee's mandate. The committee's tentative recommendations don't address them.

The separate and distinct natures of parentage and parental responsibilities can be difficult to appreciate. Parental responsibilities have a much higher profile than parentage. They are much closer than parentage to the day-to-day realities of being a parent. Disputes over parental responsibilities also tend to arise when spouses separate. As a result, there is vastly more litigation over parental responsibilities than over parentage.

Cases in which a court considers both parentage and parental responsibilities are rare. But there is a recent Ontario decision that does this, and it illustrates some important differences between the two concepts.[21]

21. See *Jacobs v Blair*, 2022 ONSC 3159.

This case featured two couples. One couple was made up of same-sex people. The other contained opposite-sex people.

Over the years, the couples had discussed the female member of the opposite-sex couple acting as a surrogate and agreeing to have the same-sex couple be the child's parents. Ontario's parentage legislation (like British Columbia's) allows surrogacy arrangements. But to create a valid surrogacy arrangement, the parties must strictly comply with the requirements of the legislation.

Unfortunately, the parties in this case weren't aware of these requirements until very late in the pregnancy. As a result, they failed to comply with them.

Nevertheless, the parties still tried to give effect to their planned surrogacy arrangement. But this led to a conflict, which gave rise to the litigation.

The same-sex couple applied to court asking for one of two orders: either (1) a declaration of parentage; or (2) if the first order couldn't be granted, a declaration of sole decision-making responsibility for the child (i.e., guardianship and parental responsibilities).[22] How the court handled these two issues neatly illustrates the important distinctions between parentage and parental responsibilities.

With respect to the first issue, the court focused its full attention on the circumstances of the child's conception. It emphasized the importance of complying with the legislative requirements for surrogacy arrangements,[23] which it found were not complied with in this case.[24] As a result, the Ontario act's rules on children conceived by sexual intercourse applied in this case, and the opposite-sex couple were legally the child's parents.[25]

The court's analysis of the second issue led to a different result. This issue concerned decision-making responsibility for the child (what BC legislation would call guardianship and parental responsibilities). As the court noted, the sole criterion for determining this issue is the best interests of the child.[26]

22. See *ibid* at paras 3–4, Gregson J.
23. See *ibid* at paras 233–234.
24. See *ibid* at para 285.
25. See *ibid* at paras 278–280.
26. See *ibid* at paras 219–223.

Determining the best interests of the child is highly dependent on the specific facts and circumstances of any given case. In this case, it was significant that the child was being raised by the same-sex couple and was thriving in their care.[27] Even though this couple weren't the child's legal parents, the court ordered that they have sole decision-making responsibility for the child.[28]

As may be seen from this discussion, disputes over parentage tend to be resolved by looking back to the circumstances of the child's conception. Disputes over parental responsibilities are resolved by determining the best interests of the child in "the here and the now and where we are today."[29]

Adoption as a method to provide new and permanent family ties after a child's birth

In the earlier discussion of parentage, it was noted that parentage confers an immutable status and that the parent-child relationship is legally unbreakable and persists throughout the parties' lifetimes. But there is one exception to these points.

This exception is adoption. Adoption refers to a legal process that allows for the creation of a new parent-child relationship after a child has been born. This process is set out in a separate statute, called the *Adoption Act*.[30]

As a section of that act states, its purpose "is to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests."[31] Adoption functions as an exception to the rules for determining parentage set out in part 3 of the *Family Law Act*.[32]

As adoption constitutes a distinct area of the law with its own statute, it was outside the scope of this project on parentage.

27. See *ibid* at para 266.
28. See *ibid* at para 299.
29. *Ibid* at para 267.
30. RSBC 1996, c 5.
31. *Ibid*, s 2.
32. See *supra* note 1, s 25.

Vital statistics and evidence of parentage

Legislation on parentage and on vital statistics can often seem to go hand-in-hand. This is because they pose "two related policy questions."[33] ("Who are the legal parents of a child at the moment of birth? Who is entitled to register as the child's parents?")[34]

Nevertheless, these two areas of the law have always been understood in Canada to be distinct. This point can be grasped by making the simple observation that British Columbia has legislation on parentage in one statute (part 3 of the *Family Law Act*) and sections on birth registration in another statute (the *Vital Statistics Act*),[35] a pattern which is found in all the other provinces and territories. As this consultation paper is focused on part 3 of the *Family Law Act*, issues concerning the *Vital Statistics Act* are outside its scope.

But it should be acknowledged that it isn't so easy to divide parentage from vital statistic in practice. Part 3 sets out the principles that determine a child's parents. Registration under the *Vital Statistics Act* provides the best evidence of that status.

Rules and principles for determining parentage may seem distant and abstract. Registration, on the other hand, is tangible. It also comes with what can seem like an official seal of approval.

So while "[t]he distinction between a *legal status* and *evidence of that status* may seem subtle," as a recent law-reform consultation paper noted, "it is important. Being listed on a birth certificate does not guarantee the substantive rights that flow from parentage."[36]

Even though the focus of this consultation paper is on parentage and the substantive rights that flow from it, the committee hasn't neglected the importance of ensuring that the law of parentage and the administrative act of registration develop in harmony. Staff from the vital statistics agency attended committee meetings as a

33. Uniform Law Conference of Canada, Civil Section, *Assisted Human Reproduction: Report of the Joint ULCC-CCSO Working Group* (August 2008), online (pdf): *Uniform Law Conference of Canada* <ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2008/Assisted-Human-Re-production.pdf> at para 12.

34. *Ibid*.

35. RSBC 1966, c 479.

36. Access to Justice & Law Reform Institute of Nova Scotia, *Parentage Act Discussion Paper* (October 2022) at 24, online: <lawreform.ns.ca/wp-content/uploads/2022/10/Parentage-Act-Nova-Scotia.pdf> [emphasis in original].

project liaison. They helped the committee to understand how various options for reform might affect the registration system.

The federal Assisted Human Reproduction Act defines the legal boundaries of assisted human reproduction

While part 3 of the *Family Law Act* contains rules for establishing the legal parentage of children who are conceived by assisted reproduction, it does nothing to regulate assisted human reproduction. This task mainly falls to a federal statute, the *Assisted Human Reproduction Act*,[37] which "regulates the scientific and commercial aspects of assisted reproduction."[38]

While an early section of this federal act lists a lengthy set of "principles,"[39] its main purpose is to enact criminal prohibitions of certain medical procedures related to assisted human reproduction. These prohibitions have the effect of creating legal boundaries around what may be carried out as assisted human reproduction in Canada.

Related issue: reviewing the federal Assisted Human Reproduction Act

Over the course of its review of part 3 of the *Family Law Act*, the committee encountered a significant number of issues in practice that it traced to the provisions of the *Assisted Human Reproduction Act*. Since recommending changes to this federal act is outside the committee's mandate, it hasn't addressed these issues in this consultation paper. But, as a general point, the committee is of the view that the federal government should consider a review of the *Assisted Human Reproduction Act* that is similar to the law-reform project that the committee is carrying out on part 3 of the *Family Law Act*.

"From a family law perspective," a commentator has noted, "the important parts of this act make it illegal to sell eggs or sperm, and say that a surrogate mother can't be paid for her services but she can be compensated for her expenses."[40]

Issues concerning reform of the *Assisted Human Reproduction Act* are outside the mandate of this project and aren't addressed by tentative recommendations for reform in this consultation paper.

37. SC 2004, c 2.

38. John-Paul E Boyd, *JP Boyd on Family Law: Resolving Family Law Disputes in British Columbia* (last modified 6 February 2023), online: *Clicklaw Wikibooks* <wiki.clicklaw.bc.ca/index.php?title=JP_Boyd_on_Family_Law> at 658.

39. See *supra* note 37, s 2.

40. Boyd, *JP Boyd on Family Law*, *supra* note 38 at 658.

The Development of Parentage Law in British Columbia

The following sections of this chapter trace the development of the law on parentage in British Columbia. The sections are organized as a chronological narrative. It begins with consideration of how the original inhabitants of this land, British Columbia's Indigenous peoples, may have conceived of parentage.[41] From there, it moves through the 20th century to the development of part 3 of the *Family Law Act* in the early 21st century.

At a very high level, this narrative shows that the law on parentage has moved from origins that emphasized above all the relationship of the child's parents to a focus on the equal status of all children. In making this movement, the law has become more and more inclusive in its conception of how families are formed. This development has played out to the present day. It has driven many of the committee's proposals in this consultation paper.

Indigenous values around parentage: An overview of the sections that follow

Little has been written directly on the subject of parentage in Indigenous cultures and societies, and there are many distinct Indigenous peoples in BC with diverse traditions, so this consultation paper cannot offer any definitive conclusions. Generally, though, extended-family networks are often seen as the primary family unit for Indigenous people, with responsibilities for child rearing understood as being more dispersed across a larger family unit than just the nuclear family. Responsibility for children is also quite fluid. There is not always a clear demarcation between parentage and parenting roles and responsibilities, particularly in societies with informalized customary-adoption processes. While this discussion relates more directly to guardianship and adoption than it does to parentage, it might imply that the relationship between parentage and identity (such as family relationships, for example) is different in Indigenous cultures.

In both Gitxsan and Coast Salish societies, kinship connections are foundational for many aspects of an individual's identity. Kinship connections are important not only on a personal level, but also as the primary vehicle through which legal rights and obligations are structured. In both legal orders, parentage is typically the source of

41. The sections surveying Indigenous values around parentage were drafted by Alex McLean, JID student, University of Victoria, Faculty of Law. BCLI thanks Alex McLean for his contribution to this consultation paper.

these kinship connections, though various forms of customary adoption can be used to modify the kinship relations established by parentage.

In Gitxsan society, the House is the main socio-political unit, and House membership is passed on to children by the birth mother (or through adoption). Land and valuable intellectual property are collectively owned by the House, and thus inherited matrilineally. Individual holdings of property such as ancestral names are distributed by the House.

In Coast Salish societies, crosscutting kinship networks structure a more flexible form of socio-political organization. Being able to trace common ancestry with various groups enables socio-political affiliation with them. Children inherit the ancestry of both parents, granting them a wide network of potential affiliations. These inherited ancestral connections also define inheritance rights to material and intangible property. Along with marriage, inheritance was traditionally the primary means of acquiring interests in land.

Indigenous perspectives on parentage

Because of the lack of literature that speaks directly to the issue of parentage in Indigenous societies, this consultation paper has attempted to gain an understanding of Indigenous perspectives on parentage through sources that discuss Indigenous perspectives on elements of parentage, including the incidents of parentage as described by the Ontario Court of Appeal.[42] The main elements discussed here are:

- life-long immutability (unless the parent consents—or the parents consent—to adoption);
- impact on identity, including lineage, family names, and citizenship (which will be expanded to refer more broadly to membership in a political unit or grouping); and
- inheritance.

Overview of Indigenous perspectives on parents and families

The literature on Indigenous family practices and parenting suggests that many Indigenous cultures have norms regarding parenting and family structure that differ from the dominant norms in Western society. In many Indigenous communities, the

42. See *AA*, *supra* note 12 and accompanying text.

primary family unit is the extended family rather than the nuclear family.[43] As such, parental responsibilities are often shared among a broader kinship network than just the biological parents.[44] Parenting arrangements are often more fluid, and may change based on practical considerations such as who is positioned to best care for the child at a particular time.[45] These arrangements were sometimes made before a child was born.[46]

Historically, having more than two legal parents was normal in many Indigenous societies.[47] *Customary adoption* (a broad term that captures a number of adoption-like procedures) often does not sever family ties with the biological parents. In many cases, it serves to *add* additional parents rather than *replace* the biological parents.[48] At the time a customary adoption occurs, it is not always clear or pre-determined whether the arrangement will be temporary (and thus comparable to a temporary change in guardianship) or permanent (and thus more comparable to a change in parentage).[49] The distinction between changes in guardianship and changes in parentage is therefore not always clear (and is perhaps not seen as important) in at least some Indigenous societies. This is particularly so in societies where customary adoption is an informal process. For example, as Robert Mitchell (then Chief of the Stellaquo Band, a Dakelh community) explained to the BC Supreme Court in *Casimel*, Dakelh people consider a child's parents to be whoever raised and cared for the child.[50] Note that the customary Dakelh adoption that took place in that case was upheld as a legal adoption under Canadian law on appeal.[51] So, conceptions of parentage appear to be indeterminate or fluid in at least some Indigenous societies,

43. See Kathleen Bennett, "Cultural Permanence for Indigenous Children and Youth: Reflections from a Delegated Aboriginal Agency in British Columbia" (2015) 10:1 First Peoples Child & Family Rev 99.

44. See Gabrielle Lindstrom & Peter Choate, "Nistawatsiman: Rethinking Assessment of Aboriginal Parents for Child Welfare Following the Truth and Reconciliation Commission" (2016) 11:2 First Peoples Child & Family Rev 45.

45. See Lara di Tomasso & Sandrina de Finney, "A Discussion Paper on Indigenous Custom Adoption Part 2: Honouring Our Caretaking Traditions" (2015) 10:1 First Peoples Child & Family Rev 19.

46. See Canada, Royal Commission on Aboriginal Peoples, *Gathering Strength: Report of the Royal Commission on Aboriginal Peoples*, vol 3 (Ottawa: Canada Communication Group—Publishing, 1991) at 11, online: <data2.archives.ca/e/e448/e011188230-03.pdf>.

47. See Hadley Friedland, "Reference re Racine v Woods" [2020] CNLR 177 at para 60.

48. See Celeste Cuthbertson, "Statutory Recognition of Indigenous Custom Adoption: Its Role in Strengthening Self-Governance Over Child Welfare" (2019) 28 Dal J Leg Stud 29 at 36–37.

49. See *ibid*.

50. See *Casimel v. Insurance Corporation of British Columbia*, 1991 CanLII 2273 (BCSC) [*Casimel* SC].

51. See *Casimel v Insurance Corp of British Columbia*, 1993 CanLII 1258 (BCCA) [*Casimel* CA].

perhaps suggesting that parentage is not necessarily a lifelong immutable status for them.

It is important to note that this section is a generalization and likely does not apply to every Indigenous culture or legal tradition. The Indigenous peoples in BC are especially diverse. The next two sections focus on two specific Indigenous legal orders, Gitxsan and Coast Salish. These two were chosen based on availability of information and scholarship and because both peoples' traditional territories are located in what is now BC.

Incidents of parentage in a Gitxsan legal context

In the Gitxsan legal order, the House group is the main political unit. According to Val Napoleon, Gitxsan citizenship is equivalent to membership in a House.[52] House groups are organized by matrilineal family line, with children always belonging to their mother's House.[53] All House members share a common ancestry and possess a shared oral history.[54] Historically, children would live with their mother's House, while their father would continue to live with his House, though the father would still be involved in raising the child.[55] The identity of the father is also legally important because there are certain reciprocal legal rights and obligations owed between children and their father's House.[56] Each House is also a member of a particular clan, which creates kinship relations between members of that House and members of all other Houses in the same clan, which creates a different set of reciprocal legal obligations.[57] The many crosscutting kinship relationships, and related obligations, are key for how law is upheld in the decentralized Gitxsan legal order (Gitxsan Democracy).[58] Val Napoleon writes that in Gitxsan society children belonged "first to the family and House, second to the closely related Houses, and finally to the clan."[59]

52. See Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009) [unpublished] at 132 [Napoleon, *Ayook*].

53. See Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order," in John McLaren et al, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) at 31.

54. See *ibid*.

55. See *ibid* at 34.

56. See *ibid*.

57. See Napoleon, *Ayook*, *supra* note 52 at 152.

58. See *ibid* at 168.

59. Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17:2 Can JL & Soc 149 at 165 [Napoleon, "Raven"].

Inheritance in traditional Gitxsan society was matrilineal.[60] Land and intellectual property (such as songs and crests) are owned collectively through the House.[61] Chiefly names are one part of a House's intellectual property, and play an important role in Gitxsan socio-political organization, indicating the status of the member who holds that name.[62] When a person dies, their name returns to the collective property of the House and the House may then assign the name to a different House member.[63] Children also have access rights to certain territories in their father's House, but these rights only last the length of his life and cannot be inherited by the children's offspring.[64]

House membership is typically determined by the identity of the birth mother. However, there are also various forms of "adoption" that exist to grant House membership to a person who was not born to a Gitxsan mother. For example, when a Gitxsan marries a non-Gitxsan, their partner will often be adopted by their father's House.[65] Similarly, if a non-Gitxsan woman is having a child with a Gitxsan partner, her partner's father's House will typically "adopt" her beforehand so that her children will be Gitxsan.[66] Adoptions to grant House membership can also occur for many other reasons, including to increase the number of wage earners for House income or to replenish dwindling membership, which could be done by adopting others' children, women of child-bearing age, or even entire families or groups of people.[67] The rights of an adopted House member may differ from those of non-adopted members. They are determined on a case-by-case basis, but typically depend in part on the type of adoption.[68] Sometimes, the children of adopted women might return to their mother's original House rather than her adopted one,[69] showing that customary adoption does not necessarily erase and replace a person's lineage. The diverse potential sets of rights associated with different forms of

60. See Napoleon, *Ayook*, *supra* note 52 at 73.

61. See *ibid* at 119, 172–173.

62. See *ibid* at 6.

63. See *ibid* at 6–7.

64. See Overstall, *supra* note 53 at 34.

65. See Napoleon, *Ayook*, *supra* note 11 at 144. They do not get adopted into their partner's own House because marriage to a member of the same House is highly stigmatized, comparable to incest. See Napoleon, *Ayook*, *ibid* at 82.

66. See *ibid* at 144.

67. See *ibid* at 132–135.

68. See *ibid*.

69. See e.g. *ibid* at 120.

customary adoption perhaps suggests that the incidences of parentage are not uniform across all cases.

Incidents of parentage in a Coast Salish legal context

In Coast Salish societies,[70] the nuclear family was generally the primary social unit. Family ancestry is important to Coast Salish personal identity. Delving deep into lineages to establish kinship connections with others was and remains an important way in which Coast Salish people relate to one another.[71] Establishing kinship connections was also central to broader social ordering. Traditional socio-political organization did not involve rigid social ordering or fixed membership in formalized political entities, but was flexibly structured based on shared descent from a common ancestor.[72] Descent is bilateral and shared descent can be traced through any combination of ancestral links from either parent.[73] Thus, Coast Salish individuals will share common ancestry with many different residence groups (sometimes referred to as *villages* or *tribes*),[74] allowing them to choose with whom to affiliate.[75]

In Coast Salish legal orders, establishing kinship connections was also the means of establishing inheritance rights. For example, one valuable form of inheritance was the right to access a resource-harvesting site. Rights to use harvesting sites were based on kinship with historical users of the site.[76] Because of extensive intermarriage, there would not be a bright line dividing those who did and those who did not have access rights.[77] Rather, rights claims laid on a spectrum, with the strongest claim being lineal descent from a rightful user. Claims to rightful use of a site would need to be formally justified, based on ancestral descent, to a steward

70. Note that *Coast Salish* is a broad term that describes many closely related peoples. It is also not a term that those peoples traditionally used to describe themselves. This section is based primarily on research about Island Hul'qumi'num speaking Coast Salish peoples.

71. See Sarah Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria, 2014) [unpublished] at 51.

72. See Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property, and Territory in the Coast Salish World* (PhD Dissertation, McGill University, 2005) [unpublished] at 274–279.

73. See *ibid* at 274.

74. See *ibid* at 280.

75. See *ibid* at 274–276.

76. See Russel Lawrence Barsh, "Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships" (2008) 14:1 Hastings W-Nw J of Envtl L & Pol'y 1375 at 1404–1405.

77. See *ibid*.

from the immediate family with the strongest historical association to the site.[78] These stewardship roles were inherited by the children of the former stewards,[79] often going to the eldest son.[80] Generally, interests in land were only acquirable through inheritance or marriage.[81]

Another valuable inheritance is the transfer of an ancestral name. Ancestral names connect the holder of the name with all the previous holders of the name, thereby helping to establish ancestral connections to a territory and the rights that that entails.[82] They also confer social status.[83] The transfer of an ancestral name must be witnessed at a formal ceremony (a feast), where guests may challenge either the host's right to bestow the name or the appropriateness of the planned recipient.[84] The ability to both receive and pass on an ancestral name is generally a kinship right that requires an ancestral connection to the previous holders of that name, though names are sometimes given to a member of another family as a thank you.[85] One cannot pass on the name of an ancestor from another family without that family's permission,[86] and even if permission is obtained, the community might still view the transfer as inappropriate and object.[87] A member of the family associated with the name can also customarily adopt the planned recipient at the naming ceremony in order to connect the family lines and enable them to pass down the inherited right.[88]

Conclusions on Indigenous perspectives on parentage

Extended family networks are often seen as the primary family unit for Indigenous people, with child-rearing being the collective responsibility of a wider group than the nuclear family. Understandings of parentage also seem to be somewhat fluid in at least some Indigenous legal traditions. For example, the Dakelh people simply view whoever is raising a child as the parent—or parents—of that child.

78. See *ibid*.
79. See Thom, *supra* note 72 at 318.
80. See *ibid* at 279.
81. See *ibid* at 280.
82. See Morales, *supra* note 71 at 130.
83. See Barsh, *supra* note 76 at 1404.
84. See *ibid*.
85. See Morales, *supra* note 71 at 69, n 65.
86. See Barsh, *supra* note 76 at 1404.
87. See Morales, *supra* note 71 at 69, n 65.
88. See *ibid*.

For both the Gitxsan and Coast Salish peoples, foundational socio-political relationships and identities derive from parentage. Particularly in the case of the Gitxsan, the way in which these identities are transferred arguably presumes that every child has one mother and one father. However, this does not mean that Gitxsan law is incapable of accommodating other forms of parentage. Val Napoleon argues that "the Gitxsan society is flexible enough by design to respond to present-day demands."[89] The rather liberal use of customary adoptions to modify these socio-political relationships in many different circumstances is perhaps one avenue allowing for such flexibility. Additionally, while parentage typically determines House membership, many of the incidents of parentage are arguably associated more with House membership than parentage itself. Coast Salish law also appears to make rather liberal use of customary adoptions to modify incidences of parentage such as inheritance rights.

For the Gitxsan, land and intellectual property are collectively owned, and a share in the collective ownership is inherited matrilineally. For the Coast Salish, certain valuable rights such as stewardship roles for resources harvesting sites are inherited from parents. Other rights are inherited through the ancestry passed down by both parents, though not in a rigid manner. Closer ancestral connections allow individuals to make stronger claims to various rights, claims which must ultimately be accepted and validated by the community. Inheritance is thus typically determined through deliberative community processes rather than a predetermined order upon intestacy.

Historical foundations of parentage in the English common law

While there were no factual connections between Indigenous legal orders and the English common law that settlers transplanted into British Columbia, they do share a similar historical approach to parentage. This approach emphasized the relationship between a child's parents within a broader system of social organization as the criterion for determining parentage. Historically, the English common-law doctrine was "structured around the concept of illegitimacy; parentage was possessory and was linked to the marital status of the child's parents."[90]

89. Napoleon, *Raven*, *supra* note 59 at 170.

90. Manitoba Law Reform Commission, *Assisted Reproduction: Legal Parentage and Birth Registration* (April 2014), online: <manitobalawreform.ca/pubs/pdf/additional/assisted_reproduction-legal_parentage_and_birth_registration.pdf> at 1 [Manitoba Law Reform Commission, *Assisted Reproduction*].

In other words, the common law relied upon marriage to assign parentage. Prior to DNA testing, this method made sense. Determining parentage of the birth parent was simple. But it wasn't possible to conclusively determine the other parent. As a result, presumptions were created to capture the non-birth parent through social constructs.[91] Essentially, the basic framework for parentage was birth parent and married spouse.

For this reason, historical parentage determinations in English common law were not biological, but rather a social construct meant to capture biological ties. The maxim *pater est quem nuptia demonstrant* (= by marriage the father is demonstrated) illustrates this point.[92]

The law was attempting to locate those responsible for the child, while, in truth, being unable to do so with absolute certainty.[93] In the past, being born illegitimate resulted in "profound stigma and deprived children of significant legal rights and protections."[94] Children born out of wedlock were deemed to be children of no one.[95] This was a social judgment, as an illegitimate child was one born of "unsanctioned sexual acts."[96]

Obviously, there is no such thing as a child of no one. It was a legal and social fiction. Illegitimate children had the same biological connections as legitimate children. "Within law, however, the illegitimate child literally had no legal relations and the rights held by illegitimate children at common law were very few."[97]

British Columbia legislation on parentage

BC passed its first legislation on parentage in 1985. The primary purpose of this legislation was to do away with legitimacy as a basis for parentage.

91. *Ibid*.

92. See Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies" (2001) 39:4 Osgoode Hall LJ 771 at 780.

93. See *ibid* at 782.

94. Jessica Feinberg, "Restructuring Rebuttal of the Marital Presumption for the Modern Era" (2019) 104:1 Minn L Rev 243 at 249.

95. See Douglas, *supra* note 19 ("[a]n unmarried mother, like an unmarried father, had no legal relationship to the child at common law" at 35).

96. Mykitiuk, *supra* note 92 at 781.

97. *Ibid* at 782.

The circumstances of this provision's enactment explain its rationale. The provision appeared in an omnibus amending statute called the *Charter of Rights Amendments Act, 1985*.[98]

This statute was prompted by the advent of the *Charter*'s equality-rights section.[99] That section only came into force three years after the rest of the *Charter*. This delay was to allow the federal, provincial, and territorial governments to deal with any legislation that could potentially be in breach of equality rights.

With more and more children being born outside marriage, it was becoming increasingly likely that someone would challenge the common-law conception of a child as limited to legitimate children (i.e., children born within wedlock) as discriminating. against children born outside marriage. This meant that there was a very real risk that any BC legislation relying on the common law to determine parentage would be struck down once the *Charter*'s equality-rights section came into force.

So this new provision on "child status" (another name for parentage) was added to the *Law and Equity Act*.[100] The section provided that "any distinction between the status of a child born inside marriage and a child born outside marriage is abolished."[101] This language clearly and decisively eliminated legitimacy as a basis for parentage in BC.

This section had little to say about the rules applying to parentage in the absence of legitimacy. It simply provided that "a person is the child of his natural parents."[102] This provision established a genetic or biological connection as the criterion that determined parentage.[103]

98. SBC 1985, c 68. The Law Reform Commission of BC had recommended previous to this statute's enactment that the distinction between legitimate and illegitimate children should be abolished in relation to rights of intestate succession and for purposes of eligibility to apply under the *Wills Variation Act*. See *Report on Statutory Succession Rights* (LRC 70, 1983), online: <bcli.org/sites/default/files/LRC70-Statutory_Succession_Rights.pdf>.

99. See *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

100. RSBC 1979, c 224, s 56.

101. *Ibid*, s 56 (1) (b).

102. *Ibid*, s 56 (1) (a).

103. See *ibid*, s 56 (1), which introduced the provision with the following phrase: "[s]ubject to the *Adoption Act* and the *Family Relations Act*, for all purposes of the law in British Columbia." This qualifier meant that biology wasn't the universal criterion for parentage that would apply in all cases. There was an express carve out for adopted children.

It's worth pausing here for a moment to reflect on the significance of this change in the law. The preceding paragraphs may have made it seem as if British Columbia were engaged in a simple act of problem solving: the advent of the *Charter* placed the common law's approach to parentage in peril, so the legislature came along and rescued it.

This simple narrative is true, but it doesn't tell the whole story. The legislation marked a major conceptual shift in the law, which had been gathering force in many places for many years. "Where children are concerned," a legal textbook has explained, "the injustice of visiting the sins of the fathers upon their children appears to have led to what may have been the key change in western family law in the twentieth century—the abolition of virtually all of the discriminatory effects of birth outside wedlock."[104] "The placing of children in an equal legal position regardless of the marital status of their parents is immensely significant from a symbolic perspective, undermining the centrality of marriage and also shifting the emphasis from an examination of the *adults'* relationship to the position of the *child*."[105]

Policymakers, judges, and lawyers have continued to grapple with this shift in emphasis into the 21st century. This consultation paper itself is in many senses a response to the implications of this shift.

Parentage in British Columbia immediately before the Family Law Act

Before the enactment of the *Family Law Act*, BC's legislative framework for parentage consisted only of the provision in the *Law and Equity Act* abolishing the distinction between children born within and outside wedlock[106] and a handful of provisions in the *Family Relations Act* (the *Family Law Act*'s predecessor), which narrowly applied only to cases in which there was a dispute over financial support for the child.[107]

104. Douglas, *supra* note 19 at 9.

105. *Ibid* [emphasis in original].

106. See RSBC 1996, c 253, s 61.

107. See RSBC 1996, c 128, ss 94 (parentage determination by court in child-support dispute), 95 (presumptions of paternity), 95.1 (paternity tests). These provisions were added in the late 1980s and early 2000s. See *Family Relations Amendment Act, 1988*, SBC 1988, c 36, s 4 (adding ss 94 and 95); *Miscellaneous Statutes Amendment Act (No 2), 2003*, SBC 2003, c 37, s 19 (adding s 95.1).

By the first decade of the 21st century, it was clear that this threadbare framework was no longer adequate. It didn't account for children conceived by assisted reproduction. It lacked a "general authority . . . for judges to make declarations of legal parentage."[108] And it lagged far behind the legislation in force in most of the other provinces and territories.[109]

Proposals for a new Family Law Act

In a 2010 publication, BC's ministry of attorney general laid out its vision for reformed legislation on parentage in a new *Family Law Act*.[110] The overriding goal was to create "comprehensive legislation governing the rules for determining a child's parentage."[111] The ministry's proposals were "intended to provide a scheme for determining legal parentage, including where assisted conception is used, in a way that protects the child's best interests and promotes stable family relationships."[112]

The development of the proposed legislation was guided by the following five "principles":

- promoting family stability;
- providing certainty of parental status as soon as possible;
- treating children fairly, regardless of the circumstances of their birth;
- protecting vulnerable persons; and
- preferring out-of-court processes where possible.[113]

These principles give a good summary of the goals of the new parentage legislation in the *Family Law Act*. The committee referred to them repeatedly in analyzing the legislation and considering options for reform.

108. *Proposals for a new Family Law Act*, *supra* note 3 at 29.

109. See *ibid*.

110. See *ibid* at 29–41.

111. *Ibid* at 29.

112. *Ibid*.

113. *Ibid* at 31.

Reforms to parentage laws in other Canadian provinces after the coming-into-force of the Family Law Act

Introduction. BC created a new legal framework for parentage based on the principles listed above, which became part 3 of the *Family Law Act*. Part 3 became the law of British Columbia when it entered into force in March 2013.

Since that date, the law on parentage elsewhere in Canada hasn't stood still. Four provinces—Ontario, Saskatchewan, Manitoba, and Québec—have revamped their parentage legislation.

Ontario reforms its parentage legislation in response to litigation. The first province after British Columbia to introduce parentage reforms was Ontario. On 1 January 2017 the *All Families Are Equal Act* came into force,[114] completely reforming Ontario's legal framework for parentage.[115]

The rationale for Ontario's legislation was similar to the rationale for part 3 of BC's *Family Law Act*. The existing parentage legislation was largely out of date, having failed to keep pace with developments in social attitudes and medical technology. But the impetus for Ontario's reforms differed from that for British Columbia's.

The spur that moved Ontario to act was litigation. There were warning signs for Ontario's parentage provisions as early as 2006, when the Ontario Superior Court of Justice struck down the province's vital-statistics legislation governing the birth registry as being in breach of the equality-rights provisions of the *Canadian Charter of Rights and Freedoms*.[116] This placed Ontario's parentage provisions at risk of meeting the same fate. But Ontario dragged its feet on reform.

Ultimately, a direct challenge to the parentage provisions was launched.[117] The Ontario government settled the litigation by agreeing with the litigants to enact legislative reforms based on an agreed set of principles.[118]

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114. *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016*, SO 2016, c 23.

115. This legal framework is found in the *Children's Law Reform Act*, RSO 1990, c C.12, ss 1–17 (as amended by *supra* note 114).

116. See *MDR v Ontario (Deputy Registrar General)*, 2006 CanLII 19053 (ONSC).

117. See *Grand v (Ontario) Attorney General*, 2016 ONSC 3434.

118. See *MRR v JM*, 2017 ONSC 2655, Fryer J [*MRR*] ("(a) Ontario law will aim to protect the security of all children, regardless of their parents' sexual orientation, gender identity, use of assisted reproduction or family composition. (b) Pre-conception intention to parent will be recognized as

Saskatchewan implements recommendations from its law reform commission. In December 2018, the Law Reform Commission of Saskatchewan published a wide-ranging final report on parentage.[119] The commission's recommendations were substantially implemented when Saskatchewan brought a new legal framework for parentage into force on 1 March 2021.[120]

Saskatchewan's parentage legislation is very similar to Ontario's. This similarity is likely due to a common ancestor they share: the Uniform Law Commission of Canada's *Uniform Child Status Act*.[121] BC also acknowledges this uniform act as a source for its parentage legislation.[122] But BC was more willing than Ontario or Saskatchewan to depart from the uniform act.

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a basis of parentage in the context of same-sex relationships and assisted reproduction. (c) Presumptions of parentage, currently based on biology and relationship with birth parent, will be expanded to include the intention to parent as a factor where assisted conception is used, regardless of the sex/gender of the parents and without precedence to biology. (d) With the birth parent's acknowledgement, consenting parents will be able to include their particulars on their child's birth registration without delay and expense where a presumption of parentage applies, except in the event of dispute. (e) A donor of human reproductive material or an embryo should not be declared a parent by reason only of the donation. (f) In the context of surrogacy, a court-ordered declaration of parentage should be required given heightened vulnerabilities and a history of functional caregiving through the gestation of a fetus. (g) Parentage will be defined and recognized in such fashion as to acknowledge the possibility of more than two parents. A maximum of four parents will be recognized by administrative process (eligibility to be determined through legislative process) and judicial declarations of parentage will still be available in circumstances of more than four parents, having regard to a child's best interests. (h) Pre-conception intention to parent will be recognized as a factor in determining best interests within s. 24 (2) (h). (i) The definition of 'birth' in the [*Vital Statistics Act*] will be changed to be inclusive of trans parents who give birth to a baby, but the term used may not necessarily be 'birth parent,' the term used will be determined in the legislative drafting, in light of other legislative provisions. (j) Declarations of parentage will continue to be available on application to the court by interested persons. Parent-child relationships recognized by declarations of parentage will be entitled to the equal protection and benefit of the law as parent-child relationships recognized by adoption order. (k) Consequential amendments to Ontario legislation will be made to deal with issues such as terminology to give effect to the principles above." At para 49.). *Cf*, above, at 26 (list of principles underlying development of BC's parentage legislation).

119. See Law Reform Commission of Saskatchewan, *Assisted Reproduction & Parentage: Final Report* (2018), online: <lawreformcommission.sk.ca/Assisted-Reproduction-Parentage-Final-Report.pdf>.

120. *The Children's Law Act, 2020*, SS 2020, c 2, ss 55–79.

121. *Uniform Child Status Act* (2010), online: <ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Child-Status-Act_1.pdf> (as amended August 2016).

122. See *Proposals for a new Family Law Act*, *supra* note 3 at 31.

So while BC's legislation shares a family resemblance to Ontario's and Saskatchewan's, it differs from those two in many of its details. This made Ontario's and Saskatchewan's legislation particularly useful benchmarks for the committee. They often illustrated alternative approaches to parentage issues, which had been tried in practice.

Manitoba responds to litigation by updating its parentage laws. Like Ontario, Manitoba only moved to reform its parentage legislation when it was facing litigation over its old parentage provisions. In Manitoba's case, the litigation resulted in the courts striking down these old provisions and suspending this declaration for a year to allow Manitoba to modernize its legislation.[123]

The reformed legislation came into force on 2 December 2021.[124] This was after the committee began meeting to discuss substantive issues but was not too far along on its work plan. So the committee was able to give the revised Manitoba provisions some consideration.

Manitoba's legislation has some similarities to Ontario's and Saskatchewan's. But it's noticeably more modest in its reforms than the parentage legislation in those two provinces.

Québec adopts Canada's newest legal framework for parentage as part of a wide-ranging package of family-law reforms. Québec's process of reforming its parentage legislation is similar to British Columbia's approach. Its reforms were first recommended in 2015 in a wide-ranging report to reform the province's family law.[125] But the path these recommendations took to implementation had some twists and turns that British Columbia didn't experience.

123. See Government of Manitoba, News Release, "Manitoba Government is Modernizing The Family Maintenance Act" (3 November 2021), online: <news.gov.mb.ca/news/index.html?item=52705>.

124. See *The Family Maintenance Act*, RSM 1987, c F20, CCSM c F20, ss 15–24.8 (as amended by *The Family Maintenance Amendment Act*, SM 2021, c 63). On 1 July 2023, the title of this legislation was changed, so Manitoba's parentage provisions are now known as *The Family Law Act*, SM 2022, c 15, Schedule A, CCSM c F20, ss 13–34.

125. See Régine Tremblay, "Quebec's Filiation Regime, the *Roy Report*'s Recommendations, and the 'Interest of the Child' " (2018) 31:1 Can J Fam L 199 (providing an English-language consideration of the *Roy Report*).

Québec's family-law legislation (including parentage) is set out as part of the province's *Civil Code*.[126] By 2015, these family-law provisions hadn't been amended in about 40 years. So, in relation to parentage, they were similar to BC's law before the advent of the *Family Law Act*: they had fallen far behind advances in medical technology and changes in social attitudes.

After some delay (including a change of government), Québec introduced legislation to implement the proposed reforms in October 2021.[127] While this took place after the committee began taking up the substantive issues for reform in this project, it was still at a relatively early stage in the committee's deliberations. So the committee did consider Québec's proposed reforms (as they stood at this time).

As the Québec bill proceeded through the legislative process, a deadline loomed in the form of a provincial election. To speed passage of the bill, many of its most far-reaching provisions were removed. A stripped-down version of the bill was enacted in June 2022.[128]

In the legislative session following Québec's provincial election (which occurred in spring 2023), a new bill was introduced in the legislature, containing many of the provisions that had been removed from the previous bill, along with some significant new reforms.[129] Unfortunately, by this time, the committee had nearly completed its deliberations and wasn't able to consider this new bill. The bill was enacted in June 2023.[130]

A fifth province may move in the near future, as Nova Scotia carries out a law-reform project. Among the provinces and territories that haven't acted recently to reform their parentage legislation, Nova Scotia stands out as lagging behind. Nova Scotia lacks legislation dealing substantively with children conceived by assisted

126. See *Civil Code of Québec*, CQLR c CCQ-1991.

127. See Bill 2, *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, 2nd Sess, 42nd Leg, Québec, 2021 (first reading 21 October 2021) [QC Bill 2].

128. See *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, SQ 2022, c 22 (in force 8 June 2022).

129. See Bill 12, *An Act to reform family law with regard to filiation and to protect children born as a result of sexual assault and the victims of that assault as well as the rights of surrogates and of children born of a surrogacy project*, 1st Sess, 43 Leg, Québec, 2023 (first reading 23 February 2023).

130. See *An Act to reform family law with regard to filiation and to protect children born as a result of sexual assault and the victims of that assault as well as the rights of surrogates and of children born of a surrogacy project*, SQ 2023, c 13 (in force 6 June 2023) [QC Bill 12].

reproduction. Its only provisions on this topic are found in a regulation adopted under its vital-statistics legislation,[131] dealing with registration of births in a surrogacy arrangement.[132]

But this state of affairs may be about to change in the near future. Nova Scotia's main law-reform organization—the Access to Justice and Law Reform Institute of Nova Scotia—is currently in the midst of a comprehensive review of that province's parentage law. In October 2022, it published wide-ranging consultation paper on a proposed *Parentage Act* for Nova Scotia.[133] The committee was able to consider many of the consultation paper's proposals as it deliberated on options for reforming part 3 of BC's *Family Law Act*.

131. See *Vital Statistics Act*, RSNS 1989, c 494.

132. See *Birth Registration Regulations*, NS Reg 390/2007, s 5.

133. See *supra* note 36.

Chapter 4. Parentage If No Assisted Reproduction

Introduction

As a judge in a recent court case observed, "[p]art 3 of the *FLA* contains two different regimes for parentage: one regime that applies to children conceived through sexual intercourse, and one that applies to children conceived through assisted reproduction."[134]

The criterion for determining the parentage of children conceived through sexual intercourse (what part 3 refers to as "parentage if no assisted reproduction") is genetic connection. The criterion for children conceived through assisted reproduction is intention to be a parent.

So, in British Columbia's parentage law, there is a different underlying basis for parentage of children conceived by sexual intercourse than for parentage of children conceived by assisted reproduction. They form distinct, airtight categories—what the court called "two different regimes for parentage."

But this approach isn't the only way to organize parentage law. Other provinces have taken a more flexible approach, allowing intention to be a factor in some cases involving parentage of children conceived by sexual intercourse.

This chapter's focus is on potential additions to part 3 that would blur the separation between the two regimes. It considers two ways to determine parentage of children conceived by sexual intercourse that don't rely on a genetic connection to the parent.

First, it examines whether part 3 should enable children conceived by sexual intercourse to have more than two parents, which is the case currently only for children conceived by assisted reproduction.

Second, it considers a reform adopted in some American states to deny parentage to a perpetrator of sexual assault when a child is born as a result of that assault.

134. *Birth Registration Case*, *supra* note 10 at para 18.

Some issues related to conception by sexual intercourse are taken up in proceeding chapters. For example, sperm donation by sexual intercourse (in general and in the context of surrogacy).

Background on the Current Law in BC and Its Development

The current legislation focuses on presumptions of parentage

Before discussing these possible additions to BC's parentage law, this chapter briefly reviews the current law and how it developed.

Part 3 of the *Family Law Act* deals with the parentage of children conceived by sexual intercourse in section 26.

The section begins by establishing genetic (or biological) connection as the basis of parentage for children conceived by sexual intercourse. In these cases, "the child's parents are the birth mother and the child's biological father."[135]

Then section 26 provides a list of presumptions that apply to help determine who is the child's biological father.

What are presumptions and why are they used in part 3?

Presumptions are "devices that effect a legal consequence" by requiring a court or other decision-maker to "infer a presumed fact when other basic facts are proved."[136]

So, to take an example from section 26, if it's proved that a male person "was married to the child's birth mother on the day of the child's birth," then that person is presumed to be the child's father.[137]

135. *Supra* note 1, s 26 (1). Note that this quotation is taken directly from the act, preserving its gender-specific terms "birth mother" and "biological father." Later in this consultation paper, the committee tentatively recommends that part 3 adopt gender-neutral terminology. See, below, at 217–220. This consultation paper uses gender-neutral terminology, except when it's quoting from a source that uses gender-specific terminology.

136. Ronald J Delisle & Lisa Dufraimont, *Canadian Evidence Law in a Nutshell*, 3d ed (Toronto: Carswell, 2009) at 39.

137. *Supra* note 1, s 26 (2) (a).

This approach may be informally described as a legal fiction—that is, something that the law takes to be true even though it may in reality be untrue. Presumptions of facts (which the presumptions found in section 26 are) only apply "provided that the party against whom the presumption operates fails to do something prescribed by law."[138] Another way of saying this is that presumptions always leave the door open to being rebutted. Section 26 expressly acknowledges this point by saying that its presumptions apply "unless the contrary is proved."[139]

How would a presumption of parentage be rebutted? This is done by appealing to the criterion that underlies the rules of parentage for children conceived by sexual intercourse: genetic connection. The rebuttal would consist of evidence that establishes whether a genetic connection does or doesn't exist between the child and the person presumed to be a parent.

Such evidence is readily available through genetic parentage testing (such as a DNA test), which is highly accurate in determining the existence of a genetic connection. Part 3 of the *Family Law Act* contains a procedure for obtaining a court order for such testing.[140]

The presumptions of parentage are themselves likely quite accurate in determining a child's genetic parents. But their accuracy isn't the point. They have been included in part 3 for two reasons: (1) they support some of the broader policy goals of part 3; and (2) they provide practical benefits.

Earlier this consultation paper set out a list of five principles that the BC government said had guided its design of part 3.[141] One of these principles was "providing certainty of parental status as soon as possible." It's readily apparent that an approach relying on presumptions would be the quickest way to establish parentage after a child's birth.

Another principle is "promoting family stability." Arguably, this goal would be supported by the use of presumptions in the legislation.

These points come to life when the alternative to using presumptions is considered. The alternative here would be routine genetic testing for children conceived by sexual intercourse.

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138. Delisle & Dufraimont, *supra* note 136 at 39.

139. See *supra* note 1, s 26 (2).

140. See *ibid*, s 33.

141. See, above, at 24.

Such testing would establish, essentially without a doubt, who the child's genetic parents are. But it would also impose significant costs and delays. And it would likely be viewed as a needless imposition by most parents.

The origins of section 26

Section 26 essentially carries forward section 95 of the *Family Relations Act* (the predecessor to the *Family Law Act*).[142] The major difference between the two is that section 95 opened with language that narrowed its scope to cases in which "a male person denies responsibility under section 88 (1) on the basis that he is not the father of the child"—section 88 (1) being the provision imposing an obligation to provide financial support to a child.[143]

Section 26—in contrast to section 95—is cast as a set of general rules for parentage of children conceived by sexual intercourse. This approach is consistent with the overriding approach of part 3 as a comprehensive legal framework for parentage in BC.[144]

The full text of section 26

Parentage if no assisted reproduction

26 (1) On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.

(2) For the purposes of this section, a male person is presumed, unless the contrary is proved or subsection (3) applies, to be a child's biological father in any of the following circumstances:

(a) he was married to the child's birth mother on the day of the child's birth;

(b) he was married to the child's birth mother and, within 300 days before the child's birth, the marriage was ended

(i) by his death,

(ii) by a judgment of divorce, or

142. See *Family Relations Act*, *supra* note 107, s 95 [repealed].

143. *Ibid*.

144. See *Family Law Act*, *supra* note 1, s 23 (1).

(iii) as referred to in section 21 *[void and voidable marriages]*;

(c) he married the child's birth mother after the child's birth and acknowledges that he is the father;

(d) he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth;

(e) he, along with the child's birth mother, has acknowledged that he is the child's father by having signed a statement under section 3 of the *Vital Statistics Act*;

(f) he has acknowledged that he is the child's father by having signed an agreement under section 20 of the *Child Paternity and Support Act*, R.S.B.C. 1979, c. 49.

(3) If more than one person may be presumed to be a child's biological father, no presumption of paternity may be made.[145]

Issues for Reform

Should part 3 of the *Family Law Act* be amended to provide for more than two parents for a child conceived by sexual intercourse?

Background information

BC's current law limits the number of parents for a child conceived by sexual intercourse. The *Family Law Act* restricts parentage for children conceived through sexual intercourse to "the birth mother and the child's biological father."[146] In other words, section 26 does not permit more than two parents.

This limitation was explored in depth in a recent case involving a polyamorous triad.[147] The parties conceived a child through sexual intercourse. This resulted in two biological parents, and a non-biological parent. Due to the restrictions outlined above, the parties were forced make a court application to have the non-biological party named a parent.

145. *Ibid*, s 26 [bracketed text in original].

146. *Ibid*, s 26.

147. See *Birth Registration Case*, *supra* note 10.

In reviewing the *Family Law Act* in this case, the court stated:

> there is a gap in the *FLA* with regard to children conceived through sexual intercourse who have more than two parents. The evidence indicates that the legislature did not foresee the possibility a child might be conceived through sexual intercourse and have more than two parents. Put bluntly, the legislature did not contemplate polyamorous families. This oversight is perhaps a reflection of changing social conditions and attitudes . . . or perhaps is simply a misstep by the legislature. Regardless, the *FLA* does not adequately provide for polyamorous families in the context of parentage.[148]

In acknowledging this gap, the court exercised its *parens patriae* jurisdiction to make a parentage declaration for the non-biological parent.[149] This resulted in three legal parents for a child conceived through sexual intercourse.

Despite the above, the *Family Law Act* does permit more than two parents for children conceived by assisted reproduction. Section 30 of the act allows this option for specific individuals, namely: (a) a birth parent and the other intended parent or parents; or (b) a birth parent and spouse, along with a donor. The parties are required to enter into a pre-conception agreement.

Two Canadian provinces allow more than two parents for children conceived by sexual intercourse. Most Canadian jurisdictions do not permit more than two parents, regardless of the method of conception. Much of the legislation in this area was originally introduced in the late 1980s and early 1990s. As stated in a recent case involving a polyamorous triad in Newfoundland and Labrador, "it is safe to say that at the time of [the legislation's] introduction approximately 30 years ago, there was no contemplation of the now complex family relationships that are common and accepted in our society."[150]

Manitoba, Saskatchewan, and Ontario have amended their parentage legislation in the past few years. Interestingly, these provinces have taken opposite approaches to the multi-parent question.

Manitoba's recently amended parentage legislation explicitly limits the number of potential parents. For example, one provision baldly states that "[a] child has no

148. *Ibid* at para 68.

149. The phrase is Latin and means *parent of the nation*: indicating the court's ability to protect vulnerable parties where there are gaps in the legislation. For more information on *parens patriae*, see, below, at 163–164.

150. *Re CC,* 2018 NLSC 71 at para 30.

more than two parents."[151] Moreover, the act's legislative definition of *intended parents* says the term "means a person . . . or two persons."[152]

Conversely, Ontario chose to open the door for up to four legal parents, subject to certain requirements.[153] The main requirements involve a pre-conception agreement with no more than four parties (i.e., intended parents).[154]

Likewise, Saskatchewan's parentage legislation has a provision permitting up to four legal parents (again, subject to certain requirements, mainly relating to the required pre-conception agreement).[155]

Ontario's and Saskatchewan's provisions appear to apply regardless of the method of conception. At this time, there is little-to-no case law regarding these provisions. Thus, it remains to be seen how they will be applied by the court.

The American Uniform Parentage Act has a procedure that allows for more than two parents. The Uniform Law Commission is an American law-reform organization that plays a similar role to the Uniform Law Conference of Canada: it recommends reform to modernize and harmonize state law. The primary means by which the Uniform Law Commission advances its reform agenda is by creating uniform statutes, which it recommends for enactment to state legislatures.

In 2017, the Uniform Parentage Act[156] was amended to include a provision allowing for more than two legal parents.[157] The language of this section was arguably modelled on the California Family Code.[158] Since its introduction in 2017, the Uniform Parentage Act section has been adopted by Washington and Vermont.[159]

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151. *The Family Law Act*, *supra* note 124, s 16 (1) (4).

152. *Ibid*, s 13 "intended parent or parents."

153. See *Children's Law Reform Act*, *supra* note 115, s 9.

154. See *ibid*, s 9 (2).

155. See *The Children's Law Act, 2020*, *supra* note 120, s 6.

156. See Uniform Parentage Act (2017), online <uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f>.

157. See Uniform Parentage Act (2017), *ibid*, § 613 (c) [Alternative B]. See also Colleen M Quinn, "Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting" (2018) 31:1 J Am Acad Matrimonial Law 175 at 183.

158. See Quinn, *supra* note 157 at 180–181.

159. See *ibid* at 180, 183.

The uniform act's provision requires a court application and particular consideration of the needs and interests of the child. In some respects, the provision echoes the path Canadian courts take in exercising *parens patriae* jurisdiction.

Brief description of the issue

The BC Supreme Court has recently ruled that part 3 has a gap because it fails to account for polyamorous families. Further, recent reforms in parentage legislation across Canada have resulted in divided approaches to permitting more than two parents for children conceived by sexual intercourse, with two provinces allowing up to four people to become parents by pre-conception agreement (regardless of conception method). In the United States, the *Uniform Parentage Act* has included a provision permitting more than two parents by court application (subject to certain considerations). Should British Columbia follow suit and permit more than two parents for children conceived through sexual intercourse?

Discussion of options for reform

The options to consider in response to this issue for reform are: (1) amend part 3 by creating a provision allowing for more than two parents for children conceived through sexual intercourse; (2) maintain the status quo.

As noted earlier,[160] part 3 of the *Family Law Act* was developed with a list of legislative objectives for a new parentage regime. These objectives included: "promoting family stability; providing certainty of parental status as soon as possible; treating children fairly, regardless of the circumstances of their birth; protecting vulnerable persons; and preferring out-of-court processes where possible."[161] It's helpful to consider the options for reform in relation to these legislative objectives.

Promoting stability and certainty. At present, families conceiving through sexual intercourse are limited to two biological parents. Thus, if a family deviates from this model, the remaining party or parties are not legislatively recognized.

Rather, such individuals must start a court application seeking parental status, which can be costly, slow, and uncertain as to outcome. Under the *Uniform Parentage Act* model, a court would be provided with clear direction on this issue (e.g., permitting more than two parents, and specifying the criteria by which they

160. See, above, at 24.

161. *Proposals for a new Family Law Act*, *supra* note 3 at 31.

may be determined). However, this still leaves a gap from the time of birth until the time a judgment is granted. Moreover, the provision *allows* for more than two parents, it does not guarantee this outcome.

Providing a legislative option for parentage of all parties by pre-conception agreement offers certainty and stability as to parentage from time of birth. "Without such recognition the family unit is vulnerable with many issues left uncertain, such as custody, citizenship, holding and succession of property, social support, and legitimacy."[162]

Treating children fairly. Scholars have argued that by refusing to acknowledge multi-parent families, children receive the message that their family structure is inferior or excluded. This speaks to the legislative objective of treating children fairly, regardless of the circumstances of their birth.

The exclusion of the third parent's legal status could also have a negative impact on the family. "The status of the parent-child relationship 'matters because it communicates society's view of the status of a relationship, and thus shapes the understanding of a relationship both among the adults and the children involved.' Lack of status could cause the family to feel inferior based on 'outsiders perceptions of his/her family not being legally recognized,' which could cause mental or physical distress."[163]

Protecting vulnerable persons. The scholarship is divided on the issue of protecting vulnerable parties.

Some authors have argued that permitting multiple parents protects children. Children do not understand differences in legal status of their parents (e.g., guardian versus parent). However, these differences have meaningful consequences in practice. As stated by the court, "[a] declaration of parentage is a lifelong immutable

162. Haim Abraham, "A Family Is What You Make It: Legal Recognition and Regulation of Multiple Parents" (2017) 25:4 Am U J Gender Soc Pol'y & L 405 at 424.

163. Mallory Ullrich, "Tri-Parenting on the Rise: Paving the Way for Tri-Parenting Families to Receive Legal Recognition through Preconception Agreements" (2019) 71:3 Rutgers UL Rev 909 at 930–931 [footnotes omitted]. See also *AA*, *supra* note 12, regarding a lesbian couple and their donor. The court referenced a quote from a child in a similar situation, "I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this . . . I want my family to be accepted and included, just like everybody else's family" (at para 15).

declaration of status,"[164] and the law granting this status to all of a child's parents provides "security, peace of mind, and validation."[165]

Parentage also protects and promotes a child's ability to obtain benefits, secure financial obligations, and inherit on death.[166] In addition, it protects the parent-child relationship. As noted by one scholar, "recognition of three parents can provide stability and continuity for a child's relationship with relevant adults."[167]

However, others have argued that multi-parent families have serious limitations and may be damaging to women and children. This discussion is often framed in reference to the community of Bountiful, BC, and the practice of polygamy as part of the religious beliefs of fundamentalist Mormons. Scholars have argued that there is evidence of "significant harms to women and children in polygamous relationships compared to those in monogamous marriages."[168]

This position was echoed in the 2011 BC Supreme Court case commonly known as the *Polygamy Reference*.[169] This case specifically reviewed whether a *Criminal Code* section prohibiting polygamy was contrary to the *Canadian Charter of Rights and Freedoms*. This case was decided in light of the allegations of abuse, sexual assault, and child brides occurring in Bountiful.[170] "The lengthy judgment reduces to a simple analysis. Yes, the prohibition of polygamy violates section 2 (a) of the *Charter*, but that violation is justified under section 1 because the prohibition is all about protecting society from harms: 'harms to women, to children, to society, and, importantly, to the institution of monogamous marriage.' "[171]

Some commentators have pointed out that there are significant differences between polygamy (as a religious practice, specifically in Bountiful) and polyamory (as the

164. *Birth Registration Case*, *supra* note 10 at para 79.

165. *Ibid* at para 81.

166. *Ibid* at paras 78–82. See also Ullrich, *supra* note 163 at 929.

167. Naomi Cahn & June Carbone, "Custody and Visitation in Families With Three (or More) Parents" (2018) 56:3 Fam Ct Rev 399 at 407 [footnote omitted].

168. Nicholas Bala, "Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy" (2009) 25:2 Can J Fam L 165 at 168.

169. *Reference Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [*Polygamy Reference*].

170. See Bala, *supra* note 168.

171. Dana Phillips, "The Prude in the Law: Why the *Polygamy Reference* is All About Sex," Case Comment on *Reference Re Section 293 of the Criminal Code of Canada*, (2014) 19 Appeal 151 at 152 [footnote omitted].

consensual relationship of multiple adults).[172] However, the *Polygamy Reference* did not make this distinction, and it is possible that community members will continue to associate multi-party relationships with the harms discussed above.[173]

Further concerns have been raised with respect to potential harms multi-parent homes may pose to children. One common concern is regarding "too many cooks in the kitchen."[174] The argument is that an increase in parents will necessarily result in an increase in complexity and opportunity for conflict.[175] Moreover, multi-parent and polyamorous families are more likely to live in multiple homes.[176] Some have argued that this will cause an increase in disruption for a child.[177] This argument is often countered by pointing to the number of children being raised by separated and divorced couples, who also live in multiple households, and often recouple—which results in a similar configuration for a child to a multi-parent household.[178]

Out-of-court options. As mentioned above, at present multi-parent and polyamorous families conceiving through sexual intercourse are forced to initiate court proceedings to have their family form recognized. This requirement would be continued under the American *Uniform Parentage Act* model. By following the example set in Ontario and Saskatchewan, the law could provide an alternative to a court application for parentage.

The committee's tentative recommendation for reform

In the committee's view, the law in British Columbia has reached an awkward stage on this issue. Part 3 of the *Family Law Act* doesn't allow a child conceived by sexual intercourse to have more than two parents. But the courts have stepped in to permit this.

The courts base their jurisdiction on this issue on a gap in the legislation. When part 3 was enacted it didn't account for the growing social acceptance of polyamorous families.

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172. See *ibid*.

173. See *ibid.*

174. Ullrich, *supra* note 163 at 924.

175. See *ibid*.

176. See John-Paul Boyd, "The polyamorous family: Study shows how Canadian relationships are evolving" *The Lawyers Weekly* (11 November 2016) at para 6, online: <thelawyersdaily.ca/articles/3701/the-polyamorous-family>.

177. See Ullrich, *supra* note 163 at 925.

178. See Abraham, *supra* note 162 at 424.

In the committee's view, the time has come to bring the legislation up to date. Requiring polyamorous families to seek a court order in each case to establish parentage imposes costs and delays on them that other families don't have to suffer. It also undermines several of the goals of part 3, notably promoting family stability, establishing parentage as soon as possible after birth, and preferring out-of-court methods to establish parentage.

Two other provinces allow children conceived by sexual intercourse to have more than two parents. Any harmful effects from this decision haven't come to light in those provinces.

Establishing a clear legislative procedure is preferable to requiring a court application in each case. The committee turned its attention in the issues that follow to the details of that procedure.

The committee tentatively recommends:

1. Part 3 of the Family Law Act should be amended to create a provision allowing for more than two parents where a child is conceived by sexual intercourse.

Should a provision allowing for more than two parents for a child conceived by sexual intercourse require a pre-conception or a pre-birth agreement?

Background information

As discussed in the previous issue, in Canada, both Saskatchewan and Ontario have introduced provisions permitting multiple parents.

These provisions contain very similar language, which represents certain legislative choices. First, there is the (unwritten) choice to permit multiple parents regardless of the means of conception. This is in contrast to section 30 of the *Family Law Act*, as discussed above.[179]

Second, both provisions require a pre-conception agreement. Third, both provisions expressly limit the number of parents to four.

179. Ontario and Saskatchewan have designed provisions which account for both methods of conception. As BC already has a provision for assisted reproduction, a drafting choice will be required to determine whether section 30 is replaced with a provision for both methods of conception, or if a section for sexual intercourse is added in conjunction with section 30.

Fourth, certain individuals are required as part of the agreement in certain circumstances. How this is set out varies between the two statutes. In Saskatchewan the agreement must include: (a) the birth parent (if not a surrogate), (b) the person whose sperm is used (if that person intends to be a parent), and (c) the respective spouses of persons (a) and (b) (to indicate consent or lack of consent).[180] In Ontario the requirement is framed slightly differently. In that province, the agreement must include: (a) the intended birth parent (if not a surrogate), (b) the person whose sperm is used (if the child is to be conceived through sexual intercourse but not through insemination by a sperm donor), and (c) the spouse of the birth parent (if the child is to be conceived through assisted reproduction or through insemination by a sperm donor).[181]

Fifth, both provisions require consent to become a parent from the spouse of the birth parent (and in Saskatchewan, from the spouse of the sperm-contributing parent). Finally, the parentage of all parties to the agreement is confirmed.

The *Uniform Parentage Act* provision makes very different legislative choices.

First, the section requires a court application, and appears to require the context of "competing claims or challenges" to parentage. Second, the court's analysis is focused on the best interests of the child (rather than the intention of the parties). Third, the finding of more than two parents is permitted where it would otherwise be "detrimental to the child." Fourth, the provision does not limit the number of parents to a specific number.

Brief description of the issue

Allowing multiple parents introduces intention to be a parent as a criterion (along with genetic connection) for determining the parentage of a child conceived by sexual intercourse. Capturing that intention, as a result, becomes a paramount concern. What kind of agreement should be required in these multiple-parent arrangements?

Discussion of options for reform

The literature on multi-parent families contains considerable discussion around parental agreements.

180. See *The Children's Law Act, 2020*, *supra* note 120, s 61.

181. See *Children's Law Reform Act*, *supra* note 115, s 9.

Proponents of such agreements point to the value of documenting a joint understanding. Interestingly, in a study on Dutch multi-parent families, it was found most had drafted contracts despite the fact they are not binding in that country.[182] "Contracts were seen as an (albeit non-legal) tool to grant all involved parties a feeling of safety and security in the midst of their precarious (legally unrecognized) multiple-parent constellation."[183]

Pre-conception agreements are important to clarify the intentions, rights, and positions of the parties. This has value from opposing perspectives: first, to grant rights to those not captured by the other provisions under part 3;[184] second, to secure obligations from those who would not otherwise be captured for things like child support. Absent such agreements, when conflicts arise, the court is left to determine the intentions of the parties.[185]

However, others have pointed to clear limitations with pre-conception agreements.

At present, many families relying on section 30 draft parenting terms into their pre-conception agreements. As multi-parent families often live in multiple households, issues like parenting time, support, and relocation need to be considered at the outset.[186] "However, it appears that while such matters can be included within a section 30 agreement, they will not be enforceable. The only binding aspect of a section 30 agreement relates to the narrow point of who is a legal parent."[187]

Section 44 of the *Family Law Act* specifically states that agreements between guardians respecting parenting arrangements are "binding only if the agreement is made (a) after separation, or (b) when the parties are about to separate, for the

182. See Nola Cammu, " 'Legal Multi-parenthood' in Context: Experiences of Parents in Light of the Dutch Proposed Family Law Reforms" (July 2019) Family & Law 1 at 4–5, DOI: <10.5553/FenR/.000042>.

183. *Ibid* at 5.

184. See Abraham, *supra* note 162 at 424.

185. *MD v TK*, 2021 ONSC 8514 [*MD*]. This case involved sperm donation. However, Justice Nicholson's comments on the value of a pre-conception agreement equally applies to this setting.

186. See Fiona Kelly, "Multiple-Parent Families Under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by which to Preserve Biological Ties and Opposite-Sex Parenting?" (2014) 47:2 UBC L Rev 565 at 590 [Kelly, "Multiple-Parent Families"].

187. *Ibid*.

purpose of being effective on separation."[188] This leaves multi-parent families in a precarious position, where only a portion of their contract is binding.[189]

A second concern is regarding the pre-conception requirement. It has been pointed out that not all families crystallize their roles until after a child is conceived or born. This may be especially true for families engaging in sexual intercourse who may conceive by accident.

> Th[e] [pre-conception-agreement] requirement is coherent when one considers that LGBT parents generally plan the birth of their children and need to ensure certainty in this planning process. But, the intention to parent pre-conception is not the only way to ensure that children's interests are put first. Loving families can be and are created after a child's birth.[190]

Scholars have argued that a provision permitting multiple parents from time of birth by pre-conception agreement should be complemented by a second provision that allows for multiple parents if this legislative form is not met (through a court application, for example).[191] This point was made in the context of the amendments to Ontario's parentage law in 2016. Namely, that the amendments muddy and potentially limit the court's ability to use *parens patriae* jurisdiction.[192] Thus, while the legislation has become more inclusive by permitting up to four parents, it has simultaneously become more difficult for parties who do not meet the legislative requirements to become parents after conception.

The committee's tentative recommendation for reform

The committee quickly came to the conclusion that an agreement would be required to establish that a child conceived by sexual intercourse has more than two parents. But the timing of that agreement generated considerable discussion within the committee.

The committee noted that requirements for pre-conception agreements are common in Canadian parentage legislation. The two provinces that allow multiple parents for children conceived by sexual intercourse both require a pre-conception agreement.

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188. *Supra* note 1, s 44 (2).

189. See Kelly, "Multiple-Parent Families," *supra* note 186 at 593.

190. Natasha Bakht & Lynda M Collins, "Are You My Mother? Parentage in a Nonconjugal Family" (2018) 31:1 Can J Fam L 105 at 133.

191. See *ibid* at 137. The authors specifically praise section 31 of the BC *Family Law Act*, *supra* note 1, as a mechanism to achieve this aim.

192. See Bakht & Collins, *supra* note 190 at 133–134.

There was also a sense, which the committee explored in depth, that requiring a pre-conception agreement would provide a safeguard for parties who may be vulnerable to exploitation.

In the end, the committee decided to strike new ground in Canadian parentage legislation and propose requiring a pre-birth agreement.

The main rationale for this proposal relates to the differing natures of conception by assisted reproduction and sexual intercourse. While conceiving a child by assisted reproduction requires a high degree of planning, conception by sexual intercourse may in some case occur by accident.

Some of these accidental pregnancies may happen in polyamorous families where the parties have general intention for the child to have more than two parents. The committee was concerned about these families falling outside the legislative requirements because they failed to capture that intention in a written pre-conception agreement.

The committee also noted that if parties in some cases fail to conclude a written pre-birth agreement in these circumstances, then the child would still have two parents. (This would be the result that follows by applying the presumptions in section 26 or by genetic testing.) In contrast, a child conceived by assisted reproduction in the absence of a pre-conception agreement would be in a much murkier legal position.

Finally, the committee was concerned about the possibility that requiring a pre-birth agreement, rather than a pre-conception agreement, would leave vulnerable parties more open to exploitation. But the committee decided that requirements for the timing of the agreement aren't the best way to address this concern. In particular, the committee noted that part 3 could expand requirements for independent legal advice as a better way to deal with this issue.[193]

The committee also wrestled with the implications of its proposal for polygamy. The committee emphasized that its proposal isn't intended to provide any support for polygamy.

In the committee's view, it's important to distinguish polygamy from polyamory.

193. See, below, at 255 (considering a tentative recommendation to require independent legal advice).

Polyamory is based on an ethic of equality, consent, and mutual decision-making.[194] Polygamy, in contrast—though it may be understood as "an umbrella term that refers to the state of having more than one spouse at the same time"—is commonly linked to bigamy, which is a *Criminal Code* offence that frequently has elements of "fraud" and "deception."[195]

The committee tentatively recommends:

2. A provision allowing for more than two parents where a child is conceived by sexual intercourse should require a pre-birth agreement.

Who should be required to be a party to the pre-birth agreement?

Brief description of the issue

This issue for reform and the next one concern some critical details for the pre-birth agreement. This issue deals with whether the legislation should identify who must be a party to a pre-birth agreement for that agreement to be valid.

Discussion of options for reform

While this issue may initially seem to have a wide range of options, they can be practically narrowed down. As a starting point, the birth parent and the person providing the sperm in conception of the child logically should be required to be parties to a pre-birth agreement. In addition, any other person who intends to be a parent to the child should be a party to the agreement.

Once the issue was narrowed down in this fashion, committee's focus turned to whether the spouse of the birth parent should be required to be a party to the agreement.

The scholarship on multi-parent families tends to focus on three potential configurations. First, a gay couple and a lesbian couple, agreeing to conceive a child through assisted reproduction and co-parent. Second, a same-sex couple, and their opposite-sex donor or surrogate, agreeing to conceive a child through assisted reproduction and co-parent. Finally, a polyamorous triad.

194. See *Polygamy Reference*, *supra* note 169 at paras 138, 430–434.

195. *Ibid* at paras 135, 142–143. See also *Criminal Code*, RSC 1985, c C-46, s 290 (crime of bigamy).

The legislation in Canada largely echoes this understanding. As discussed above,[196] the chosen framework in Ontario and Saskatchewan requires inclusion of certain parties based on biology or spousal status. The inclusion of those closest to a child biologically and relationally makes sense, "[n]atural parents, as a general assumption, are more likely to do what is best for their own children than are any other individuals, groups, or institutions. Rights are given to parents to reinforce their natural instincts and innate sense of responsibility."[197]

These relationships are often conceived within the framework of marital or conjugal relationships. However, it is important to note that other configurations exist. For example, two friends in Ontario decided to become co-parents.[198] These individuals were never in a romantic or conjugal relationship. The birth parent was inseminated using an anonymous donor, and her friend acted as a birthing coach. When the child was born with severe disabilities, the friends decided to co-parent the child. In their case, the court granted parentage to both parties via the *parens patriae* jurisdiction.[199]

Other potential family configurations involve those who identify as aromantic, or those who want children but have been unsuccessful in finding an appropriate partner. Websites exist to match such individuals and assist them in setting up families.[200] Scholars have also pointed to kinship carers, who may include grandparents, godparents, aunts and uncles, and friends who act in a parental role.[201]

The committee's tentative recommendation for reform

In the committee's view, it was clear from the start that the birth parent, the sperm provider, and any other person who intends to be a parent should be required to be parties to the pre-birth agreement.

There was some discussion of whether or not to require the spouse of the birth parent (if that person didn't provide sperm for the conception of the child to be a

196. See, above, at 38–39.

197. Katharine T Bartlett, "Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed" (1984) 70:5 Va L Rev 879 at 891.

198. See Bakht & Collins, *supra* note 190.

199. See *ibid* at 107–108.

200. See *ibid* at 145.

201. See Abraham, *supra* note 162 at 419.

party). In the end, the committee decided that—even in cases in which that spouse won't be a parent—the spouse will be living with the birth parent and will be involved with the child. For the sake of clarity and certainty, that spouse should also be required to be a party to the pre-birth agreement.

The committee tentatively recommends:

3. A provision allowing for more than two parents where a child is conceived by sexual intercourse should require, at a minimum, that the following people must be parties to the pre-birth agreement:

(a) the intended birth parent, who is not a surrogate;

(b) the spouse of the intended birth parent;

(c) the person whose sperm is used to conceive the child, if that person is not a donor and is not the same as the party listed at (b);

(d) any other person who intends to be a parent to the child.

Who should be made a parent through the pre-birth agreement?

Brief description of the issue

This issue is linked to the previous issue for reform. Having established who should be required to be a party to a pre-birth agreement, the question here is whether some of those parties should be allowed to enter into the agreement to demonstrate an intention *not* to be the child's parent.

Discussion of options for reform

There is potentially a wide range of options to consider in response to this issue. The options range from a light touch (which would allow the parties to the pre-birth agreement maximum flexibility in determining who could be made a parent through the agreement) to a more directive approach (which would limit the child's parents to categories of people identified in the legislation).

At one end of the range, the legislation could simply empower the parties to a pre-birth agreement to agree on who will be the child's parents. This approach would be clearest in relying on intention as the means to determine parentage. But it could also be the most difficult approach to reconcile with the current provisions of part 3. Allowing a birth parent or a sperm provider to decide not to be a child's parents would appear to allow alternative ways to create surrogacy arrangements and

donor arrangements, which would undercut the current requirements for those arrangements in part 3.[202]

At the other end, the legislation could name specific parties who must be parents. There are any number of ways in which to structure such a provision. For example, the provision could require that the birth parent, sperm provider, and their spouses must be parents. Or it could require the birth parent, sperm provider, and people on a set list of close relatives must be parents. The point is that such a provision would limit the role that pure intention plays in determining multiple parents for children conceived by sexual intercourse.

The committee's tentative recommendation for reform

The committee decided that the best approach to this issue should fall between these two extremes.

In the committee's view, in cases in which a child conceived by sexual intercourse will have more than two parents, legislation should provide that the birth parent is one of the child's parents. Otherwise, this provision could be used as an alternative way to create a surrogacy arrangement, which would undermine the procedure and lack the safeguards set out under section 29 of the *Family Law Act*.

While the committee came to agreement on this first point quickly, it spent more time considering whether legislation should require a sperm provider to also be a parent. The committee explored whether there would be more scope for providing the parties with some flexibility on this point. In the end, though, the committee was concerned that allowing the sperm provider to decide not to be a parent would create an alternative to its proposed procedure for sperm donation by sexual intercourse.[203] The committee was also concerned that allowing the sperm provider not to be a parent in this case would run counter to how the *Family Law Act* deals with child support.[204]

In the committee's view, this provision should be clearly focused on providing a means for a child conceived by sexual intercourse to have more than two parents. Other arrangements—such as surrogacy arrangements and donor arrangements—are covered off elsewhere in part 3.

202. See *supra* note 1, ss 24, 29.

203. See, below, at 67–74.

204. See *supra* note 1, s 147.

Apart from the birth parent and sperm provider, the legislation in the committee's view should only rely on the intentions of the parties to the pre-birth agreement to determine the child's other parents. Any other approach, which attempted to name specific people or categories of people, would in all likelihood end up being underinclusive.

The committee tentatively recommends:

4. A provision allowing for more than two parents where a child is conceived by sexual intercourse should provide that the child's parents are:

(a) the intended birth parent, who is not a surrogate;

(b) the person whose sperm is used to conceive the child, unless the parties made a pre-conception agreement under the section for sperm donation by sexual intercourse,

(c) the other parties to the pre-birth agreement who agree to be parents of the child.

Should a provision allowing for more than two parents for a child conceived by sexual intercourse limit parents to a specific number?

Brief description of the issue

This issue contains two distinct questions. First, there is the yes-or-no question on whether part 3 should contain a limit on the number of parents for a child conceived by sexual intercourse. If the answer is *yes*, then a second question arises: what should that limit be?

Discussion of options for reform

Section 30 of the *Family Law Act* does not specify a number of parents permissible for children conceived through assisted reproduction. As a result, there is disagreement in the scholarship about the legislation's intentions. Some scholars state three as the maximum number of parents,[205] while others say six are permissible.[206] This provides flexibility for parties to fit themselves within the

205. See Kelly, "Multiple-Parent Families," *supra* note 186 at 566–567.

206. See John-Paul E Boyd, *Polyamorous Relationships and Family Law in Canada* (Calgary: Canadian Research Institute for Law and the Family, 2017) at 78, online:

legislative parameters. However, it may also cause confusion. The *Uniform Parentage Act* has followed this model.

Ontario and Saskatchewan both explicitly limited potential parents to four. This specificity has advantages. If the number is set, it is simpler for government records to have appropriate forms and systems to account for the family construction. For example, the birth certificate permitting a given number of parents.[207] Such forms can also contain neutral language to reflect the unique scenario, for example using the term parent rather than mother and father.[208]

As noted earlier,[209] some scholars believe that the number of potential parents should be limited for practical reasons. First, trying to arrange the lives and schedules of more than three or four parties could become unruly.[210] Second, an increase in individuals may result in more conflict and disputes. However, some authors have pointed out that there is no evidence that multiple parents are more or less likely to engage in litigation.[211] Third, a larger number of parents may result in an increasing number of households, which may prove disruptive to a child.[212]

Conversely, some have argued that an increase in the number of parents has the potential to provide more benefits to a child. As noted by one author, "[w]hy limit support, access to health insurance, inheritance, and other benefits when more choices are available?"[213]

The committee's tentative recommendation for reform

The committee gave this issue extensive consideration.

It noted that there are some potential drawbacks to having no statutory limit. This could give rise to extreme scenarios with, say, one child having 20 parents. This could lead to a lack of stability in the child's life, which wouldn't be in the child's best

<prism.ucalgary.ca/server/api/core/bitstreams/6c7d5f96-7a6c-4951-802d-5bbe5121174c/content> [Boyd, *Polyamorous Relationships*].

207. See Quinn, *supra* note 157 at 198.

208. See *ibid*.

209. See, above, at 42–43.

210. See Quinn, *supra* note 157 at 205.

211. See Abraham, *supra* note 162 at 221.

212. See Cammu, *supra* note 182 at 5.

213. Melanie B Jacobs, "More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage" (2010) 16:2 Cardozo JL & Gender 217 at 226.

interests. Such cases would also pose administrative difficulties for the vital statistics offices.

But, in the end, the committee viewed such extreme cases as being highly unlikely to occur. People likely wouldn't go down the path of creating a pre-birth agreement to become parents to a child frivolously. Parenthood entails significant legal responsibilities for the parent.

Further, the committee was concerned that any number set out in legislation would be arbitrary and would have the effect of cutting out some families. Research indicates that there are only a small number of polyamorous families in Canada, and little is known about their makeup.[214] In the committee's view, the law shouldn't be looking for ways to keep them out of forming families. It should aim to treat everyone with dignity and on the same footing.

The committee tentatively recommends:

5. A provision allowing for more than two parents where a child is conceived by sexual intercourse should not limit the number of potential parents.

Should part 3 be amended to prevent a perpetrator of sexual assault from becoming a parent to a child born through the perpetration of that assault?

Background information

Statistics and prevalence. Unfortunately, sexual assault is not uncommon in Canada. A 2018 Statistics Canada report found that 39% of women and 35% of men have experienced sexual assault (the report explicitly did not account for trans individuals because the sample size was too small).[215]

214. See Boyd, *Polyamorous Relationships*, *supra* note 206.

215. See Statistics Canada, *Gender-based violence and unwanted sexual behavior in Canada, 2018: Initial findings from the Survey of Safety in Public and Private Spaces*, by Adam Cotter & Laura Savage, Catalogue No 85-002-X (Ottawa: Statistics Canada, 5 December 2019), online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00017-eng.pdf?st=TRMiovxt>.

Sexual assault is notoriously underreported. Statistics Canada estimates roughly 5% of all cases are reported to police.[216] Of these, a very low percentage proceed through each step in the criminal-justice system.

Over a six-year period between 2009 and 2014, sexual-assault cases experienced attrition at all levels of the criminal-justice system: an accused was identified in three in five (59%) sexual assault incidents reported by police; less than half (43%) of sexual assault incidents resulted in a charge being laid; of these, half (49%) proceeded to court; of which just over half (55%) led to a conviction; of which just over half (56%) were sentenced to custody.[217]

Applying the math on the above reveals that less than 1% (0.34%) of all sexual assaults that occur in Canada end with a conviction.

Sexual assaults are most often perpetrated by a person known to the survivor. "A friend, acquaintance or neighbour was the offender for 41% of incidents . . . 22% of incidents were perpetrated by a family member—such as a parent, child, sibling or extended family member—and 5% were perpetrated by a current or former spouse or common-law partner."[218] Less than 20% of assailants were strangers.[219]

Despite the above-reported numbers, scholars have pointed out that survivors are less likely to report sexual assault when it's perpetrated by someone close to them. In other words, reporting rates are most likely when the perpetrator is a stranger. "Sexual assaults in intimate relationships then, especially spousal relationships, are therefore the least likely to come to the attention of the criminal justice system."[220] Thus, the 5% estimate in the preceding paragraph should be considered in that light.

Statistics on rape-related pregnancy are difficult to find. Most sources continue to quote an American study conducted in 1996, which indicated that 5% of sexual

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216. See Statistics Canada, *Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile,* by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 October 2017), online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54870-eng.pdf?st=nbTSTd-i>.

217. See *ibid*.

218. Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy & Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 July 2017), online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/14842-eng.pdf?st=cU4p5i6U>.

219. See *ibid*.

220. Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent,' and the Law: Honest But Mistaken Judicial Beliefs" (2008) 32:2 Man LJ 144 at 144–145.

assault survivors become pregnant.[221] Nevertheless, American scholars have attempted to estimate the prevalence of such pregnancies:

> every year, an estimated 25,000 to 32,000 rape-related pregnancies occur in the United States. Of these women, an estimated twenty-six percent to fifty percent will choose to terminate their pregnancies; thirty-six percent of women who choose to carry to term will place the baby up for adoption. Based on these calculations, approximately 8000 to 16,000 women become pregnant through rape each year in the United States and choose to raise the rape-conceived child.[222]

While these numbers are American, it is not unreasonable to presume this issue impacts many Canadians as well. As discussed in the next section, the case law reveals patterns of sexual assault leading to pregnancy in intimate relationships, with strangers, and in instances of sexual abuse of a minor.

Current law in British Columbia doesn't address this issue as a matter for parentage. The concepts central to this issue are not raised in part 3 of the *Family Law Act*. There is no mention of sexual assault, violence, or related topics. This leads to the conclusion that section 26 on children conceived by sexual intercourse applies regardless of whether the sexual intercourse was consensual.

This is not to say the *Family Law Act* fails to consider violence. Indeed, addressing family violence was a major consideration in the act's development. However, the issue of conception and parentage by sexual assault was not discussed during that development period.[223]

The *Family Law Act* mentions sexualized violence in its comprehensive definition of *family violence*.[224] This definition is applied throughout the act, chiefly with respect to part 4 regarding care of children, and part 9 regarding protection orders. With respect to part 4, family violence is mentioned with respect to the best interests of the child,[225] in assessing a denial of parenting time,[226] or a proposed move by one parent.[227]

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221. See Anastasia Doherty, "Choosing to Raise a Child Conceived through Rape: The Double-Injustice of Uneven State Protection" (2018) 39:3-4 Women's Rts L Rep 220 at 221.

222. *Ibid* at 223.

223. See *Proposals for a new Family Law Act*, *supra* note 3.

224. See *supra* note 1, s 1 "family violence" (b), (c).

225. See *ibid*, ss 37, 38.

226. See *ibid*, s 62.

227. See *ibid*, s 66.

Thus, the *Family Law Act* does not appear to provide a mechanism to deny parentage to a perpetrator of sexual assault. Rather, this would become a consideration under part 4 of the act with respect to whether a violent person should be a guardian, granted parenting time, or given the ability to make decisions for a child.

However, the *Vital Statistics Act* allows a birth parent to register a birth independently.[228]

Historically, an unrecognized party could not alter a registration after the fact. This resulted in a Supreme Court of Canada case in 2003. At that time, the Supreme Court briefly touched on the fact scenario explored in this section:

> [i]n addition, fathers in the first category, to whom no reasons justifying their exclusion from the registration of birth apply, should not be compared or confused with fathers who are justifiably excluded. *Among those included in the latter category are rapists and perpetrators of incest.*[229]

The *Vital Statistics Act* was amended in response to the above case. The section does not prevent a person from seeking to establish parentage. However, it does allow a birth parent the option to avoid acknowledging a perpetrator of a sexual assault.

The case law reflects three common fact patterns with respect to children conceived through sexual assault. First, where a parent states that they were sexually assaulted by their spouse, resulting in the birth of one or more of the couple's children. This generally arises as part of later litigation.[230] In such cases, the violent parent is already the named biological parent. Second, where a party states that a child was conceived by sexual assault, and thus the birth parent does not know who the other parent is. Third, where a minor is sexually assaulted by a stepparent or relative resulting in a pregnancy. These cases are largely criminal and thus not concerned with the *Family Law Act*. Reading between the lines, it appears that pregnancies in such cases generally result in abortion or adoption.[231]

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228. See *supra* note 35, s 3.

229. *Trociuk v British Columbia (Attorney General),* 2003 SCC 34 at para 23, Deschamps J [emphasis added].

230. At times the court has deemed allegations of sexual assault as part of a litigation strategy. See e.g. *Verma v Di Salvo*, 2020 ONSC 850.

231. In *TM v ZK*, 2021 ABQB 588 a man sexually abused his stepdaughter. She became pregnant. She bore the baby, stating the child was the result of a sexual assault, but that she did not know the father. The child was placed for adoption. See also *R v RV,* 2019 SCC 41, where a girl was sexually assaulted by her cousin. The pregnancy was aborted before DNA evidence could be collected.

Relevant laws in other jurisdictions: other Canadian provinces and territories. It appears that no Canadian jurisdiction has legislation addressing sexual assault and parentage.

New development: Québec has enacted a law denying parentage to a perpetrator of sexual assault

After the committee had considered this issue, and as this consultation paper was being drafted, Québec amended its parentage legislation to allow for a court to order that a perpetrator of a sexual assault is not a parent of a child born as the result of that sexual assault. See QC Bill 12, *supra* note 130, s 21 (repealing art 542 of the *Civil Code of Québec*, *supra* note 126, and replacing it with, among other provisions, arts 542.22, 542.24, and 542.29).

Alberta's *Family Law Act*[232] contains a section which addresses guardianship of children conceived through sexual assault.[233] This provision is not contained in the part regarding parentage. Rather it is under part 2 of the Alberta act, which governs guardianship, parenting, and contact orders.

Like British Columbia, many provinces have provisions regarding family or domestic violence. However, considerations of violence arise under what would be the equivalent of part 4. Namely, pertaining to guardianship, the best interests of the child, parenting time, and relocation.

Relevant laws in other jurisdictions: United States of America. Most American states have legislation concerning sexual assault and parentage or parenting rights. This was in part a response to the federal *Rape Survivor Child Custody Act*[234] passed in 2015, which provided incentives for states to enact laws providing for court ordered termination of parental rights given clear and convincing evidence of rape.[235] The issue has been primarily addressed in two ways: "(1) approximately 30 states have statutes that permit a court to terminate the parental rights of the

232. SA 2003, c F-4.5.

233. See *ibid*, s 20 ("(4) Despite subsection (2), if the pregnancy resulting in the birth of the child was a result of a sexual assault, the parent committing that assault is not eligible to be a guardian of the child under this section. (5) For the purposes of subsection (4), sexual assault may be found by a court under subsection (6) to have occurred whether or not a charge has been or could be laid, dismissed or withdrawn and whether or not a conviction has been or could be obtained. (6) A court may, on application by a parent of a child, a guardian of a child or a child, or on its own motion in a proceeding under this Act or the *Child, Youth and Family Enhancement Act*, make a determination that a parent meets or does not meet the requirements to be a guardian under subsection (2).").

234. 34 USC §§ 21301–08.

235. Jamie D Pedersen, "The New Uniform Parentage Act of 2017" (2018) 40:4 Fam Advoc 16.

perpetrator; (2) approximately 20 states permit courts to restrict the custodial or visitation rights of the perpetrator."[236] Only two states "provide means for paternity to be revoked."[237]

Brief description of the issue

Sexual assault is a serious concern in North America. Absent special provisions, children conceived of sexual assault are legally tied to the perpetrator due to biological parentage regimes. However, some states allow for parentage to be denied to an offender. Should British Columbia create a provision to deny parentage to a perpetrator of sexual assault?

Discussion of options for reform

The options to consider in response to this issue for reform are (1) amend part 3 by creating a mechanism to deny parentage to perpetrators for children conceived through sexual assault; (2) maintain the status quo.

There are several benefits to denying parentage to perpetrators of sexual assault.

First, scholars have pointed out that severing parentage best honours the depth of the wrong perpetrated by the assailant. It communicates: "you cannot rape yourself a family."[238] This speaks to the connection between parentage and notions of identity, lineage, rights, and obligations. As stated by the court, "the key difference between parentage and guardianship is that parentage is immutable: the relationship between a parent and their child cannot be broken."[239] Breaking this tie sends a clear message.

Second, if that link is broken, it makes it more difficult for a perpetrator to pursue other rights with respect to the child in part 4. If they are not a parent, it becomes much more difficult to obtain guardianship.[240] Without guardianship, a person cannot have parental responsibilities (decision-making authority) or parenting time with a child.[241] Ideally, by denying parentage, a survivor may obtain a final resolution and closure. This finality may be important to the integrity of other

236. *Uniform Parentage Act* § 58 (2017). See comments.

237. Doherty, *supra* note 221 at 227.

238. *Ibid*.

239. *Birth Registration Case*, *supra* note 10 at para 46.

240. See *Family Law Act, supra* note 1, ss 50, 51.

241. See *ibid*, s 40 (1).

claims, as survivors have reported that perpetrators will seek parental rights "as intimidation tactics in response to child support orders and criminal cases."[242]

Third, denying parentage honours several of the policy goals outlined in the development of the *Family Law Act*.[243] It provides certainty and stability to survivors. Where a person has conceived a child by sexual assault, they cannot gain parentage by that act. It also protects vulnerable individuals. Further, it decreases reliance on the courts. As mentioned above, denial of parentage is a one-time determination. Conversely, issues like guardianship, parenting time, parental responsibilities, and a child's best interests may be litigated repeatedly as a situation changes.

There two clear disadvantages to pursuing the first option, both of which are constitutional in nature.

The first potential issue is with respect to the division of powers. In the Canadian constitution, the federal and provincial governments are given different powers under sections 91 and 92 respectively. [244] Each head of government is only allowed to legislate on topics in their respective list.

For example, in the realm of family law, there is both provincial and federal legislation. The federal parliament has power over marriage and divorce.[245] Therefore, the federal *Divorce Act* regulates only married couples. The provincial legislatures have power over the solemnization of marriage, as well as property and civil rights.[246] These areas are interpreted broadly, granting the province authority over "succession, support of spouses and children, adoption, guardianship, custody, legitimacy, affiliation and names."[247] The BC *Family Law Act* regulates many of these areas, as well as providing for property division on the breakdown of a spousal relationship.

242. Doherty, *supra* note 221 at 256.

243. See, above, at 24.

244. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

245. See *ibid*, s 91 (26).

246. See *ibid*, s 92 (12), (13).

247. Peter W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2016) (loose-leaf updated 2018, release 1), ch 27 at 27-2.

Sexual assault raises special concerns because the federal government has power over criminal law.[248] The provinces have the power to impose punishment by fine, penalty, or imprisonment for enforcing any law of the province.[249] Thus, when the province creates a law that is penal in nature, it must be for the enforcement of a valid provincial law. It cannot be criminal in nature. In Canadian constitutional law, this is known as the pith and substance of legislation—in other words, the true purpose of the legislation.

Thus, it is important to consider whether denying parentage to a perpetrator of sexual assault is enforcing or creating a valid provincial law regarding civil and property rights, or if it has strayed into the realm of punishing criminal behaviour.

The *Canadian Charter of Rights and Freedoms* adds another level to this issue. Under section 15, individuals have the right to equality before and under the law. This section protects individuals from discrimination on the basis of "race, national or ethnic origin, colour, religion, sex, age, or mental and physical disability."[250]

The courts have extended this list to include items that are sufficiently like those listed above (known as analogous grounds). These grounds "are all personal characteristics of individuals that are unchangeable (or immutable), or at least unchangeable by the individual except with great difficulty or cost. They are not voluntarily chosen by individuals . . . [and] describe what a person is rather than what a person does."[251]

Scholars have stated that "[s]ection 15 has nothing to say about laws that make special provision for those who have committed a crime. . . . It is true that individuals may claim to be treated unfairly by the law for conditions that are their own responsibility, but this kind of claim even if fully justified does not warrant a constitutional remedy."[252]

This comment is interesting because in British Columbia, the *Human Rights Code* states that employers are not permitted to discriminate on the basis of a criminal or summary conviction which is unrelated to the employment.[253]

248. See *Constitution Act, 1867, supra* note 244, s 91 (27).

249. See *ibid*, 92 (15).

250. *Charter*, *supra* note 99, s 15.

251. Hogg, *supra* note 247 at 55-22.

252. *Ibid*.

253. See *Human Rights Code*, RSBC 1996, c 210, s 13.

Provincial human-rights codes protect against discrimination in situations such as employment, accommodation, access to education. On the other hand, the *Charter* protects against discrimination in "state action."[254] Thus, while they have considerable overlap in content, it is clear that each has a different application.

Based on the above, an individual who is denied parentage to a child based on a criminal behaviour, may attempt to argue that the rationale in the *Human Rights Code* should be extended to apply to the *Charter*.

The committee's tentative recommendation for reform

The committee wrestled with this issue. It acknowledged that sexual assault poses a serious social problem. And it's sympathetic to survivors of sexual assault.

But the committee was wary of using the law of parentage as a remedy to this issue. Although there is legislation in the United States on parentage and sexual assault, the committee isn't aware of anyone or any organization raising this issue in Canada. The committee was reluctant to get out ahead of Canadian society by posing a solution to something that may not yet be recognized as a problem here.

The committee was also concerned about using parentage law to impose consequences on men in the absence of a criminal conviction.

In the end, the committee was of the view that there are likely other, better ways to address sexual assault and to help survivors of sexual assault.

The committee tentatively recommends:

6. Part 3 of the Family Law Act should not be amended to deny a perpetrator of sexual assault parentage to a child conceived through that sexual assault.

254. Hogg, *supra* note 247.

Chapter 5. Donors and Parentage

Introduction

While sperm, egg, and embryo donation form one of the major aspects of assisted reproduction, this chapter begins by considering an issue that echoes the concern in the previous chapter regarding the bright line in the law of parentage between rules for children conceived by assisted reproduction and rules for children conceived by sexual intercourse. The issue concerns whether British Columbia should further blur that bright line by following the lead of some other provinces and adopting legislation enabling sperm donation by sexual intercourse.

From there, the chapter focuses on a series of issues involving fine-tuning improvements to the current law concerning donors and assisted reproduction. These issues concern the legislative definition of the word *donor*, the rule that a donor isn't a parent by virtue of the donation, and spousal non-consent to parentage.

Finally, the chapter concludes with an extended look at donor anonymity. It considers whether British Columbia should be moving away from donor anonymity to a regime predicated on openness, which would allow donor-conceived people to have access to identifying information about their donors. While this issue is arguably on the boundaries of parentage law, the committee felt that donor anonymity is increasingly becoming a pressing concern and that it was important to begin the work of considering reforms in this area.

Background Information

Donors and parentage law

Parentage legislation concerning donors only appeared in British Columbia with the advent of the *Family Law Act* in 2013. As was noted during the development of this legislation, the major policy that it was intended to implement was the following rule: "[i]n all cases, third-party donors of eggs, sperm or an embryo are not considered to be parents solely by virtue of the donation. As a general rule, third party donors do not intend to be the child's parents."[255]

"An exception to that general rule," was built into the legislation, allowing "a person who donates genetic material [to] agree in advance of the child's conception to be a

255. *Proposals for a new Family Law Act*, *supra* note 3 at 32.

legal parent."[256] This exception appears in part 3's provision allowing for more than two parents for a child conceived by assisted reproduction.[257]

The *Family Law Act*'s provisions on donors—which are found in the definition of that term and section 24—are mainly clarifying in nature. They are meant to provide certainty on a matter that could create some confusion (is this donor a parent—looking strictly at genetic connections would yield *yes* as the answer—looking at intentions would likely yield *no*). In this way, the legislation supports some of the broader policy goals of part 3—in particular, promoting family stability, providing certainty of parental status as soon as possible, and preferring out-of-court processes where possible.[258]

The full text of the Family Law Act's definition of "donor" and section 24

Interpretation

20 (1) In this Part:

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"**donor**" means a person who, for the purposes of assisted reproduction other than for the person's own reproductive use, provides

(a) his or her own human reproductive material, from which a child is conceived, or

(b) an embryo created through the use of his or her human reproductive material;

***

Donor not automatically parent

24 (1) If a child is born as a result of assisted reproduction, a donor who provided human reproductive material or an embryo for the assisted reproduction of the child

(a) is not, by reason only of the donation, the child's parent,

(b) may not be declared by a court, by reason only of the donation, to be the child's parent, and

256. *Ibid* at 30.

257. *Supra* note 1, s 30.

258. See, above, at 24.

(c) is the child's parent only if determined, under this Part, to be the child's parent.

(2) For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must not be read as a reference to, nor read to include, a person who is a donor unless the person comes within the description because of the relationship of parent and child as determined under this Part.

Issues for Reform

Should part 3 allow sperm donation by sexual intercourse?

Background information

The current law in British Columbia: sperm donation is only available for children conceived by assisted reproduction. Both the definition of *donor* (which applies "for the purposes of assisted reproduction") and the substantive provisions of section 24 (which are introduced with the condition "if a child is born as a result of assisted reproduction") make it clear that part 3 views sperm donation as limited to cases involving children conceived by assisted reproduction. This is another aspect of the "bright line"[259] in BC's parentage law, separating rules for children conceived by assisted reproduction from those for children conceived by sexual intercourse.[260]

Sperm donation by sexual intercourse: an option in other provinces. Other provinces have blurred this bright line between sexual intercourse and assisted reproduction. Saskatchewan, Ontario, and Québec each have legislation allowing sperm donation by sexual intercourse.

Saskatchewan. Saskatchewan has one of the newest parentage statutes in Canada.[261] The elements of its defined term—*insemination by a sperm donor*—give a

259. Michelle Kinney et al, "Baby Steps II: Assisted Reproductive Technology and the B.C. Family Law Act," in Continuing Legal Education Society of British Columbia, eds, *Baby Making: Fertility Law and Assisted Reproductive Technologies 2016* (Vancouver: Continuing Legal Education Society of British Columbia, 2016) 2.1.1 at 2.1.12 ("Underlying the FLA are the following principles . . . There is a bright-line between children conceived through sexual intercourse and children conceived through assisted reproduction.").

260. See, above, at 33 (for more discussion of this bright line).

261. See *The Children's Law Act, 2020*, *supra* note 120, ss 55–77. See also, above, at 28 (briefly discussing the development of Saskatchewan's parentage legislation).

good explanation of how the legislation operates. The term "means an attempt to conceive a child through sexual intercourse in circumstances in which"—and these circumstances set out the conditions to be met by people who want to bring their cases within the scope of the definition—"*before the attempt to conceive*, the person whose sperm is to be used and the intended birth parent *agree in writing*, in the prescribed form and manner, *that the person whose sperm is to be used does not intend to be a parent of the child*."[262]

Cases involving insemination by a sperm donor form an exception to Saskatchewan's presumptions that apply to determine parentage of a child conceived through sexual intercourse.[263] The sperm donor isn't recognized as the child's parent,[264] and a general rule of statutory interpretation in Saskatchewan's legislation provides further that the sperm donor or sperm donor's relatives aren't to be considered relatives of the child.[265] The child's parents are the birth parent[266] and the birth parent's spouse[267] (if there is a spouse and that spouse has consented before the child's conception to be a parent and hasn't withdrawn that consent).[268]

Ontario. Ontario's legislation is similar to Saskatchewan's.[269] It carves out an exception to its rules on parentage for children conceived by sexual intercourse[270] in cases involving what the Ontario act calls *insemination by a sperm donor*. In these cases, "if, before the child is conceived, the person [whose sperm is used to conceive a child through sexual intercourse] and the intended birth parent agree in writing that the person does not intend to be a parent of the child,"[271] then the sperm donor

262. *Ibid*, s 55 (1) "insemination by a sperm donor" [emphasis added].

263. See *ibid*, s 59 (3).

264. See *ibid*, s 59 (4).

265. See *ibid*, s 57 (1) ("For the purpose of construing any Act, regulation or other statutory instrument, a reference to a person or group or category of persons described in terms of relationship to another person by blood or marriage: . . . (b) with respect to a child conceived through assisted reproduction or through insemination by a sperm donor, does not include: (i) a person who donated reproductive material or an embryo for use in the conception if that person had no intention at the time of the child's conception to be a parent of the child; or (ii) a person related to a person mentioned in subclause (i).").

266. See *ibid*, s 58.

267. See *ibid*, s 60 (2).

268. See *ibid*, s 60 (3).

269. See *Children's Law Reform Act*, *supra* note 115.

270. See *ibid*, s 7.

271. See *ibid*, s 7 (4).

"is not, and shall not be recognized in law to be, a parent of a child conceived in the circumstances set out" in the legislation.[272] Ontario's legislation also has provisions similar to those found in Saskatchewan's act on (1) the birth parent's spouse being recognized as a child's parent, provided that the spouse consents before conception and doesn't withdraw that consent[273] and (2) the sperm donor's relatives not being considered as relatives of the child.[274]

New development: Québec has eliminated the one-year window for a donor to establish parentage

After the committee completed its review of this issue, Québec passed new parentage legislation. One of the provisions in the new legislation repealed and replaced the article in the *Civil Code of Québec* discussed in the text. The new provision maintained the general rule that a donor isn't considered to be a parent of a child conceived through the use of the donor's reproductive material. But it also eliminated the one-year period after the child's birth during which the donor (by way of sexual intercourse) was allowed to establish parentage of the child. See QC Bill 12, *supra* note 130, s 17.

Québec. Québec's approach (which has been in flux)[275] differs from Saskatchewan's and Ontario's. It deals with this issue in an article of the *Civil Code* that begins by stating a principle similar to the one found in section 24 of BC's *Family Law Act*: a donor isn't automatically a parent by reason only of the donation.[276] But, unlike British Columbia's section 24, the Québec provision goes on to carve out an exception that applies "if the contribution of genetic material is provided by way of sexual intercourse."[277] In this case, the donor parent gets a one-year period after the child's birth in which to establish parentage of the child.[278]

272. See *ibid*, s 7 (5).

273. See *ibid* at s 8 (2), (3).

274. See *ibid*, s 2 (1) (b).

275. See, above, at 29–30 (briefly discussing recent developments in Québec's parentage legislation).

276. See *Civil Code of Québec*, *supra* note 126, art 538.2 ("The contribution of genetic material to the parental project of another cannot be the basis for any bond of filiation between the contributor and the child consequently born.") [repealed].

277. *Ibid*.

278. See *ibid* ("[I]f the contribution of genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation.") [repealed].

Manitoba: holding the line. Manitoba has recently amended its legislation in this area.[279] But Manitoba has chosen not to follow the path set out by the Saskatchewan, Ontario, and Québec. Rather, the amendments mirror the current wording of BC's *Family Law Act* by maintaining the bright line between sexual intercourse and assisted reproduction.

In the case of sexual intercourse, it maintains parentage to the "birth parent and the person whose sperm resulted in conception of the child."[280] It does not create the option of donating sperm via sexual intercourse.

Brief description of the issue

Other provinces have decided to blur the bright line between sexual intercourse and assisted reproduction by allowing for sperm donation by sexual intercourse. Should part 3 be amended to allow for donation by sexual intercourse?

Discussion of options for reform

The options to consider in response to this issue for reform are: (1) amend part 3 by adding a provision to allow for sperm donation by sexual intercourse; (2) amend part 3 by adding a provision to allow for sperm donation by sexual intercourse only if there is a pre-conception agreement in place; (3) maintain the status quo.

Advantages and disadvantages of allowing sperm donation by sexual intercourse. The first option has several advantages. It reduces barriers to creating a family both from a financial and logistical standpoint. Assisted reproduction is quite costly. Further, in British Columbia there are few fertility clinics, the majority of which are in the Lower Mainland. Not all clinics offer known-donor insemination, making it more difficult to use sperm of a friend or relative. These factors add considerable logistical barriers.

The first option does not require a legal agreement prior to conception. This again reduces financial barriers to starting a family. Moreover, it captures those who may not have reduced their intentions to writing or may not have done so prior to conception.

The first option also has disadvantages. First, by not requiring an agreement, a court could be left to sort through conflicting evidence as to the intention of the parties.[281]

279. See, above, at 28–29 (briefly discussing the development of Manitoba's parentage legislation).

280. *The Family Law Act*, *supra* note 124, s 19 (1).

281. See *MD*, *supra* note 185. In this case, conception was prior to the amendment to Ontario law

Second, a party seeking to avoid financial and other responsibilities could claim the original intention was only to act as a donor. This has the potential to create another hurdle for parents seeking to enforce support obligations on a delinquent partner.

For example, in an Ontario case,[282] one party claimed to be a sperm donor and not a parent. At the time of sexual intercourse, the birth parent had stated she was unable to conceive. The other party claimed the interaction was a one-night stand and he had no intention of having another child (as he was married to someone else at the time). Following conception, the birth parent raised the child independently for many years, until she had a serious accident which left her unable to work.

The court considered several factors in determining whether the party was a parent or a sperm donor. First, the parties did not have any discussion regarding sperm donation in or around the time of conception. Second, the parties chose to have unprotected sex and thus must accept the consequences of that decision regardless of statements around fertility.[283]

On the other side of the coin, a party who didn't intend to act as a parent may be made one. Without an agreement in place, the court is left looking at evidence of the parties' intentions and the child's best interests. Thus, acting as a donor could have significant risks. Where a court is unable to determine the parties' intentions, it is not unreasonable to predict that a court would declare parentage. This may put an intended sperm donor on the hook for child support and other responsibilities.[284]

Likewise, scholars have pointed out that courts can struggle with single-parent families. Courts have historically been inclined to declare parentage, especially in situations where the parties were previously in a relationship and there is a biological connection.[285] For example, a party may want to become a single parent,

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requiring an agreement pre-conception for sperm donation. The parties did not have an agreement in place. Justice Nicholson repeatedly expressed the importance of an agreement to deal with such cases. The court also mentioned the lack of transition provisions as problematic.

282. See *EK v NB*, 2018 ONCJ 634. This case again involved conception prior to the amendment. However, the sperm provider tried to argue the amended provisions should apply to the case.

283. See *ibid* at para 43–45, Zisman J.

284. See Wanda Wiegers, "Assisted Conception and Equality of Familial Status in Parentage Law" (2012) 28:2 Can J Fam L 147 at 187.

285. See Heather Kolinsky, "The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights" (2015) 119:4 Penn St L Rev 801 at 828. This paper investigates the American context, specifically looking at a case in which a woman was donated sperm by an ex-boyfriend. Insemination occurred through assisted

and ask a person to help by donating sperm by sexual intercourse. This results in a child. Later, the donor comes back and seeks a parentage declaration. In these situations, the court may decide it is better for the child to have two parents, even though the original plan was to be a single parent.[286]

Advantages and disadvantages of allowing sperm donation by sexual intercourse only with a pre-conception agreement. The second option shares the advantage of decreasing barriers to parentage. Further, it also (largely) overcomes the disadvantages of option (1). By requiring a pre-conception agreement, the legislation ensures that parties clarify their intentions and rights early in the process.[287] Moreover, this requirement prevents parents from claiming to be donors to avoid responsibility.

Unfortunately, the second option does not entirely do away with potential issues. Problems can arise for those who are unaware of, or fail to follow, the requirements. This issue has already arisen in Ontario.

For example, in one case,[288] the parties agreed to conceive a child through sexual intercourse. They had an unwritten agreement that one party would donate the sperm, but not act as a parent to the child. At the time of conception, the law did not require a written agreement. After the child was born, the parties entered into an agreement reflecting their original intentions. The birth parent later disputed this understanding.

Ultimately, the court determined that because there was no pre-conception agreement, on the face of the law, the intended donor was a parent. The court nevertheless relied on Ontario's provision that allowed it to make an order declaring parentage to honour the original intention of the parties. This section states that a "person having an interest may apply to the court for a declaration that a person is

reproduction methods. Despite meeting the legal requirements for the sperm to be a donation, the court found that the sperm donor was a parent. The article argues that the court largely ignored the fact that the sperm donor gave up parental rights and was not in a relationship with the birth parent at the time. Thus, the court overrode the parties' intentions, instead reinstating parentage based on biology.

286. See *ibid* at 829.

287. See Susan Frelich Appleton, "Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation" (2015) 49:1 Fam LQ 93 at 113. Scholars in examining this option have asked the question—if an agreement is in place between the parties outlining parentage—why does it matter how the sperm is delivered?

288. See *MRR*, *supra* note 118.

or is not a parent of the child."[289] Thus, in the result the sperm donor was not found to be a parent. However, the court noted that this case was not meant to imply that contracts are not a requirement.

Thus, the court has been willing to help honour the intentions of people who don't follow the rules. A legislative tool must exist to allow the court to do this, however. Further, parties should not count on this. The court in Ontario has stated that "where a parent is seeking a declaration of non-parentage without a written agreement, the likelihood of success appears greatly reduced."[290]

Finally, allowing for a party to opt out of parentage by way of contract could result in instances of violence. For example, a partner may force the other party to sign an agreement before or after conception to avoid responsibility.[291]

Advantages and disadvantages of the status quo. Maintaining the status quo has benefits. Most conceptions involving sexual intercourse are not intended as sperm donations. Under the current model, an unwilling party cannot opt out of being a parent. "A person cannot have sex, conceive a child, and have no responsibility to that child."[292] This also protects the sperm provider from being denied parentage. Fundamentally, the aim is "to prevent claims by one parent that either they are not—or their ex-partner is not—actually a legal parent of the child in the event of a breakdown of the relationship."[293]

However, some commentators have pointed out that there is an illogical nature to the bright line.

> If you have a child through sexual intercourse the paternity presumptions apply to determine who the parent is. If you have a child through ART [assisted reproductive technology], the ART parentage provisions apply. Some question the fact that a child's rights, and the rights of their prospective parents, depend on whether the man donating sperm donated it into a vial and the turkey baster method was used, or directly to the woman.[294]

289. *Children's Law Reform Act*, *supra* note 115, s 13 (1).

290. *MD*, *supra* note 185 at para 24.

291. See *Droit de la famille—181283*, 2018 QCCS 2574. In this case, the father claimed his wife had raped him, and he was thus only a donor and not a parent. Given the lengths this individual went to, it is not difficult to imagine how a violent person might use an agreement to avoid being named a parent.

292. Kinney, *supra* note 259 at 2.1.39.

293. Law Reform Commission of Saskatchewan, *supra* note 119 at 49.

294. Kinney, *supra* note 259 at 2.1.38.

This line has been blurred by other provinces, raising the question if it is necessary to maintain in BC.

The committee's tentative recommendation for reform

The committee favoured following the lead of Saskatchewan and Ontario on this issue. Part 3 should allow sperm donation by sexual intercourse.

While it's unlikely that many people will choose to employ sperm donation by sexual intercourse, there are some people who would if given the chance. They would benefit from a more accessible option to forming their families.

In the committee's view, this reform should be coupled with a requirement for a written pre-conception agreement (as in Saskatchewan and Ontario). In the absence of this requirement, such legislation could create considerable uncertainty and is likely to generate litigation.

The committee tentatively recommends:

7. Part 3 of the Family Law Act should be amended by adding a provision that permits sperm donation by sexual intercourse where a written pre-conception agreement is in place.

Should the definition of "donor" in part 3 of the Family Law Act be amended to align with the definition in the Assisted Human Reproduction Act?

Background information

The provincial *Family Law Act*[295] and federal *Assisted Human Reproduction Act*[296] both touch directly on assisted reproduction and the use of human reproductive materials. However, the purpose of each act is quite different.

In the context of donors, the federal legislation seeks to ensure purchase and sale of human reproductive material does not occur.[297] The provincial legislation seeks to

295. *Supra* note 1.

296. *Supra* note 37. See also, above, at 14 (briefly discussing of the *Assisted Human Reproduction Act*).

297. See Afsana Allidina et al, *Wilson on Children and the Law* (Toronto: LexisNexis Canada, 1994) (loose-leaf updated 2020, release 119-11) at 10.2.

provide clarity around parentage. Courts in reviewing these two pieces of legislation have viewed these purposes as complimentary.[298]

Despite the overlap in subject matter, the acts have different definitions for the same words. This section explores whether these definitions (specifically of the word *donor*) should remain different or be aligned.

Definitions in other Canadian jurisdictions. The definitions of *embryo* and *human reproductive material* in the *Family Law Act* and the *Human Assisted Reproduction Act* are nearly identical. Across Canada, several provinces simply defined these terms in parentage legislation "as defined in the *Assisted Human Reproduction Act.*"[299]

Despite the exact duplication of the terms *embryo* and *human reproductive material*, no province or territory has exactly copied the definition of *donor* from the *Assisted Human Reproductive Act* in parentage legislation. Most provinces and territories which have defined *donor* use language very similar to BC's.[300]

Comparing definitions. There are significant differences in the definition of *donor* as found in the *Family Law Act* and the *Human Assisted Reproduction Act*.

In the *Family Law Act*, there are two key aspects of the definition. First, that the material is used for (1) purposes of assisted reproduction *other than for the person's own reproductive use*, and that such material is used (2) to conceive a child or create an embryo.[301]

In the *Assisted Human Reproduction Act*, the definition refers to the source of the human reproductive material.[302] With respect to *in vitro*, the definition refers to the person or persons who have had the embryo created for their reproductive use.[303] This definition comes from the regulation.

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298. See *Family Law Act (Re)*, 2016 BCSC 598 at paras 25–26, Fitzpatrick J [*Re KG*].

299. See e.g. Saskatchewan: *The Children's Law Act, 2020*, *supra* note 120, s 55 (1) "embryo."

300. See, above, at 66 (full text of BC's definition of *donor*).

301. See *supra* note 1, s 20.

302. See *supra* note 37, s 3 "donor" ("means (a) in relation to human reproductive material, the individual from whose body it was obtained, whether for consideration or not; and (b) in relation to an *in vitro* embryo, a donor as defined in the regulations").

303. *Administration and Enforcement (Assisted Human Reproduction Act) Regulations*, SOR/2019-194, s 1 (1) "donor" (" 'donor,' in relation to an *in vitro* embryo, means (a) in the case of an embryo that is created for reproductive use (i) the individual for whom the embryo is created and who

Brief description of the issue

Federal and provincial legislation define the term *donor* in different ways. There may be benefits for professionals who work with both pieces of legislation to harmonize these legislative definitions. Should BC alter the definition of donor contained in the *Family Law Act* to align with the federal legislation?

Discussion of options for reform

The options to consider in response to this issue for reform are: (1) amend part 3 to align the definition of *donor* contained in *Family Law Act* to match the *Assisted Human Reproduction Act*; (2) maintain the status quo.

The obvious advantage to aligning the definitions of the two acts is uniformity. Individuals would be provided with certainty as to the meaning and application of the word, rather than trying to establish whether it is in a federal or provincial context. This would increase clarity for those navigating clinics and legal agreements, which may contain different applications of the word.

Conversely, the differences noted above raise serious concerns for definition matching. The *Assisted Human Reproduction Act* uses donor in a context (*in vitro*) in which a person or persons has created an embryo for their reproductive use. This is in direct contradiction to the *Family Law Act* definition, where a donor is not using the reproductive material for their own use.

In other words, if BC aligned the definition of donor with the federal act, this would likely require the creation of a new word which holds the same meaning currently held by *donor*—as a person who contributes reproductive material not for their own use. As will become clear in the later issues, this understanding is key to several provisions in part 3.

There was no discussion of the two definitions or the benefits and drawbacks of aligning these definitions in the reviewed case law and literature on donors. This may indicate it is not an issue of concern. Alternatively, it may simply not be an issue for discussion in litigation, or of interest to legal scholars.

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has no spouse or common-law partner at the time the embryo is created, regardless of the source of the human reproductive material used to create the embryo, or (ii) subject to subsection (3), the couple for whom the embryo is created and who are spouses or common-law partners at the time the embryo is created, regardless of the source of the human reproductive material used to create the embryo; and (b) in the case of an embryo that is created for the purpose of improving or providing instruction in assisted reproduction procedures, the individuals whose human reproductive material is used to create the embryo").

The committee's tentative recommendation for reform

While the committee noted that the differing wording of the two definitions can cause confusion (particularly at the clinical level), it didn't favour aligning the definition in part 3 with the federal definition.

In the committee's view, much of the confusion is caused by the dense and difficult federal definition of *donor*. Changing part 3's definition to align with it wouldn't address this source of confusion. Instead, it would likely just make part 3 harder to understand.

The committee tentatively recommends:

8. Part 3 of the Family Law Act should not be amended to align the definition of "donor" with the Assisted Human Reproduction Act.

Should the definition of "donor" in part 3 of the Family Law Act be amended for embryo donors by removing the reference to the embryo being created through the use of the donor's human reproductive material?

Background information

Part 3's definition of "donor" creates a genetic-connection requirement for embryo donors. This section of the consultation paper examines a part of the *Family Law Act*'s definition of *donor*.[304] This part comes at the very end of the definition, which defines *donor* for the purposes of embryo donation as a person who has provided "an embryo *created through the use of his or her human reproductive material*."[305]

The words to focus on for this issue are the ones in italics. These words effectively create a requirement for an embryo donor to have a genetic connection to the donated embryo. Or, to look at it from another angle, these emphasized words carve out a person who has created an embryo with donated human reproductive material[306] from the scope of this legislative definition of *donor*.

304. See, above, at 66 (setting out the full text of the definition of *donor*).

305. *Supra* note 1, s 20 (1) "donor" para (b) [emphasis added].

306. See *ibid*, s 20 "human reproductive material" ("means a sperm, an ovum or another human cell

Assisted Human Reproduction Act (Canada). It's worth noting that the federal definition of *donor*—as it applies to embryo donors—contains the qualifier "regardless of the source of the human reproductive material used to create the embryo."[307] This means that the federal definition takes an opposing position to the BC definition, directly denying the need for a genetic connection between the embryo donor and the donated embryo.

Parentage legislation applying to donors in four provinces and territories doesn't contain a genetic-connection requirement for embryo donors. In addition to the federal act, other Canadian legislation—this time parentage legislation at the provincial and territorial level—takes an approach to embryo donors that doesn't require a genetic connection with the donated embryo.

Ontario's parentage legislation doesn't contain a definition of *donor*, but its substantive provisions on donors and parentage describe embryo donors without BC's reference to the embryo being "created through the use of his or her [i.e., the donor's] human reproductive material." The relevant Ontario section reads as follows:

> **Provision of reproductive material, embryo not determinative**
>
> **5** A person who provides reproductive material or *an embryo* for use in the conception of a child through assisted reproduction is not, and shall not be recognized in law to be, a parent of the child unless he or she is a parent of the child under this Part.[308]

Saskatchewan takes a similar approach to Ontario. Like Ontario, Saskatchewan's parentage legislation doesn't contain a definition of *donor*. Instead, one of Saskatchewan's "rules of construction" (i.e., interpretation) describes an embryo donor in language similar to Ontario's legislation. The relevant Saskatchewan provisions read as follows:

> **Rules of construction**
>
> **57** (1) For the purpose of construing any Act, regulation or other statutory instrument, a reference to a person or group or category of persons described in terms of relationship to another person by blood or marriage:
>
> . . .

or human gene, and includes a part of any of them").

307. *Administration and Enforcement (Assisted Human Reproduction Act) Regulations*, *supra* note 303, s 1 (1) "donor."

308. *Children's Law Reform Act*, *supra* note 115, s 5 [emphasis added].

> (b) with respect to a child conceived through assisted reproduction or through insemination by a sperm donor, does not include:
>
> (i) a person who donated reproductive material or *an embryo* for use in the conception if that person had no intention at the time of the child's conception to be a parent of the child.[309]

Just as in the Ontario act, Saskatchewan's legislation simply refers to "an embryo," without any qualifying language about the source of human reproductive material used to create that embryo.

Alberta's parentage legislation takes an approach similar to Saskatchewan's. One of Alberta's "rules of parentage" reads as follows:

> (4) A person who donates human reproductive material or *an embryo* for use in assisted reproduction without the intention of using the material or embryo for his or her own reproductive use is not, by reason only of the donation, a parent of a child born as a result.[310]

This provision—which is essentially an equivalent to BC's section 24 (establishing that a donor isn't a parent simply by reason of making a donation)—simply refers to "an embryo," without any qualifying language about the human reproductive material used in the creation of that donated embryo.

Finally, the Northwest Territories' parentage legislation contains two provisions relating to embryo donors. Both use the kind of unqualified language seen in Ontario, Saskatchewan, and Alberta. First, here is a provision in the NWT act that sets out a "rule of construction" relating to embryo donors:

> (3) For the purpose of construing an instrument or enactment, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person must not be construed to refer to and does not include the following persons:
>
> (a) a person who has donated human reproductive material or *an embryo* for use in assisted reproduction, if he or she is not presumed or has not been declared under this Act to be a parent of the child born as a result[311]

309. *The Children's Law Act, 2020*, *supra* note 120, s 57 (1) (b) (i) [emphasis added].

310. *Family Law Act*, *supra* note 232, s 7 (4) [emphasis added].

311. *Children's Law Act*, SNWT 1997, c 14, s 3 (3) [emphasis added].

Second, here's an addition to the NWT act from 2011,[312] which creates a substantive rule similar to the one in section 24 of BC's *Family Law Act*:

> A person who donates human reproductive material or *an embryo* for use in assisted reproduction is not, by reason only of the donation, a parent of a child born as a result and may not, by reason only of the donation, be declared under this section to be a parent of the child.[313]

Parentage legislation applying to donors in two provinces (in addition to BC) does contain a genetic-connection requirement for embryo donors. Manitoba's legislation[314] (which is among the most recent parentage legislation enacted in Canada), contains a definition of *donor* (like BC's *Family Law Act*). Manitoba's definition doesn't place any qualifying language on embryo donors. Here is Manitoba's definition:

> **"donor"** means a person who provides reproductive material or *an embryo* for use in assisted reproduction, other than for the donor's own reproductive use.[315]

But a subsequent provision in Manitoba's act imposes a genetic-connection requirement similar to the one found in British Columbia's definition of *donor*. The provision reads as follows:

> **Providing reproductive material**
>
> **15** A reference in this Part to a person providing reproductive material or an embryo is a reference to the provision of
>
> (a) the person's own reproductive material; or
>
> (b) an embryo *created with the person's own reproductive material*.[316]

Prince Edward Island's parentage legislation also contains a definition of *donor* that's similar to BC's. Here it is:

> **"donor"** means a person who, for the purposes of assisted reproduction, other than for the person's own reproductive use, provides
>
> (i) the person's own human reproductive material, from which a child is conceived, or

312. See *Vital Statistics Act*, SNWT 2011, c 34, s 113 (7) [in force 1 January 2013].

313. *Children's Law Act*, *supra* note 311, s 5.1 (3) [emphasis added].

314. *The Family Law Act*, *supra* note 124, s 13 "donor."

315. *Ibid*, s 13 "donor" [emphasis added].

316. *Ibid*, s 15 [emphasis added].

(ii) an embryo *created through the use of the person's human reproductive material*.[317]

Like BC and Manitoba, PEI essentially requires a genetic connection between the embryo donor and the donated embryo.

Brief description of the issue

The definition of *donor* in part 3 of the *Family Law Act* effectively requires an embryo donor to have a genetic connection to the donated embryo. Since some embryos are created with donated sperm or eggs (or both)—and not with the embryo donor's own human reproductive material, as the definition requires—this means that some embryo donors won't come within the legislative definition. Since the defined term *donor* is used in an important substantive provision of part 3, which establishes that a donor isn't considered to be a parent solely because of the donation, there are potentially serious and disruptive consequences that could result from an embryo donor being outside the scope of this definition. As embryo donation is becoming more and more common, is it time to remove the language from the definition of *donor* that creates this genetic-connection requirement, thus ensuring that all embryo donors come within the scope of the definition?

Discussion of options for reform

There are essentially only two options to consider. The definition of *donor* in part 3 could be reformed by striking out the language creating the genetic-connection requirement for embryo donors. On the other hand, it could be decided that reform isn't needed at this time—the definition may remain as is.

A leading argument for reforming the definition of *donor* may rest on the difficulty in justifying the current definition. This definition contains language ("created through the use of his or her human reproductive material") that establishes a distinction in the class of embryo donors. Embryo donors who use their own human reproductive material to create an embryo (and thus have a genetic connection to that embryo) are "donors" for the purposes of part 3. As a result, they aren't considered to be parents simply because they donated an embryo.

But someone who donates an embryo that was created with donated human reproductive material apparently isn't a donor for the purposes of part 3. Since the main use of the defined word *donor* is in section 24—the section that establishes the principle that a donor isn't automatically a parent—this would appear to mean that this group of embryo donors should be considered to be parents.

317. *Children's Law Act*, RSPEI 1988, c C-6.1, s 17 (d) [emphasis added].

It's difficult to articulate a rationale for this distinction. It actually seems to work against the legitimate expectations of embryo donors, who would very likely consider themselves to be, in all circumstances, donors but not parents.

The definition of *donor* in the *Assisted Human Reproduction Act* may also support an argument to reform the BC definition. While this federal act doesn't deal with parentage, it does effectively set the boundaries of assisted-reproduction practices by criminalizing certain procedures. It would be telling if the federal act drew the same distinction in the class of embryo donors that the BC act does, as this would be an indication that there is some medical or ethical basis for the distinction. But the federal act doesn't do this. In fact, it goes a step further, emphasizing that an embryo donor is a donor "regardless of the source of the human reproductive material used to create the embryo."[318] So if there is no medical or ethical basis for this distinction, why should it appear in the law of parentage?

Finally, it's also worth noting that other provinces and territories don't draw distinctions between types of embryo donors for their parentage legislation. So it is possible, apparently, for parentage legislation to function adequately without this distinction.

On the other hand, it may be possible to formulate arguments in favour of the status quo, even if this is difficult to do in theory. It could be pointed out that the definition hasn't caused problems in practice. No one appears to be calling for its reform. These may be indications that the legislation is adequate as it stands, and making changes to it shouldn't be a priority for legislators.

The committee's tentative recommendation for reform

The committee favoured amending the definition of *donor*. In the committee's view, an amendment would clarify the law. It would also head off potential problems that could lead to litigation.

Most embryo donors would consider themselves to be donors and not parents, regardless of the source of the donation. The current definition of *donor* doesn't appear to align with this expectation. Legislative reform to address this issue is preferable to having it brought to a court for resolution.

318. *Administration and Enforcement (Assisted Human Reproduction Act) Regulations*, *supra* note 303, s 1 (1) "donor."

The committee tentatively recommends:

9. The definition of "donor" in section 20 of the Family Law Act should be amended to eliminate the requirement that an embryo donor must have a genetic connection to the donated embryo by striking out "created through the use of his or her human reproductive material."

Should section 24 provide for a donor to have contact with the child, even though the donor isn't a parent?

Background information

Current law in British Columbia. The *Family Law Act* specifically excludes donors as parents. As discussed in the previous two issues, this is founded on the definitional understanding that a donor is providing material *without intending* to act as a parent.[319]

Given this definition, the individual is presumed not to be a parent by the legislation. Moreover, familial ties to extended family of the donor are also severed.[320]

Relevant laws across Canada. Several provinces and territories have language to exclude a donor as parent. These provisions take a few different forms.

Alberta[321] and Saskatchewan[322] set out exclusions for a donor in the construction or general rules section, the language of which is very similar to the BC provision.

Québec's *Civil Code* states that a donor isn't automatically a parent by reason only of the donation.[323]

Manitoba, PEI, and Ontario (with some differences) define a donor at the outset, and/or expressly exclude donors with a separate provision (akin to the language used in British Columbia).

319. See *Family Law Act, supra* note 1, s 20.

320. See *ibid*, s 24.

321. See *Family Law Act*, *supra* note 232, s 7 (4).

322. See *The Children's Law Act, 2020*, *supra* note 120, s 57 (1) (b) (i).

323. See *Civil Code of Québec*, *supra* note 126, art 538.2.

Newfoundland and Labrador[324] and Yukon[325] appear to intend the same result by different means. The legislation from this province and territory contains a provision on artificial insemination which states some variation of: "[a] man whose semen is used to artificially inseminate a woman to whom he is not married or with whom he is not cohabiting at the time of the insemination is not in law the father of the resulting child."[326]

Regardless of the nuances in identifying a donor and the circumstances in which someone can donate, much of the Canadian legislation establishes that once a party is recognized as a donor, parentage is not assumed.

Discussion of the issue. This section will review increased legislative flexibility through enabling agreements allowing donors contact with the child by reference to the policy goals of part 3.[327]

Promoting stability and certainty. Where a donor is involved, intentions as to parentage are (ideally) framed at the outset, providing clarity as to who will be a parent and who will not. This clarity is often achieved by the legislation, which is at times supplemented by agreements (see section below on section 24 and agreements). Absent this clarity, scholars have expressed concern regarding both sides of the coin.

First, where families have been intentionally created, it undermines stability to later override the chosen family model by the return of a donor who was not originally intended to become a parent.[328]

Second, as pointed out by the Manitoba Law Reform Commission, donors very often do not want to be parents. By opening a legislative door, this may actively hurt the donation framework, which is based on absolute surety that a donor will not be on the hook for the child. As the commission noted, "any risk that the donor will be considered to be a parent may be a significant disincentive to donate."[329]

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324. See *Children's Law Act*, RSNL 1990, c C-13, s 12.

325. See *Children's Law Act*, RSY 2002, c 31, s 13.

326. See Newfoundland and Labrador: *Children's Law Act*, *supra* note 324, s 12 (6); Yukon: *Children's Law Act*, *supra* note 325, s 13 (6).

327. See, above, at 24.

328. See Fiona Kelly, "Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families" (2013) 64 UNBLJ 253 at 278 [Kelly, "Equal Parents"].

329. Manitoba Law Reform Commission, *Assisted Reproduction*, *supra* note 90 at 24–25.

Within the context of assisted reproduction, the Manitoba Law Reform Commission pointed out that many law-reform commissions have recommended that donors be excluded from parentage, as it "provide[s] certainty to donors and prospective parents that an uninvolved donor is not a legal parent merely because a genetic relationship exists."[330]

Protecting vulnerable persons. Early scholarship focused on vulnerable women-led families and how the law treated this group with respect to donors.

Many court cases are centred around two narratives. The first one is a lesbian couple who use the sperm of a known donor to conceive. The donor later returns seeking parental rights or parentage. Prior to the major legislative changes of the past 10 years, parentage was often granted to the biological parent to the exclusion of the birth parent's spouse (who generally was a primary caregiver).

The second scenario is that of an individual choosing to be a parent independently. This person often asks a former romantic partner for reproductive material, with the understanding that they will not become a parent. As with the first scenario, the donor later returns seeking parental rights or parentage.

Scholars have pointed to a pattern of case law failing to protect these women-led families. Rather, some courts have chosen to reinstate biological ties despite clear intentions for a donor not to become a parent.[331] As stated by one scholar in 2013, "[t]he existing case law suggests that when judges have some discretion, they prefer to protect biological relationships over pre-conception intention and existing family relationships."[332]

In other words, where there is grey area in the role of a donor, independent single parents, non-biological, and non-normative families may be at increased risk of losing.[333] Scholars have asserted the only way to protect these vulnerable parties is the joint operation of two legislative provisions:

> [t]his is typically achieved via two statutory presumptions. First, individuals who donate gametes for the purpose of assisted reproduction are not legal parents by virtue of the donation. . . . The second key feature present in all of the statutes is the inclusion of a

330. *Ibid* at 25.

331. See Kelly, "Equal Parents," *supra* note 328.

332. *Ibid* at 272.

333. See *ibid* at 273.

> parentage presumption that locates parenthood with the birth mother and her partner, whether male or female, provided that the partner has consented to the conception. . . . *Any reform in this area must include these two elements as a matter of basic protection for women-led families.*[334]

Out-of-court options. It may be argued that creating more flexibility in the law regarding parentage of donors is unnecessary. Out-of-court remedies already exist to clarify the role of a party as donor or parent.

Under part 3, the legislation already clarifies a donor is not a parent. Much of the litigation prior to this legislative change was fought to establish facts that are now part of the legislative framework (for example, that a biological donor is not a parent, but rather the birth parent's spouse is a parent).

Where a person is not a donor but rather another intended parent, legislation increasingly provides the option of adding the donor as a third legal parent—thus, opening the door to a person who would previously be relegated to a donor becoming a co-parent simply by legislation.[335]

Brief description of the issue

Part 3 contains a strict rule that provides that a donor is not a parent. While this rule may be beneficial in many cases, in other cases families may want the law to recognize a connection between the donor and child. Should part 3 be amended to provide this sort of flexibility to its rule on donors and parentage?

Discussion of options for reform

While there is potentially a very wide range of options that could be considered in response to the issue, it's best to focus initially on the decision whether or not to stay with the status quo.

Part 3's current strict rule on donors not being parents is a clear rule that provides certainty to the donor process. It's also likely in agreement with the expectations of most participants in that process.

On the other hand, taking a more flexible approach to providing legal recognition to some donor-child relationships might provide benefits to certain families. While there aren't many Canadian examples of this legislative approach, New Zealand is often cited as providing a legislative alternative to the parent-or-donor approach

334. *Ibid* at 273–274 [footnotes omitted; emphasis added].

335. See Law Reform Commission of Saskatchewan, *supra* note 119.

currently available in Canada. Under its legislation,[336] a donor and the parents can enter into an agreement setting out terms and parameters of a donor-child relationship.[337] This agreement is not enforceable but can be converted to a consent order (which is enforceable).[338]

However, this provision does not appear to impact parentage. Thus, its translation to British Columbia would likely be within part 4 of the *Family Law Act*.[339]

One advantage of granting rights under part 4 is the availability of a middle route. As noted by one scholar, the all-or-nothing approach of parent or donor may result in some individuals feeling pressured to include a third party as a parent because there is no less intrusive option.[340] By allowing for a pre-conception agreement permitting contact, this may appease a donor who wishes to be involved, while simultaneously reserving legal parentage to those who intend to take up the bulk of the childcare. In the Canadian context, the Manitoba and Saskatchewan Law Reform Commissions have pointed out that inclusion of language that like found in section 24 of the *Family Law Act* does not completely exclude a donor seeking to be involved in a child's life.

Such a provision does not prevent a court "finding that a donor who is not a legal parent has developed a parent-like relationship with a child for the purposes of custody, access or support."[341]

In other words, where a donor has some level of relationship with a child, they already have the option to seek involvement in the child's life through other mechanisms in the *Family Law Act*.

The committee's tentative recommendation for reform

The committee wrestled with this issue, but in the end it favoured retaining the current strict rule. The committee was wary of proposing any legislation that might undermine the current clear separation of the roles of donor and parent. In the

336. See *Care of Children Act 2004* (NZ), 2004/90 (as at 28 October 2021).

337. See Kelly, "Equal Parents," *supra* note 328 at 262. This is somewhat akin to BC's *Family Law Act*, *supra* note 1, s 58 (agreements respecting contact).

338. See Kelly, "Equal Parents," *supra* note 328 at 262.

339. See *supra* note 1, ss 37–80.

340. See Kelly, "Multiple-Parent Families," *supra* note 186 at 588–589.

341. Manitoba Law Reform Commission, *Assisted Reproduction*, *supra* note 90 at 24–25 [footnotes omitted].

committee's view, blurring this distinction could be harmful for people who rely on donors to form their families. It could also be off-putting to potential donors, who might be reluctant to make donations if the legal framework wasn't clear and certain about their role.

The committee tentatively recommends:

10. The Family Law Act should not be amended to allow for parents and a donor to draft an agreement for contact with a child.

Should section 24 be amended to require a written pre-conception agreement as part of the donor process?

Background information

Types of donors. While not specifically mentioned in the legislation, it is helpful to understand the different kinds of donors. At present, donors may be known or unknown.

A known donor is an individual who has a connection to the intended parents. This may be a friend, relative, or former romantic partner.

An unknown donor is a stranger who has donated their reproductive material. The level of information available about an unknown donor varies from anonymous to those willing to release some information to the birth parent and child (often at a particular age of the child).[342]

When agreements are required. As discussed earlier,[343] pre-conception agreements are required in Ontario and Saskatchewan when a donation is made by sexual intercourse. This is the course the committee has elected to follow in the tentative recommendations.[344]

Where a known donor is used, but conception is by assisted reproduction, there is no clear requirement for a pre-conception agreement under part 3 of the *Family Law*

342. See Fiona Kelly, "Is it Time to Tell? Abolishing Donor Anonymity in Canada" (2017) 30:2 Can J Fam L 173 at 183–186 [Kelly, "Is it Time to Tell?"]. See also, below, at 101–117 (for more information on donor anonymity and the committee's tentative recommendation for reform).

343. See, above, at 67–69 (discussing legislation on sperm donation by sexual intercourse).

344. See, above, at 74 (tentative recommendation no. 7).

Act. The law in BC, as outlined above,[345] states that the donor is not a parent. The birth parent and spouse (if they have not denied consent) are the parents by operation of section 27. This is the same for an unknown donor.

Despite the lack of a requirement, donation agreements are recommended by legal professionals to clarify rights, responsibilities, and process.[346]

Brief description of the issue

In other Canadian jurisdictions, pre-conception agreements are required for donation by sexual intercourse. However, where assisted reproduction is used, pre-conception agreements are not required. Should BC require pre-conception agreements for all types of donors and all methods of conception?

Discussion of options for reform

The options to consider in response to this issue for reform are (1) amend part 3 to require a pre-conception agreement as part of the donor process; (2) amend part 3 to require a pre-conception agreement as part of the donor process for certain types of donors but not others; (3) maintain the status quo.

Advantages and disadvantages of requiring a pre-conception agreement for all donors. There are several advantages to requiring pre-conception agreements for donors. Such agreements provide clarity for the parties and the court with respect to the parties' expectations.[347] This may be of particular value to single mothers by choice, who historically have struggled the most to exclude a donor from parentage.[348]

While it is theoretically simple to obtain a pre-conception agreement with a known donor, obtaining one from an unknown donor is a considerable hurdle in light of Canada's current framework around donor information.

As discussed in detail later in this consultation paper,[349] there is no clear British Columbia or federal legislation which regulates the information and identity of

345. See, above, at 66–67 (for the full text of section 24).

346. See Fertility Law BC, "Sperm Donation" (last visited 10 August 2023), online: *Fertility Law BC* <www.fertilitylawbc.com/donor-issues/sperm-donation/>.

347. See e.g. *MD*, *supra* note 185.

348. See e.g. *Caufield v Wong*, 2017 ABCA 288.

349. See, below, at 101–117 (discussing donor anonymity).

donors.[350] Absent a clear way to source this information, it is difficult to imagine how donors would be contacted to obtain an agreement.

Moreover, scholars often debate whether donation should be conditioned on anonymity of the donor.[351] If a process as complex and invasive as contract negotiation were required, this would be a serious disincentive to donate. Given the Canadian donor pool is very small (approximately 37 individuals in 2011), further roadblocks may only limit supply.[352]

A further issue is that most of the donated reproductive material used in Canada is sourced from the United States.[353] This adds a further layer of complexity—ranging from locating donors to navigating interjurisdictional issues.

Advantages and disadvantages of requiring a pre-conception agreement for only some donors. Requiring an agreement only for known donors would overcome the limitations with the unknown donor system.

Moreover, case law involving donor disputes nearly always pertains to known donors—namely, whether the individual was intended to be a donor or a parent. Several such cases were discussed earlier.[354]

Historically, many individuals chose to use unknown donors because using a known donor was seen as too legally risky. As discussed above, previously the courts often decided parentage disputes in favour of biological ties over the intentions of the parties.[355] Thus, many who would otherwise have used a known donor viewed it as a possible threat to their family's stability and security.[356]

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350. See Kelly, "Is it Time to Tell?," *supra* note 342 at 183. Anonymous donors may still be used in Canada, despite the law shifting away from this model in countries like Australia. The *Safety of Sperm and Ova Regulations*, SOR/2019-192, under the *Assisted Human Reproduction Act*, *supra* note 37, does require establishments using sperm and ova to maintain donor identification codes and requires various assessments to take place for safety purposes. These records must be stored for a certain period of time by the establishment.

351. See Kelly, "Is it Time to Tell?," *supra* note 342 at 223–224.

352. See Stefanie Carsley, "DNA, Donor Offspring and Derivative Citizenship: Redefining Parentage under the Citizenship Act" (2016) 39:2 Dal LJ 525 at 535.

353. See *ibid*.

354. See *supra* note 347–348 and accompanying text.

355. See Kelly, "Equal Parents" at 273.

356. See Angela Cameron, Vanessa Gruben, & Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions" (2010) 26:1 Can J Fam L 95 at 129.

This threat does not appear to exist in the unknown-donor context. Thus, agreements may not be necessary as a protection against unknown donors.

There is a limitation with agreements for known donors, especially if they intend to be actively involved with the child. Namely, it has been found that agreements cannot override future behaviour. In the *Doe* case,[357] the court found that an agreement between the parties to block parentage and all responsibilities to the child was not sufficient to override later actions to the contrary. As explained by another court referencing the above case, "[t]he chambers judge held that an agreement could not preclude the possibility that a court may at some time in the future find that John Doe stands in the place of a parent."[358] While "contractual intent may be relevant . . . it is not determinative."[359]

Thus, parties can enter into a contract to clarify a party's role as a donor. However, this does not override the court's ability to find otherwise.

Advantages and disadvantages of the status quo. At present in BC, donations can only be made in the context of assisted reproduction. No pre-conception agreement is required to block parentage. A pre-conception agreement is required if an individual seeks to be a parent rather than a donor under section 30.

Under the committee's tentative recommendations, this landscape would change, as donations would be permissible through sexual intercourse. This process would also require a pre-conception agreement.

In other words, under the framework of the committee's current recommendations, parties would require a pre-conception agreement to escape the framework of sections 26 and 27. Thus, where children are conceived through sexual intercourse, a party would require a pre-conception agreement to be deemed a donor. Where children are conceived through assisted reproduction, a donor would require a pre-conception agreement to be deemed a parent.

The committee's tentative recommendation for reform

The committee took on this issue mainly because it had decided to propose a change to part 3, which would allow sperm donation by sexual intercourse, so long as

357. *Doe v Alberta*, 2007 ABCA 50 [*Doe*].

358. *Cornelio v. Cornelio*, 2008 CanLII 68884 (ONSC) at para 21, van Rensburg J.

359. *Ibid.*

parties had entered into a pre-conception agreement. It wanted to examine whether this requirement for a pre-conception agreement should be extended to donations of human reproductive material for the purposes of assisted reproduction.

While the committee acknowledges that there is some benefit to having the requirements for donations be consistent, it decided not to propose amending part 3 to add a requirement for a pre-conception agreement as part of the donor process for assisted reproduction. In the committee's view, this process is different enough from sperm donation by sexual intercourse to justify different rules.

It would also be difficult to implement a requirement for a pre-conception agreement as part of the donor process for assisted reproduction. It's likely that the requirement would be breached often, which could result in an increase in parentage litigation.

The committee tentatively recommends:

11. Part 3 of the Family Law Act should not be amended to require a pre-conception agreement as part of the donor process for children conceived through assisted reproduction.

Should section 27 be amended to require a standardized form for spouses of birth parents to demonstrate non-consent to parentage of a child conceived through assisted reproduction?

Background information

Current law in British Columbia. When a child is conceived through assisted reproduction (regardless of who provided the human reproductive material), the *Family Law Act* states that the parents are "the child's birth mother" and "a person who was married to, or in a marriage-like relationship with, the child's birth mother when the child was conceived" (this person will be identified as the spouse for the purposes of discussing this issue).[360] The section goes on to state that the spouse is a parent "unless there is proof that, before the child was conceived, the person (a) did not consent to be the child's parent, or (b) withdrew the consent to be the child's parent."[361]

360. *Supra* note 1, s 27.

361. *Ibid*.

The act does not outline what proof is required to demonstrate a lack or withdrawal of consent. Interestingly, there's some further information regarding this provision in a government publication preceding development of the *Family Law Act*: "[i]f the birth mother's partner disputes parentage, the partner must prove on a balance of probabilities that he or she did not consent, or prior to the assisted conception withdrew consent, to be the child's parent."[362]

Case law specifically on section 27 does not appear to discuss this issue.

Relevant laws in other jurisdictions: Canada. Most provinces and territories that deal with assisted reproduction name the birth parent's spouse as a parent subject to consent. Wording varies, however. Some provinces require consent, using some variation of: the party "consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception."[363] Other jurisdictions use language akin to BC, which focuses on denial or withdrawal of consent. None of the legislation outlines what form consent, or a denial or withdrawal of consent, must take.

In Alberta, the law sets out a somewhat complicated series of provisions depending on whose reproductive material was used, and whether the birth parent is intended to be a surrogate. These variations require consent of the spouse in most cases.[364] "Subsection 8.1 (6) states that the person's consent is presumed unless the contrary is proven."[365]

Newfoundland and Labrador and Yukon take a different approach. Their legislation directly addresses three different scenarios.[366] For example, in the Newfoundland and Labrador act, a "man whose semen was used to artificially inseminate a woman is in law the father of the resulting child if he was married to or cohabiting with the woman at the time she is inseminated."[367] In other words, where the spouse is a biological parent, consent is not required.

362. *Proposals for a new Family Law Act*, *supra* note 3 at 32.

363. Alberta: *Family Law Act, supra* note 232, s 8.1.

364. *Ibid*.

365. Law Reform Commission of Saskatchewan, *supra* note 119 at 39.

366. See Newfoundland and Labrador: *Children's Law Act, supra* note 324, s 12; Yukon: *Children's Law Act*, *supra* note 325, s 13.

367. *Supra* note 324, s 12 (2).

The act goes on to state that a man who is married to or cohabiting with a "woman at the time she is artificially inseminated solely with the semen of another man shall be considered in law to be the father of the resulting child if he consents in advance to the insemination."[368] Thus, where a spouse does not have a biological connection, consent is required.

Finally, the act carves out an exception to non-consent, stating: "[n]otwithstanding a married or cohabiting man's failure to consent . . . he shall be considered in law to be the father of the resulting child if he has demonstrated a settled intention to treat the child as his child unless it is proved that he did not know that the child resulted from artificial insemination."[369]

New development: Québec has revised its parentage rules for children conceived by assisted reproduction
After the committee considered this issue, Québec revised the language of one of the provisions discussed in the text. See QC Bill 12, *supra* note 130, s 16 (revising art 538.1 of the *Civil Code of Québec*, *supra* note 126).

Québec's *Civil Code* states that the parents to a child conceived through assisted reproduction are "the woman who gave birth to the child and, where applicable, the other party to the parental project."[370] The code goes on to state that if a child is conceived through assisted reproduction and born "during the marriage or the civil union or within 300 days after its dissolution or annulment, the spouse of the woman who gave birth to the child is presumed to be the child's other parent." The provision then goes on to create an exemption where a child is born outside the 300-day window (unless the parties reconcile). Interestingly, the provision further clarifies, "[t]he presumption is also rebutted as regards the former spouse if the child is born within 300 days of the termination of the marriage or civil union, but after a subsequent marriage or civil union of the woman who gave birth to the child."[371]

Both the Saskatchewan and Manitoba Law Reform Commissions, in their reviews of the legislative provisions in this area, did not elaborate on how consent or non-consent should be documented. Rather both simply recommended the use of language akin to BC.[372]

368. *Ibid*, s 12 (3).

369. *Ibid*, s 12 (5).

370. S*upra* note 126, art 538.1 [repealed and replaced].

371. *Civil Code of Québec*, *supra* note 126, art 538.3.

372. See e.g. Law Reform Commission of Saskatchewan, *supra* note 119 at 40.

Relevant laws in other jurisdictions: United States of America. The Uniform Parentage Act takes a very different approach to this issue.[373]

Unlike the Canadian legislation, the Uniform Parentage Act contains considerably more detail over multiple provisions ranging from consent to withdrawal of consent.

Starting with section 703, the Unform Parentage *Act* states: "[a]n individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."[374]

Section 704 outlines how consent is to be obtained. First, consent "must be in a record signed" by the birth parent and the other individual intending to be a parent.[375] However, absent this, parentage may still be established in two scenarios. First, if the parties can provide "clear-and-convincing evidence [of] the existence of an express agreement entered into before conception" that they would both be parents.[376] Second, if the parties "resided together in the same household with the child and both openly held out the child as the individual's child."[377]

Section 705 of the act limits a spouse's ability to dispute parentage. A challenge may only be raised (1) within two years of the child's birth, (2) if the spouse did not consent to the assisted reproduction at any point. However, a challenge may be raised at any time if, (1) the spouse did not provide reproductive material or consent to the assisted reproduction, (2) the spouse has not cohabited with the birth parent since the time of assisted reproduction, and (3) the spouse never held out the child as their own.[378]

Section 707 specifically deals with the withdrawal of consent. Where a person had previously consented under section 704, they may withdraw consent "any time before a transfer that results in a pregnancy, by giving notice in a record of the withdrawal of consent to the woman who agreed to give birth to a child conceived by assisted reproduction and to any clinic or health-care provider facilitating the

373. See Uniform Parentage Act (2017), *supra* note 156.

374. *Ibid*, § 703.

375. *Ibid*, § 704 (a).

376. *Ibid*, § 704 (b) (1)

377. *Ibid*, § 704 (b) (2). This provision provides further language regarding where a parent has died or become incapacitated.

378. See *ibid*, § 705.

assisted reproduction."[379] At which point, the individual will not be named a parent of the child.

Brief description of the issue

BC confers parentage to the spouse of the birth parent in instances of assisted reproduction, unless consent is denied or withdrawn. As a result, the following discussion will focus on denial or withdrawal of consent (as opposed to granting of consent).

At present, parentage legislation in Canada does not expressly mention a prescribed form to demonstrate refusal and withdrawal of consent for parentage.[380] In the USA, the Uniform Parentage Act expressly requires a "record" of withdrawal of consent. Should British Columbia require a standardized form to demonstrate non-consent?

Discussion of options for reform

The options to consider in response to this issue for reform are: (1) amend part 3 to require a standardized form for spouses of birth parents to demonstrate non-consent to parentage of a child conceived through assisted reproduction; (2) maintain the status quo.

Advantages and disadvantages of requiring a standard form. In this option, the starting presumption would remain the same—a birth parent's spouse is a parent to a child conceived through assisted reproduction. However, where the spouse does not consent, or withdraws consent, they must complete a prescribed form.

The *Family Law Act* does contain prescribed forms in the regulation.[381] One example of a consent form is the Consent to Child Protection Record Check required for a guardianship application. In a similar fashion, section 27 could require use of a prescribed form for denial or withdrawal of consent. This document could be added to the regulation.

379. *Ibid*, § 707 (a).

380. It is possible that forms are used as a matter of practice by clinics or other practitioners in this field. It is also possible that forms are required per other pieces of legislation which were not part of this investigation. Discussion of this issue has focused solely on parentage legislation and the clearly articulated requirements of that legislation.

381. See *Family Law Act Regulation*, BC Reg 347/2012.

The obvious benefit of requiring a set form to deny or withdraw consent is certainty and clarity. As noted by one scholar, something as important as refusal of parentage should not be left to "oral allegations alone."[382]

Requiring a set form is also seen as a safeguard for both parties. "Consent is a critical element of parentage through assisted reproduction. Without it, people could be made parents of biologically unrelated children against their wills."[383] Equally, a person could be made a parent against the will of the birth parent. By having a prescribed form, the legislation would provide a mechanism to empower parties to arrange their affairs as they see fit.

In other words, a prescribed form can provide security to both parties that intentions will be honoured.[384] Moreover, where a party later changes their mind and seeks to come back on the issue of parentage, there would be a clear indicator that consent was denied or withdrawn.

Another benefit of a prescribed form for denial or withdrawal of consent is increased simplicity for third parties like the vital statistics agency when dealing with registration of parentage.

Timing and notice. The American Uniform Parentage Act requires that withdrawal of consent be given prior to the pregnancy. Moreover, the withdrawal must be provided not only to the birth parent, but also to the health-care provider assisting with the process.

This requirement makes sense. It is not hard to imagine a spouse forging a denial or withdrawal of consent form on dissolution of a relationship to avoid parentage and its responsibilities. Further, if the form is only delivered to the birth parent, it is not difficult to imagine such a form being lost or solely in the possession of one party or the other and thus subject to the usual they said–they said issues common with litigation. By requiring the form be provided to a neutral third party, the legislation guards against some of the above concerns.

Compliance issues. The commentary accompanying the Uniform Parentage Act indicates parties often fail to follow legislative requirements. Such parties have

382. Thomas B James, "Assisted Reproduction: Reforming State Statutes after Obergefell v. Hodges and Pavan v. Smith" (2019) 19:2 U Md LJ Race, Religion, Gender & Class 261 at 289.

383. *Ibid*.

384. See Sophia Makris, "Adam & Eve, Adam & Steve, and Ada & Eve: Gender Neutrality in Defining Parental Status in Assisted Reproduction" (2018) 36:4 Rev Litig 743 at 764.

historically brought court applications for a remedy. In such instances, American courts have been forced to revert to equity and common-law principles. "Some other courts, however, have rigidly applied written consent requirements, often producing results that seem inequitable and harmful to the child."[385]

The Uniform Parentage Act commentary above conveys the sense that strict enforcement of the legislative requirements is perceived as harmful and ineffective.

This raises the question whether the legislation should include backup alternatives where parties have failed to use the prescribed form.

To overcome this concern, the Uniform Parentage Act does not preclude parentage where the parties have failed to meet the necessary formalities. Rather there are "three mechanisms of proving parentage—(1) written consent, (2) express agreement, and (3) residing and holding out."[386] In other words, the legislation has saving provisions.

However, the issue framed by the committee is not regarding documenting consent and conferring parentage. Rather, the issue is documenting non-consent and refusing parentage.

In some ways this is a simpler issue because non-consent presumably will be far less common. Thus, less people will be impacted by non-compliance.

Despite the differences in focus, the Uniform Parentage Act provides a partial model for non-consent. For example, where strict compliance with the prescribed form is not met, a provision could permit proof of express agreement that the spouse would not be a parent to the resulting child. This is akin to the model already in use in BC. As discussed above,[387] a party seeking to avoid parentage must prove non-consent on a balance of probabilities.

Behavioural indicators and non-consent. An interesting tension arises where a party refuses or withdraws consent, and yet is still conferred parentage or parental rights and responsibilities by the law due to later behaviour toward the child.

385. *Uniform Parentage Act* (2017), *supra* note 156, § 704 (comment).

386. Beth S Dixon, "For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology: A Framework for North Carolina" (2021) 43:1 Campbell L Rev 21 at 39.

387. See *supra* note 362 and accompanying text.

As discussed above,[388] the Newfoundland and Labrador and Yukon provisions state that where a party has refused consent, but later demonstrates a settled intention and acts as a parent to the resulting child, parentage is conferred.

Even absent an express legislative provision, it is not unlikely a non-consenting spouse could be captured by existing provisions of the *Family Law Act* conferring rights and obligations (though not parentage).

As discussed earlier, in the *Doe* case the parties proposed entering into an agreement indicating the spouse's lack of consent to parent, and expressly waiving responsibilities for the child.[389] The court found that the parties were welcome to make such an agreement. However, while proof of intention, the agreement could not prelude the court from determining a party had come to stand in the place of a parent (and thus be responsible for corresponding obligations).[390]

This finding was made despite the party's express (and supported) intention not to be a parent to the child. The court relied on reasoning that a person living with a child will inherently act in a parental manner. ("Can it seriously be contended that he will ignore the child when it cries? When it needs to be fed? When it stumbles?")[391] This led the court to conclude that "a relationship of interdependence with the mother of the child in the same household, will likely create a relationship of interdependence of some of some permanence, vis-à-vis the child."[392]

This position has been criticized by some scholars as focusing on the wrong relationship—that of the birth parent rather than that of the child.[393] However, this reasoning also causes serious concerns for any party seeking to deny or withdraw consent to parent while maintaining a relationship with a birth parent. As articulated by one scholar, "[a]ccording to the Court, the intention to be a partner leads to the practice of being a parent."[394]

388. See *supra* note 366 and accompanying text.

389. See *supra* note 357.

390. See *Doe*, *ibid.*

391. *Ibid* at para 22, Berger JA. See also Brenda Cossman, "Parenting Beyond the Nuclear Family: Doe v. Alberta" (2007) 45:2 Alta L Rev 501 at 504.

392. *Supra* note 357 at para 23.

393. See Cossman, *supra* note 391 at 504–505.

394. *Ibid* at 503.

It is not unreasonable to assume the above logic would also apply when a prescribed form is used.

Advantages and disadvantages of the status quo. Case law and commentary in Canada have not touched on this topic in detail. Most of the analysis relating to section 27 is with respect to equality of same-sex couples and the protection of a spouse who isn't genetically connected to the child.

This may indicate that consent and withdrawal of consent are not pressing issues and the current model is working. Alternatively, this issue may not be in published cases or a matter of scholarly interest.

While the American Uniform Parentage Act does require a record of consent and its withdrawal, again discussion appears to centre on statutory protection for a partner who isn't genetically connected to the child.[395] Moreover, based on commentary accompanying the Uniform Parentage Act (and in the literature), it appears most American litigation pertains to parties who fail to follow the legislative requirements.[396]

The committee's tentative recommendation for reform

The committee was attracted to the certainty that would result from using a prescribed form. But making use of the form mandatory, in its view, would be taking things too far.

The committee was concerned about cases in which an individual was unwilling to sign a prescribed form or was unaware of its existence. These cases could turn into thorny disputes before the courts.

In the committee's view, there is a happy medium. This would involve creating a prescribed form and making its use optional. There are examples from other BC statutes that have successfully taken this approach.[397]

The committee tentatively recommends:

12. Part 3 of the Family Law Act should be amended to add an optional form which could be used for spouses of birth parents to demonstrate non-consent to parentage of a child conceived through assisted reproduction.

395. See Makris, *supra* note 384 at 763.

396. See *Uniform Parentage Act* (2017), *supra* note 156, § 704 (comment).

397. See e.g. *Power of Attorney Act*, RSBC 1996, c 370, s 9.

Should British Columbia enact legislation enabling donor-conceived people to have access to identifying information about their donors?

Background information

What kinds of donor information are relevant for laws on collection and disclosure of information? Distinguishing between identifying and non-identifying information. The category of donor information is open-ended. It could encompass an inexhaustible range of information. As a way of organizing discussion of legal issues, many commentators draw a distinction between identifying and non-identifying information.[398]

This distinction is intuitive. Identifying information is information that reveals the identity of the donor, whereas non-identifying information does not.

Examples of identifying and non-identifying information. The classic example of identifying information is a person's name.[399] Non-identifying information is more diffuse. To take some specific examples, a commentator has noted that the United Kingdom's legislation has (since 1 October 2009) allowed a donor-conceived person "to receive any recorded *non-identifying* information about her or his donor, including":

- Year of birth;
- Country of birth;
- Ethnic group;
- Height;
- Weight;

398. See e.g. Vanessa Gruben & Angela Cameron, "Donor Anonymity in Canada: Assessing the Obstacles to Openness and Considering a Way Forward" (2017) 54:3 Alta L Rev 665 ("Secrecy is entirely concealing the fact that donor-conceived people are born from donated gametes, which can cause shock and upset if this fact is discovered inadvertently. Anonymity, by contrast, is where donor-conceived people know they are conceived using donor gametes, but do not have identifying information about the donor. They may have non-identifying information such as age, hobbies, hair colour, childhood photos, etc" at 667, n 5.).

399. See e.g. Uniform Parentage Act (2017), *supra* note156, § 901 (1) (defining "identifying information" to mean "(A) the full name of a donor; (B) the date of birth of the donor; and (C) the permanent and, if different, current address of the donor at the time of the donation.").

- Eye, hair and skin colour;
- Whether the donor had any children;
- Any other details the donor may have agreed to provide, e.g. occupation, interests, religion, skills, "goodwill message."[400]

Disclosure of identifying information is more controversial. Unsurprisingly, identifying information has been the more sensitive and contested class of information for public policy and legislation. It is tied directly into donor anonymity. Using legal means to prevent the disclosure of identifying information is what preserves donor anonymity.

Release of non-identifying information is much less controversial. According to one commentator, "non-identifying information is more widely available and is typically released without consent."[401]

What does part 3 have to say about donor anonymity? No express provisions. Part 3 of BC's *Family Law Act* contains no provisions dealing with donor anonymity. There's a temptation to state this fact more emphatically, saying (for example) that part 3 is completely silent on donor anonymity. This might be overstating things, as one aspect of part 3 could be relevant to any future legislation on donor anonymity.

Provision declaring donors aren't parents may be relevant. Part 3 does contain a provision that clearly declares that, for children "born as a result of assisted reproduction," a donor "is not, by reason only of the donation, the child's parent."[402] Some commentators have said that such provisions are important conditions to the development of any legislation that takes an open stance on donor information.[403] This is because the absence of such legislation would put donors in an ambiguous position. A donor has a genetic connection with a donor-conceived child. Such a genetic connection has traditionally formed the basis of parentage (and, in BC, still

400. Eric Blyth, "Access to Genetic and Birth Origins Information for People Conceived Following Third Party Assisted Conception in the United Kingdom" (2012) 20:2 Int'l J Child Rts 300 at 306 [emphasis in original].

401. See Kelly, "Is It Time to Tell?," *supra* note 342 at 212.

402. *Supra* note 1, s 24 (1) (a).

403. See Gruben & Cameron, *supra* note 398 ("Where provinces have not revised their family law statutes to reflect the use of donated gametes in family building (for example, including a presumption that a gamete donor is not a parent), many Canadians have advocated in favour of donor anonymity. They see the use of an anonymous donor as offering protection against the potential interference by the donor in the family unit. Comprehensive family law reform, which occurred in jurisdictions such as the UK and Sweden, will eliminate this obstacle" at 674.).

forms the basis of parentage for children conceived by sexual intercourse).[404] There's a longstanding concern that courts could find, in the face of legislative silence, that a donor's genetic connection to a donor-conceived child means that the donor is legally the child's parent—even though such a finding could upend the expectations of donors and intended parents and undermine some of the goals of parentage legislation.[405] This concern is allayed, somewhat, by donor anonymity, as it makes it much more difficult, in practical terms, for any such litigation to reach the courts. (It would have to be preceded, in these circumstances, by an investigation to find the donor.) But this concern would be amplified if openness were the rule. British Columbia's declaratory provision removes this concern as a consideration to be taken into account in assessing donor anonymity.

Does any other BC legislation address donor anonymity? No legislation specifically on donor anonymity. BC doesn't have any legislative provisions that expressly address donor anonymity.

General legislation on disclosure of health information applies by default. As a commentator has pointed out, "blanket health information protection legislation" in a province may be seen to support donor anonymity.[406] In British Columbia, there are two statutes that may fit this description. One is the *Freedom of Information and Protection of Privacy Act*.[407] It applies to the public sector (for example, hospitals). The other is the *Personal Information Protection Act*.[408] This act applies to the private sector (for example, private clinics, labs, and doctors' offices).

Protection of personal information. Both statutes set out comprehensive legal frameworks for organizations' collection, use, and disclosure of personal information. The acts define *personal information* in a way that essentially makes it synonymous with what commentators in this area have called a donor's identifying information.[409] One of the overriding purposes of both acts is to provide for the protection of someone's personal information when it is in the possession or under

404. See *Family Law Act*, *supra* note 1, s 26.

405. See, above, at 26.

406. Natasha Procenko, "Gamete Donor Anonymity: What's Privacy Got to Do with It?" (2022) 59:4 Alta L Rev 1001 at 1003.

407. RSBC 1996, c 165.

408. SBC 2003, c 63.

409. See *Freedom of Information and Protection of Privacy Act*, *supra* note 407, Sch 1 "personal information" ("means recorded information about an identifiable individual other than contact information"); *Personal Information Protection Act*, *supra* note 408, s 1 "personal information" ("means information about an identifiable individual").

the control of an organization. This purpose is met with detailed legislative provisions, but it's fair to say (in basic terms) that the cornerstone of this system for protecting personal information is consent.[410]

Default legislation. As is the way with this type of general or blanket legislation, these acts apply by default. They may be displaced by express legislation on a specific topic.[411] This means that their existence wouldn't stand in the way of British Columbia developing legislation specifically addressing donor anonymity.

Do other provinces or territories have any legislation on donor anonymity?
Anonymity by default. The bulk of Canada's provinces and territories are similar to British Columbia in lacking any legislation on donor anonymity. "In Canada," as one commentator put it, "donor anonymity is tacitly protected across the country because there is an absence of provincial laws or regulations that explicitly address the issue. Anonymity is the default."[412]

Why is anonymity the default? A number of factors have turned the absence of specific legislation on donor anonymity into a default rule in favour of anonymity. First, as was noted earlier in connection with British Columbia, blanket legislation on the protection of personal (identifying) information operates in most provinces to make consent a condition to disclosure. This means that identifying information, in practice, won't be disclosed unless the donor agrees to it being disclosed. In addition, as a law professor has pointed out, "there is no centralized registry, national or provincial, that is responsible for collecting, storing, and disclosing donor information; rather, this responsibility lies with individual clinics, and health service providers on a voluntary and contractual basis."[413] These contracts tend to reinforce the importance of consent, which supports a rule of donor anonymity. Also, information collected privately in this vein "is by and large done to measure success

410. See *Freedom of Information and Protection of Privacy Act*, *supra* note 407, s 33 (2) (c); *Personal Information Protection Act*, *supra* note 408, s 6 (2) (a).

411. See *Freedom of Information and Protection of Privacy Act*, *supra* note 407, s 3 (7) ("If a provision of this Act is inconsistent or in conflict with a provision of another Act, this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act."); *Personal Information Protection Act*, *supra* note 408, s 3 (5) ("If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless another Act expressly provides that the other enactment, or a provision of it, applies despite this Act.").

412. Procenko, *supra* note 406 at 1021.

413. *Ibid* at 1011.

rates (such as the number of cycles, age of recipient, and so on) rather than for the purpose of information disclosure."[414]

New development: Québec ends donor anonymity
After the committee had completed its review of this issue, Québec enacted legislation allowing donor-conceived people to have access to specified identifying information about their donors. See QC Bill 12, *supra* note 130, s 21 (adding arts 542.10–542.13, 542.18 to the *Civil Code of Québec*, *supra* note 126).

Legislation in Québec. The exception to all this appears to be Québec. This province has legislation that expressly enshrines donor anonymity. As a commentator explains it, the Québec provision "provides that information that allows a donor to be identified is confidential and may not be disclosed, even with the consent of the person concerned, with limited exceptions."[415]

Has any legislation addressing donor anonymity ever been enacted at the federal level? Assisted Human Reproduction Act. Legislation enacted at the federal level—the *Assisted Human Reproduction Act*[416]—at one time contained extensive provisions enshrining donor anonymity as the law of Canada. When this statute was enacted in 2004 it contained a detailed legal framework governing "privacy and access to information."[417]

Express provisions on donor information and anonymity. This framework governed the collection and disclosure of information about assisted reproduction. With respect to disclosure, the act's overriding position was to require "written consent of the person to whom the information relates allowing its disclosure."[418] By this mechanism, the act ensured that donor anonymity would be preserved.

Provisions were struck down in court. But, as one commentator has noted, "Canada's history with respect to regulating assisted reproduction has been tumultuous."[419] And this remark applies with particular force to the fate of the *Assisted Human Reproduction Act*.

414. *Ibid* [footnote omitted].

415. *Ibid* at 1011 (discussing *An Act respecting clinical and research activities relating to assisted procreation,* SQ 2009, c 30, s 44).

416. *Supra* note 37.

417. *Ibid*, ss 14–19 [not in force].

418. *Ibid*, s 15 (1) (a).

419. Alicia Czarnowski, "Retrospective Removal of Gamete Donor Anonymity: Policy Recommendations for Ontario Based on the Victorian Experience" (2020) 33:2 Can J Fam L 251 at 257.

Shortly after this federal act was enacted, the province of Québec challenged it in court as an unconstitutional intrusion into provincial jurisdiction. The case ultimately made its way to the Supreme Court of Canada,[420] where a majority decision found largely in favour of Québec.

In this litigation, Québec conceded that the federal act had some provisions that prohibited certain activities.[421] These provisions came within one of the subjects that the constitution assigns to the federal level (criminal law).[422] But Québec argued that large parts of the *Assisted Human Reproduction Act* went beyond criminal prohibitions and delved into regulating health care.[423] These provisions impermissibly strayed into provincial heads of power (establishment, maintenance, and management of hospitals; property and civil rights in the province; and generally all matters of a merely local or private nature in the province).[424]

The majority of judges in the Supreme Court of Canada agreed with Québec's argument. They concluded that the *Assisted Human Reproduction Act* had created a legal framework for assisted human reproduction that overlapped with and duplicated Québec's existing legal framework for medical care.[425] So they struck down much of the act, including the provisions dealing with information and donor anonymity.[426]

Donor anonymity is a provincial and territorial, not federal, matter. As a result of this decision, it's now clear that if Canada is going to have any legislation dealing with donor anonymity (no matter whether that legislation requires anonymity or openness or any combination of the two), it will have to be enacted by the provinces and territories. That's why this review of background information started by

420. See *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

421. See *ibid* at para 179, LeBel and Deschamps JJ.

422. See *Constitution Act, 1867*, *supra* note 244, s 91 (27).

423. See *Reference re Assisted Human Reproduction Act*, *supra* note 420 ("As regards the provisions on consent and on the controlled activities, however, he considers that Parliament is regulating the entire field of medicine connected with assisted human reproduction and related research. . . . Subjecting this field of medical practice to the control and oversight of a national agency represents, in this case, a major overflow of the exercise of federal legislative jurisdiction into matters within the provinces' authority" at para 179.).

424. See *Constitution Act, 1867*, *supra* note 244, s 92 (7), (14), (16).

425. See *Reference re Assisted Human Reproduction Act*, *supra* note 420 at paras 222, 225.

426. See *ibid* at para 281.

focusing on what the provinces and territories have done, even though historically most of the action on this issue has taken place at the federal level.

What is the trend in international jurisdictions regarding donor anonymity? Trend toward openness. As one commentator has put it, "[t]here is a clear international trend toward the prospective abolition of donor anonymity."[427] It's possible to read this comment as overstating the international scene. As of 2016, there were only 18 jurisdictions noted in worldwide survey articles as having open access to donor information.[428] It's possible to list them all:

- Argentina;
- Austria;
- Australia (states of New South Wales, South Australia, Victoria, and Western Australia);
- Croatia;
- Finland;
- Germany;
- Ireland;
- the Netherlands;
- New Zealand;
- Norway;
- Sweden;
- Switzerland;
- United Kingdom;
- United States of America (state of Washington);
- Uruguay.[429]

427. Kelly, "Is It Time to Tell?," *supra* note 342 at 225.

428. See Eric Blyth, "Access to Genetic and Birth Origins Information for People Conceived Following Third Party Assisted Conception in the United Kingdom" (2012) 20:2 Int'l J Child Rts 300 at 311; Sophia Allen, *Donor Conception and the Search for Information: Approaches to Information Release Around the Globe* (2016), online: <rtc.org.au/wp-content/uploads/2017/03/Sonia-Allan_Donor-Anonymity-RTC_2016.pdf>.

429. See Argentina: *Civil and Commercial Code of the Nation*, Title V, Ch 2, approved by Law 26, 1994; Austria: *Reproductive Medicine Law*, Federal Law Gazette 275/1992; Croatia: *Law on Medically*

Raw numbers may still favour donor anonymity. So, by just focusing on raw numbers, it's possible to agree with the point made in a recent law-review article that "[a]cross the world, countries have reached radically different positions on whether to allow anonymous sperm donation."[430] And, among these "radically different positions," donor anonymity appears to command the larger share of jurisdictions.

But trend is only in the direction of openness. But the original comment on the international scene is likely meant in a more limited sense. The focus isn't on absolute numbers, but rather on the trend. And that trend seems to run in only one direction. While commentators can point to 18 jurisdictions that have moved from anonymity to openness, no one seems able to come up with any recent examples of a jurisdiction moving from an open system to one based on donor anonymity.

Legislative action required to achieve an open system. Another point is also worth noting here. Establishing a system based on openness requires legislative action. But donor anonymity, on the other hand, can thrive in a jurisdiction that hasn't taken any steps to address access to information about a donor. (The provinces and territories of Canada provide an example of just such a dynamic.)[431] This reinforces the sense of an international trend, in that many of the jurisdictions

Assisted Reproduction, 12 July 2012 (Croatia), No 71-05-03 / 1-12-2; Finland: *Act on Assisted Fertility Treatments*, 1237/2006; Germany: right established by 2015 decision of German Supreme Court; Ireland: *Children and Family Relationships Act 2015*, Act No 9 of 2015; the Netherlands: *Artificial Insemination (Donor Information) Act*, 2002; New South Wales: *Assisted Reproductive Technology Act 2007* (NSW), 2007/69; New Zealand: *Human Assisted Reproductive Technology Act 2004* (NZ), 2004/92; Norway: *Act on Biotechnology 2003*; South Australia: *Assisted Reproductive Treatment Act 1988* (SA); Sweden: *Genetic Integrity Act 2006*; Switzerland: *Federal Act on Medically Assisted Procreation* of 18 December 1998; Victoria: *Assisted Reproductive Treatment Act 2008* (Vic), 2008/76; United Kingdom: *Human Fertilisation and Embryology Act 1990* (UK); Uruguay: *Law Regulating Human Assisted Reproductive Techniques* (22/11/2013 No 19.167); Washington: Wash Rev Code §§ 26.26A.800–825; Western Australia: *Human Reproductive Technology Act 1991* (WA), 1991/22. See also Uniform Parentage Act (2017), *supra* note 156, art 9 (uniform act recommended for enactment in American states by the Uniform Law Commission).

430. Glenn Cohen, Travis Coan, Michelle Ottey, & Christina Boyd, "Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors" (2016) 3:3 JL & Biosciences 468 at 469.

431. See Procenko, *supra* note 406 ("[i]n Canada, donor anonymity is tacitly protected across the country because there is an absence of provincial laws or regulations that explicitly address the issue. Anonymity is the default" at 1021); Czarnowski, *supra* note 419 ("Consequently, the law became silent on the issue of donor anonymity. In the absence of any explicit caveats, gamete donor information is not distinguished from patient information acquired in any other medical context" at 260.).

that can be listed as favouring donor anonymity have reached that position not because of any deliberate decision, but rather due to legislative inertia.

Are there any noteworthy examples in British Columbia of other legislative frameworks moving from anonymity to openness? Litigation over donor anonymity. Over 10 years ago, there was an attempt to eliminate donor anonymity in British Columbia through the courts.[432] In *Pratten*, a donor-conceived person sought to establish a right for donor-conceived people to receive information about their biological origins, which would include identifying information about their donors. Although this litigation was ultimately unsuccessful, it did helpfully (for a project considering legislative reform) point to another legal framework that evolved through the legislature from anonymity to openness.

Adoption Act. This legal framework governs adoption. Its centrepiece is the *Adoption Act*.[433] The purpose of this act is "to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests."[434]

History of adoption legislation. The judgment in *Pratten* tells the story of the *Adoption Act*'s history in some detail.[435] In brief, the first version of the act was enacted in 1920.[436] "Since its early history," the court noted, "adoption legislation has provided for the safekeeping of adoption orders and the use of birth certificates in the adoption process."[437] For the first 75-plus years of its history, the *Adoption Act* "required the court-ordered adoption process to be kept secret."[438]

British Columbia moves to open adoptions in the 1990s. "However," the court observed, "to give effect to changing social conditions, the Legislature amended the *Act* in 1996 to provide for open adoptions."[439] Under the new system, the legislation "granted adoptees, once they reach the age of majority (i.e., 19), qualified access to

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432. See *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 [*Pratten* CA], rev'g *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656 [*Pratten* SC].

433. *Supra* note 30.

434. *Ibid*, s 2.

435. See *Pratten* CA, *supra* note 432 at paras 29–33, Frankel JA.

436. See *Adoption Act*, SBC 1920, c 2.

437. *Pratten* CA, *supra* note 432 at para 32.

438. *Ibid* at para 33.

439. *Ibid*.

their adoption order and registration of birth."[440] With these changes, British Columbia became the first jurisdiction in Canada to embrace open adoptions.[441]

Summary of the current system of open adoptions. Part 5 of the *Adoption Act* deals with "openness and disclosure."[442] Part 5 is lengthy and detailed. It contains 19 sections.[443] Its core is made up of two provisions dealing with disclosure of birth registrations and adoption orders: one calling for disclosure to the adopted person (who has reached the age of 19 years);[444] the other calling for disclosure to "pre-adoption parents" (when the adopted person is 19 years of age or older).[445] Disclosure is made by way of application to the registrar general of the vital statistics agency.[446] The legislation doesn't grant an unqualified right to this information. It provides for a disclosure veto in certain circumstances.[447] The act also allows an adopted person or a pre-adoption parent to file a no-contact declaration.[448]

Brief description of the issue

British Columbia doesn't have any legislation that addresses donor-conceived people having access to identifying information about their donors. This absence of legislation has the practical effect of making donor anonymity the rule in this province. But trends in legislation—including both international jurisdictions adopting open-access systems for donor-conceived people and British Columbia implementing an open-access system for adopted people—and broader social trends are beginning to call the default choice of donor anonymity into question. Is the time right for British Columbia to respond to these trends by creating a legislative

440. *Ibid*.

441. See American Adoption Congress, "Canadian Legislation" (last accessed 2 January 2023), online: *American Adoption Congress* <www.americanadoptioncongress.org/canadian_legislation.php>. Since 1996 every other province and territory has followed suit, moving more or less toward openness in adoptions.

442. See *supra* note 30, ss 58–74.

443. And part 5 is supported by a further seven sections in the *Adoption Regulation*, BC Reg 291/96 (ss 19–25).

444. See *Adoption Act*, *supra* note 30, s 63.

445. See *ibid*, s 64.

446. See *ibid*, ss 63, 64.

447. See *ibid*, s 65.

448. See *ibid*, s 66.

framework that allows donor-conceived people to have access to identifying information about their donors?

Discussion of options for reform

A threshold question. This issue is essentially the threshold question for legislation on this subject. It has only two options, which are that, in principle, British Columbia should enact new legislation establishing open access as its rule for donor information or it should not do this at this time (retaining the status quo of donor anonymity—at least for now).

Arguments in favour of openness. There has been considerable legal commentary on this topic. People who favour ending donor anonymity have made two main arguments.

Benefits for donor-conceived people. The first set of arguments relate to the benefits that an open system would provide to donor-conceived people. Commentators have identified three concrete benefits to this group's health and well-being.

Medical history. First, donor anonymity deprives donor-conceived people of information about their medical history.[449] This information has become increasingly important as genetic family history has flourished as a diagnostic tool.[450] In brief, an open system would provide better support for the physical health of donor-conceived people.[451]

Sexual health and concerns about incest. Second, an open system better supports the sexual health of donor-conceived people. Donor anonymity leaves donor-conceived people in the dark about any siblings they may have. This creates the risk that a sexually active donor-conceived person could inadvertently violate the taboo on

449. See Matt Malone, "Gamete Donor Anonymity in Canada: An Overview of Potential Policy Solutions" (2017) 38 Windsor Rev Legal Soc Issues 71 ("The most compelling interest for donor-conceived individuals to have information about their donor is health-related. Specifically, donor-conceived individuals want to know about genetic susceptibilities that they might unknowingly possess" at 78.).

450. See Cameron, Gruben, & Kelly, *supra* note 356 ("[k]nowledge of one's family and genetic history is increasingly important in the prevention and treatment of disease" at 109).

451. See Kelly, "Is It Time to Tell?," *supra* note 342 ("Concerns raised by donor offspring about their lack of access to potentially relevant family medical information fall into two categories. The first relates to general requests for information about a person's medical history. . . . The second health-related concern raised by anonymity relates to the risk of offspring inheriting a significant genetic condition from their donor" at 188 [footnotes omitted]).

incest.[452] Surveys have revealed that this fear can have an impact on donor-conceived people's sexual relationships.[453] Some commentators have argued for an open system because it would help to alleviate these concerns.[454]

Psychological well-being and identity. Third, an open system is seen to support the broader psychological health of donor-conceived people. This is because this system provides these people with more information about their origins and identity, which can be instrumental for psychological well-being.[455] "[T]he release of identifying information to donor-conceived people," argue two law professors in a recent article, serves "to alleviate the stress, anxiety, and frustration that may be caused by not knowing their genetic origins."[456]

Legislative and social trends. The second set of arguments that are often marshalled in favour of open access draws on broader legislative and social trends.

International legislation ending donor anonymity and BC's Adoption Act. On the legislative side, it could be argued that British Columbia should take the opportunity to align its legislation with (1) international jurisdictions that have moved to an open system for donor-conceived individuals and (2) its own legislation on adoption, which in the 1990s moved from anonymity to open access.

Societal trends. But societal trends—which are broader than narrow legislative trends—may exert more force in driving legislative change. The trends to note here are similar to those commonly cited as rationales for legislative reform in relation to assisted reproduction generally: changing social attitudes and advances in technology.

Changing social attitudes, greater acceptance of assisted reproduction. As commentators have observed, "the use of AHR and donor gametes has historically

452. See *Pratten* SC, *supra* note 432, Adair J ("donor offspring are legitimately concerned about the implications of interacting with, and possibly forming intimate relationships with, unknown, blood-related family members" at para 100).

453. See Czarnowski, *supra* note 419 ("[m]any worried about unknowingly engaging in intimate relations with genetically-related family members" at 264 [footnote omitted]).

454. See Gruben & Cameron, *supra* note 398 at 667.

455. See Kelly, "Is It Time to Tell?," *supra* note 342 ("anonymity denies donor offspring access to information about their genetic origins and identity, which is understood by some offspring as important to their developing sense of self" at 187).

456. Gruben & Cameron, *supra* note 398 at 667.

been stigmatized."[457] This historical stigma may partly account for how donor anonymity has become the default rule in British Columbia.[458] If so, it's worthwhile considering whether social attitudes have changed. If use of assisted human reproduction is no longer considered a source of shame, then this could prompt a rethinking of whether donor anonymity should be preserved.

Advances in technology, consumer DNA testing. The technological advance that is cited most frequently in this area is the advent of mass commercial DNA testing, through such services as 23andMe.[459] Commentators have noted that these services could render legislative requirements for donor anonymity ineffective in practice.[460] In view of these concerns, one national regulator has even speculated that donor anonymity may be untenable in the near future.[461] This point might apply with greater force to a jurisdiction like British Columbia, in which donor anonymity is the rule in default of any legislative action. By placing development of the law largely in the hands of private actors—such as doctors and clinics—such a jurisdiction may be facing added uncertainty and, potentially, increased litigation, as parties try to work out the boundaries of access and anonymity.[462]

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457. *Ibid* at 671.

458. See Eric Blyth, "Discovering the 'Facts of Life' Following Anonymous Donor Insemination" (2012) 26:2 Int'l JL Pol'y & Fam 143 at 143.

459. See 23andMe, "It's just saliva. No blood. No needles." (last visited 10 August 2023), online: <www.23andme.com/en-ca/howitworks/> (offering a "home-based saliva collection kit" for sale to the public; customers receive a genetic report based on DNA testing involving samples collected from this kit).

460. See Katina Merino, "Connecticut's Dilemma: Consumer DNA Testing, Sperm Donor Anonymity, and Public Health" (2021) 24:4 Quinnipiac Health LJ 547 ("[t]he rise in accessibility to consumer genetic testing means that anonymity can no longer be guaranteed" at 555 [footnote omitted]). But see Kelly, "Is It Time to Tell?," *supra* note 342 (discussing "sperm bank or fertility clinic based donor registry services, social media searches using information contained in the donor's profile, privately run online donor registries such as the Donor Sibling Registry, and online networks created by recipient parents and/or donor offspring . . . . [as well as] [w]eb based genealogy services and direct-to-consumer DNA testing services [that] have also emerged as tools for locating donor relatives" and concluding that "[w]hile some offspring and recipient parents have been successful in locating donors and donor siblings using informal mechanisms, these practices are not an adequate alternative to statutory access" at 185–186 [footnotes omitted]).

461. See Hannah Devlin, "UK fertility watchdog could recommend scrapping donor anonymity law," *The Guardian* (20 May 2022), online: <www.theguardian.com/society/2022/may/20/uk-fertility-watchdog-could-recommend-scrapping-donor-anonymity-law> (quoting "Peter Thompson, the chief executive of the Human Fertilisation and Embryology Authority," as saying "the rapid rise of consumer genetic testing websites such as 23andMe could soon make it impossible to guarantee donor anonymity").

462. See Morgan Catherine York, "I Just Took a DNA Test—Turns out, I'm 100% Breaching My Donor

Arguments in favour of continuing donor anonymity. But there are arguments against creating a legislative framework based on open access. These arguments often implicitly acknowledge the benefits that flow to donor-conceived people from such a system but point to countervailing concerns.

Balancing multiple interests. Many commentators have pointed out that any legislative system addressing this issue shouldn't be designed in the single-minded pursuit of one group's interests.[463] Instead, the system should try to balance the interests of donor-conceived individuals with those of donors and intended parents, among others.[464]

Donors' privacy interests. Donors have a clear privacy interest in identifying information.[465] Anonymity may support that interest.[466] There is a widespread concern that donors—or a large percentage of them—will refuse to participate in a system that requires open access to their identifying information.[467]

Intended parents' interests. Intended parents, as a group, have garnered less attention and study than donors and donor-conceived people. Some commentators have said that a state-endorsed system of openness could be seen as undermining

Anonymity Contract: Direct-to-Consumer DNA Testing and Parental Medical-Decision-Making" (2021) 28:2 Ind J Global Legal Stud 293.

463. See Gruben & Cameron, *supra* note 398 ("[t]o characterize access to this information as a 'right' fails, in our opinion, to balance other, equally important interests" at 667, n 6).

464. See Procenko, *supra* note 406 (listing several other interests at play, including "the maintenance of the gamete supply; physicians seeking to avoid involvement in lawsuits; the high costs of maintaining an information registry for either governments or individual clinics; and preventing consanguinity between donor-offspring" at 1003).

465. See Czarnowski, *supra* note 419 ("donors therefore continue to enjoy a right to privacy in their identifying information, since the personal information collected during gamete donation is not distinguished from personal information that would be collected for any other medical procedure") at 276.

466. But see Procenko, *supra* note 406 (arguing that "donors have a weak claim to anonymity based on privacy rights that currently receive public protections in Canadian law" at 1003).

467. See I Glenn Cohen, "Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands" (2012) 100:2 Geo LJ 431 ("regimes that prohibit anonymity usually *ceteris paribus* reduce the number of sperm donors, as has been the experience in Sweden, the Australian province of Victoria, England, New Zealand, and the Netherlands" at 436 [footnote omitted]. But see Devlin, *supra* note 461 ("When asked if shortening or removing the period of anonymity could deter donors, Thompson [chief executive of the UK Human Fertilisation and Embryology Authority] said this concern proved unfounded when rules around anonymity changed in 2005, with donations dipping briefly and then recovering.").

the choices of some intended parents, effectively "promot[ing] genetic essentialism," which would include the concept that biological ties should take precedence (socially and emotionally, if not necessarily legally) over families formed by intention.[468]

Societal interests. Beyond the immediate parties, there are broader societal interests to consider. Commentators have made a number of arguments here.

Potential futility for first mover. One argument is linked to the concern noted earlier about donors withdrawing from an open-access system. This argument takes account of the fact that legislation on donor anonymity in Canada must be enacted at the provincial or territorial level. Since no province or territory has enacted legislation ending donor anonymity, the concern is that the first province or territory to do so will end up seeing its efforts come to naught, as donors and intended parents sidestep that jurisdiction and engage in assisted reproduction in a neighbouring jurisdiction that preserves donor anonymity.[469]

Added costs and administrative burdens. Another concern is the cost and administrative burden of storing and providing access to a donor's identifying information. Most jurisdictions that have an open system rely on a public agency to collect, store, and provide access to the donor's information. This entails both start-up and ongoing costs for the public purse.[470] In theory, it might be possible to limit the cost to the public by placing the obligations of collection, storage, and access on clinics dealing with donor-enabled assisted reproduction.[471] But this approach would serve to concentrate costs on the sector, where they would likely flow through to intended parents. This would make an expensive process (which, in British Columbia, isn't covered by the Medical Services Plan) even more expensive.

The committee's tentative recommendation for reform

The committee gave this issue extensive consideration, wrestling with its implications. Ultimately, it favoured proposing that British Columbia establish the principle of open access to information in place of donor anonymity.

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468. Cameron, Gruben, & Kelly, *supra* note 450 at 109.

469. See Gruben & Cameron, *supra* note 398 ("[T]here may be a concern that provincial action would be ineffective. Prohibiting donor anonymity in one province may simply result in individuals going to other provinces where anonymous gametes are available" at 672.).

470. See *ibid* (noting "the cost and effort associated with setting up a registry system that would ensure donor information is collected and disclosed to donor-conceived individuals").

471. See e.g. Wash Rev Code §§ 26.26A.820–825.

The committee noted that an open system would provide significant benefits for donor-conceived people. While the committee accepted that any system regulating access to donor information would have to balance the interests of several groups, the current system of donor anonymity appears to significantly devalue the interests of donor-conceived people.

Most people in British Columbia essentially take knowing their genetic origins for granted. But the experience of donor-conceived people shows that being deprived of this knowledge can cause significant harm.

The committee also pointed to British Columbia's experience of moving to a system of open adoptions as a helpful precedent for opening access to donor information.

The committee did have some concerns about the potential practical impacts of moving to an open system. In particular, the committee noted that most of British Columbia's donor sperm comes from outside the province. While the committee didn't want to propose any changes that would diminish the likelihood of donation, it did believe that a move to a more open system could be implemented in a way that would limit such potential downsides.

Finally, the committee acknowledges that its tentative recommendation only states a broad principle. Creating an open-access system would take a considerable amount of policy development, which the committee believes would be outside its mandate to review part 3 of the *Family Law Act*. On this point, the committee urges policymakers to draw on the experience of open adoptions in the 1990s. (For example, the government's decision to facilitate counselling as part of that transition was seen as progressive and helpful and could be usefully considered as part of a move to open access to donor information.)

While it will take some time to develop a fully fledged system of open access, that process can only begin by deciding to embrace the principle of open access. The committee hopes that its proposal will stimulate consideration of adopting this principle.

The committee tentatively recommends:

13. British Columbia should enact legislation enabling donor-conceived people to have access to identifying information about their donors.

Chapter 6. Parentage If Surrogacy Arrangement

Introduction

This chapter examines a pair of issues that would fine-tune BC's current legislation on surrogacy arrangements. The issues concern possible legislation (1) enabling conception by sexual intercourse in a surrogacy arrangement and (2) clarifying responsibility for decision-making for a newborn child in a surrogacy arrangement.

Background Information on Surrogacy

What is surrogacy?

In simple terms, a surrogate in BC law is a birth parent who enters into a specific kind of legal agreement.[472] The agreement must be entered into before conception of the child and have a number of features, the most important of which are the following:

- it is an agreement between the surrogate and the intended parent—or intended parents;
- the surrogate agrees not to be the child's parent;
- after the child's birth, the surrogate will relinquish the child to the intended parent or parents; and
- the child's parent or parents will be the intended parent or parents.[473]

These aren't the only features of a surrogacy agreement. This list only sets out the essential features required by BC law. Surrogacy agreements typically have many more provisions that go beyond the essential features.[474]

472. See *Family Law Act*, *supra* note 1, s 29 (1). The legislation currently uses the term "birth mother".

473. See *ibid*, s 29 (2).

474. See Law Reform Commission of Saskatchewan, *supra* note 119 at 71–72 (examples of provisions that may be found in a surrogacy agreement).

The development of legislation on surrogacy and parentage in British Columbia

While some commentators have noted that surrogacy can be characterized as an ancient practice with deep roots in history, BC (like most jurisdictions world-wide) only began to consider it as a subject for legislation with the advent of assisted human reproduction.[475] During the policy-development phase before the enactment of the *Family Law Act*, the government sketched out the requirements of a surrogacy agreement (noted on the previous page) and set out the guiding policy that parentage in a surrogacy arrangement would be determined by the intentions of the parties (i.e., the intended parent or intended parents would be the child's parent or parents from birth, with the agreement of the surrogate and the surrogate's spouse—if any).[476]

Related issue: aligning formalities and other requirements for surrogacy agreements with requirements for international adoptions

Although it was outside the committee's mandate, the committee did give some consideration to aligning the requirements for surrogacy agreements (particularly in cases with an international dimension) with the requirements for international adoptions. There may be further scope for another law-reform organization to pursue this line of inquiry.

These policies were ultimately enacted as a section in part 3 of the *Family Law Act*. That section—section 29—became British Columbia's first legislative provision on surrogacy and parentage.

As one commentator has put it, section 29's provisions "promote certainty of status, autonomy of the participants, and out-of-court processes over judicial or administrative oversight of the surrogacy arrangement. Substantive, evidentiary, and procedural requirements are minimal."[477] These qualities are distinctive within Canada. Other Canadian jurisdictions tend to take a more regulatory approach to parentage and surrogacy, requiring (for example) a court order to be part of the process. BC's approach has been labelled "the most 'surrogacy-friendly' " in Canada.[478]

475. See Hague Conference on Private International Law, Permanent Bureau, *Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, Prel Doc no 10 (March 2012) at para 4, online: <assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>.

476. See *Proposals for a new Family Law Act*, *supra* note 3 at 32–33.

477. Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere" (2013) 25:2 Can J Women & L 284 at 297.

478. Law Reform Commission of Saskatchewan, *supra* note 119 at 28.

Surrogacy and the federal Assisted Human Reproduction Act

Section 29 of BC's *Family Law Act* isn't intended to be a comprehensive legal framework for surrogacy. It's really only meant to deal with parentage and surrogacy agreements.

Other important aspects of surrogacy are dealt with elsewhere. In particular, the federal *Assisted Human Reproduction Act* contains some important provisions for surrogacy.[479] Notably, that act prohibits what it calls "payment for surrogacy,"[480] regulates intermediaries,[481] and sets a minimum age for being a surrogate.[482] Regulations under this act govern reimbursement for expenditures related to surrogacy.[483]

These are important topics that touch on key aspects of the experience of surrogacy. But they don't relate to parentage, so they remain background for this project. They are not the subject of any tentative recommendations.

The full text of section 29

Parentage if surrogacy arrangement

29 (1) In this section, **"surrogate"** means a birth mother who is a party to an agreement described in subsection (2).

(2) This section applies if,

(a) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and

(b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth,

(i) the surrogate will not be a parent of the child,

479. See *supra* note 37. See also, above, at 14 (briefly discussing the *Assisted Human Reproduction Act*).

480. See *ibid*, s 6 (1).

481. See *ibid*, s 6 (2), (3).

482. See *ibid*, s 6 (4) ("No person shall counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that the female person is under 21 years of age.").

483. See *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193, ss 4, 8.

(ii) the surrogate will surrender the child to the intended parent or intended parents, and

(iii) the intended parent or intended parents will be the child's parent or parents.

(3) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (2), a person who is an intended parent under the agreement is the child's parent if all of the following conditions are met:

(a) before the child is conceived, no party to the agreement withdraws from the agreement;

(b) after the child's birth,

(i) the surrogate gives written consent to surrender the child to an intended parent or the intended parents, and

(ii) an intended parent or the intended parents take the child into his or her, or their, care.

(4) For the purposes of the consent required under subsection (3) (b) (i), the Supreme Court may waive the consent if the surrogate

(a) is deceased or incapable of giving consent, or

(b) cannot be located after reasonable efforts to locate her have been made.

(5) If an intended parent dies, or the intended parents die, after the child is conceived, the deceased intended parent is, or intended parents are, the child's parent or parents if the surrogate gives written consent to surrender the child to the personal representative or other person acting in the place of the deceased intended parent or intended parents.

(6) An agreement under subsection (2) to act as a surrogate or to surrender a child is not consent for the purposes of subsection (3) (b) (i) or (5), but may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth.

(7) Despite subsection (2) (a), the child's parents are the deceased person and the intended parent if

(a) the circumstances set out in section 28 (1) *[parentage if assisted reproduction after death]* apply,

(b) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and a person who was married to, or in a marriage-like relationship, with the deceased person, and

(c) subsections (2) (b) and (3) (a) and (b) apply.

Issues for Reform

Should part 3 permit conception by sexual intercourse in a traditional surrogacy arrangement?

Background information

Two types of surrogacy. There are two types of surrogacy. The first is gestational surrogacy, so named because the person is carrying the child but does not have a genetic connection. This usually involves implantation of an embryo containing the genetic material of the intended parents (although this is not always the case).[484]

The second is traditional surrogacy, in which the surrogate not only carries the child, but is also biologically related (and therefore an egg donor).[485] This usually involves insemination of the surrogate by the sperm of one of the intended parents.

Current law in British Columbia. Section 29 of the *Family Law Act* governs surrogacy.[486] The section begins by defining a surrogate as a "birth mother" who is a party to an agreement described in the section. Such an agreement must be entered into prior to conception between the intended surrogate (who conceives through assisted reproduction) and parent or parents.

Assisted reproduction must be used. As can be seen above, surrogacy arrangements *require* the use of assisted reproduction.

Parentage if sexual intercourse is used would be determined by genetic connection. If parties employ sexual intercourse as the means of conception, section 26 of the *Family Law Act* applies and genetic connection would dictate parentage.[487]

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484. See Karen Busby & Delaney Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 Can J Fam L 13 at 27.

485. See *ibid.* See also Kahn Zack Erlich Lithwick, "A Guide to Surrogacy" (last visited 12 May 2023), online: *Kahn Zack Erlich Lithwick* <www.kzellaw.com/guide-to-surrogacy>.

486. See *supra* note 1.

487. See *ibid*.

Thus, the resulting parents would be the *intended* traditional surrogate and the other contributor of human reproductive material. This fails to meet the parties' objectives in two respects—first by making the surrogate a parent rather than an egg donor and gestational carrier, and second by failing to capture the non-biologically related intended parent or parents.

Court cases on traditional surrogacy. In BC, there has been one case on traditional surrogacy involving sexual intercourse.[488] Unfortunately, there were several points of complication and contention which clouded the issue. While this case involved a married couple and a surrogate, the surrogate was having an affair with the husband. The parties disagreed as to method of conception and whether surrogacy was the actual intention.

Sperm donation by sexual intercourse. The committee has previously decided to make the tentative recommendation that sperm donation be available through sexual intercourse if a pre-conception agreement is in place.[489] However, this does not assist with a traditional surrogate who is an egg donor.

Relevant laws in other jurisdictions. The federal *Assisted Human Reproduction Act* requires conception by assisted reproduction for surrogacy arrangements.[490] The act does not prohibit conception by sexual intercourse, as it does with other aspects of surrogacy (e.g., payment). Not all provinces and territories across Canada explicitly deal with surrogacy in parentage legislation. Of those that do, the vast majority clearly state that the child must be conceived through assisted reproduction.

Nova Scotia may be an exception. Nova Scotia is one exception—although, it has been described as an outlier by the Saskatchewan Law Reform Commission for failing to contain several hallmarks of other Canadian surrogacy provisions.[491] In other words, the lack of clarity around conception method is likely due to oversight and not by design.

488. See *KB v MSB*, 2021 BCSC 1283. The court noted the lack of case law with a similar fact pattern.

489. See, above, at 67–74.

490. See *supra* note 37, s 3.

491. Law Reform Commission of Saskatchewan, *supra* note 119. See also Nova Scotia: *Birth Registration Regulations*, *supra* note 132, s 5; Access to Justice & Law Reform Institute of Nova Scotia, *supra* note 36 (proposing fundamental reforms for Nova Scotia parentage law).

Québec was revising its legislation over the course of this project. Québec's parentage legislation was in flux as the committee was considering this issue.[492] It had a longstanding provision that simply disallowed surrogacy, stating "[a]ny agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null."[493] But it was considering adopting a provision that stated "[a] parental project involving surrogacy exists from the moment a person alone or spouses have decided, before a child is conceived, to resort to a woman or a person who is not party to the parental project to give birth to the child."[494]

This provision did not explicitly require conception by assisted reproduction. Thus, it left open the question whether Québec intended both assisted reproduction and sexual intercourse to be permissible.

Brief description of the issue

The *Family Law Act* requires conception by assisted reproduction for surrogacy arrangements (whether traditional or gestational). Most Canadian provinces and territories tackling this issue also explicitly require the use of assisted reproduction. Should BC permit conception by sexual intercourse for traditional surrogacy?

Discussion of options for reform

The options to consider in response to this issue for reform are (1) amend part 3 to permit conception by sexual intercourse for traditional surrogacy; (2) maintain the status quo.

Advantages and disadvantages of allowing conception by sexual intercourse for traditional surrogacy. The most obvious benefit of permitting conception by sexual intercourse is cost. Assisted reproduction is expensive. These costs—in addition to the already very high costs associated with surrogacy—create inequalities for low-income families.[495]

Another benefit of permitting conception by sexual intercourse is consistency. The committee has tentatively recommended to allow for sperm donation by sexual

492. See, above, at 29–30 (briefly discussing legislative developments in Québec).

493. *Civil Code of Québec*, *supra* note 126, art 541.

494. QC Bill 2, *supra* note 127, cl 96 (as introduced for first reading; adding new art 541.1 to the *Civil Code of Québec*, *supra* note 126).

495. See e.g. Legislative Assembly of Manitoba, Standing Committee on Justice, (30 November 2021) at 19:20 (Ms. Lisa Davies McDonald) [Manitoba Debates].

intercourse.[496] Allowing for egg donation by sexual intercourse in a traditional surrogacy would align with this previous decision.

One main limitation with permitting conception by sexual intercourse for traditional surrogacy is that the *Family Law Act* does not currently distinguish between gestational or traditional surrogacy. All surrogacy is treated the same. In order to create space for this concept, the act would have to separate out the two kinds of surrogacy—thereby creating opportunity for each to be treated differently.

In the USA, distinctions between traditional and gestational surrogacy are often found in legislation. However, this is generally to block traditional surrogacy because the connection between a traditional surrogate and a child is perceived as too strong.[497] Adding sexual intercourse to the mix may only strengthen this kind of logic. In other words, creating a distinction in the legislation may have far-reaching implications.

Another issue with permitting conception by sexual intercourse is the relationship between surrogate and intended parents.

On the one hand, many surrogates are close friends or family members. Thus, having sexual intercourse with the intended parent may cause emotional distress or relationship strain.[498] For example, one scholar discussed a case where a sister agreed to act as surrogate for her sibling. However, she refused traditional surrogacy all together, "despite the fact that it would have been cheaper and easier[,] to avoid strains to her marriage and relationship with her sister, and her own mental health."[499] It is easy to extend this logic to sexual intercourse, especially in cases involving close family members like siblings, parents, or cousins where sexual intercourse would be viewed as inappropriate and socially taboo (not to mention it being a crime in cases involving sexual intercourse between siblings or parents and children).[500]

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496. See, above, at 74.

497. See Frank J Bewkes, "Surrogate or Mother: The Problem of Traditional Surrogacy" (2014) 3:2 Tenn J Race Gender & Soc Just 143.

498. See Rakhi Ruparelia, "Giving Away the 'Gift of Life': Surrogacy and the Canadian *Assisted Human Reproduction Act*" (2007) 23:1 Can J Fam L 11 at 17.

499. *Ibid*.

500. See Ethics Committee of the American Society for Reproductive Medicine, "Using family members as gamete donors or surrogates" (2012) 98 Fertil Steril 797. See also *Criminal Code*, *supra* note 195, s 155 ("Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may

On the other hand, many surrogates are strangers to the intended parents (many of whom are in committed relationships).[501]

If sexual intercourse were permitted as a method of conception in surrogacy arrangements, potential surrogates may feel forced to have unprotected sexual intercourse with a relative or stranger to save on costs. This presents potential risks to mental and physical health. At present, assisted reproduction is required. This offers the protection of a clinical setting, including screening of reproductive materials for transmittable diseases.

Advantages and disadvantages of the status quo. Research did not reveal any case law, commentary, or discussion on this issue. This may indicate that the status quo is adequate, and this is not an issue that needs to be addressed.

The absence of discussion and litigation may suggest that traditional surrogates are simply not using sexual intercourse to conceive, or if they are, that it is not resulting in disputes. However, as some scholars have indicated, individuals may also be reluctant to come to court due to fears associated with the legality of surrogacy and payment.[502] In the USA, scholars have speculated that much of the case law on surrogacy is sealed,[503] which leaves a gap in understanding what is happening on the ground.[504]

Alternatively, this may not be an issue simply because traditional surrogacy is less common. Since the advent of gestational surrogacy, most people prefer to have a child genetically related to both intended parents. In 2011, one study estimated "that 95 percent of all surrogacy situations (in which an attorney is involved) are gestational surrogacy cases, rather than traditional surrogacy."[505]

Even in other countries there is little discussion of this issue. Scholars discussing so-called reproductive tourism have not mentioned conception by sexual

be, has sexual intercourse with that person.").

501. See e.g. Alison Motluk, "Anatomy of a Surrogacy" (6 November 2017), online: *Hazlitt* <hazlitt.net/longreads/anatomy-surrogacy>.

502. See Busby & Vun, *supra* note 484 at 38.

503. See Bewkes, *supra* note 497 at 149.

504. See *ibid*.

505. Diane S Hinson & Maureen McBrien, "Surrogacy across America" (2011) 34:2 Fam Advoc 32 at 33.

intercourse.[506] Rather, most discussions centre around certain countries becoming increasingly specialized in assisted-conception methods to support this industry.[507]

Thus, the status quo may be sufficient. Alternatively, if this is an issue, it is not being discussed openly in the courts or the academic literature.

The committee's tentative recommendation for reform

The committee took up this issue in the wake of its decision to tentatively recommend that part 3 adopt provisions on sperm donation by sexual intercourse. It wanted to explore whether the rationale for this proposal could be extended to surrogacy arrangements.

While there is some surface logic to proposing such an extension for surrogacy arrangements, the committee ultimately decided not to make this tentative recommendation.

In the committee's view, the two situations aren't parallel. A surrogacy arrangement is more than just egg donation.

The committee was also concerned that the parties in a surrogacy arrangement could be more vulnerable to exploitation. This concern made the committee unwilling to endorse allowing traditional surrogacies to proceed by sexual intercourse.

The committee tentatively recommends:

14. Part 3 of the Family Law Act should not be amended to allow for conception by sexual intercourse for traditional surrogacy.

506. See Raywat Deonandanl & Andreea Bentel, "Assisted Reproduction and Cross-Border Maternal Surrogacy Regulations in Selected Nations" (2014) 4:1 British Journal of Medicine & Medical Research 225.

507. See *ibid.*

Should part 3 contain a provision addressing decision-making for the child after the child is born but before the surrogate provides written consent to relinquish the child to the intended parents?

Background information

Current law in British Columbia. In BC, there is the potential for a gap between the child's birth and the surrogate relinquishing the child to the intended parents (and thus confirming parentage). This gap is created by the section 29 requirement that written consent be given by the surrogate *after* the child's birth.[508]

As will be discussed below, some provinces require a specific passage of time before consent may be granted by a surrogate (e.g., three days). BC does not have this requirement. While post-birth consent is required, there is no mandatory waiting period and thus in theory a surrogate could give consent immediately.

If all the conditions of section 29 are met, the intended parents are the legal parents from time of birth.[509]

Nevertheless, this gap between birth and the granting of consent presents a grey area as to who has legal authority to make decisions for a child during this time (for example, in a medical emergency).

In situations where parentage is not disputed, section 41 of the *Family Law Act* outlines that guardians with parental responsibilities have the right to make healthcare decisions for a child[510] (subject to the *Infants Act* provision regarding medical decision making for capable minors).[511]

Current law in other Canadian jurisdictions. In Canada, provinces with recently amended parentage legislation have all adopted a similar approach to address the gap. Namely, Saskatchewan, Manitoba, and Ontario dictate a set timeframe in which consent is not permitted. During this period, the legislation divides power and responsibilities between the intended parents and the surrogate for decisions.

Saskatchewan. Saskatchewan's legislation requires written consent of the surrogate relinquishing entitlement to parentage of the child. This consent is not

508. See *supra* note 1, s 29 (3) (b).

509. See Manitoba Law Reform Commission, *Assisted Reproduction*, *supra* note 90 at 33.

510. See *supra* note 1, s 41.

511. See RSBC 1996, c 223, s 17.

permitted before the child is three days old.[512] The legislation states "[u]nless the surrogacy agreement provides otherwise, the surrogate and the intended parents share the powers and responsibilities of a parent with respect to the child from the time of the child's birth until the child is 3 days old."[513] After three days, the intended parents take over responsibility for the child and "any provision in the surrogacy agreement that provides otherwise is of no effect."[514]

Manitoba. Manitoba follows largely the same scheme as Saskatchewan with respect to the gap between birth and consent. Its legislation requires a two-day waiting period in which consent may not be given by the surrogate. For these two days, the surrogate and intend parents share "the rights and responsibilities of a parent" (subject to the surrogacy agreement).[515]

Regardless of consent, the parties must apply to court to receive a declaratory order of parentage. A main drawback to the act is that it fails to cover responsibilities for the period between day two and when a parentage order is made.

Ontario. Akin to the other provinces, Ontario's act sets a timeframe in which the surrogate cannot grant consent to relinquish the child. Ontario sets this at seven days.[516] During those seven days, and subject to the surrogacy agreement, "the surrogate and the intended parent or parents share the rights and responsibilities of a parent."[517] After this point, the surrogacy agreement has no effect in this area.

Once the surrogate's consent is granted in writing to relinquish parentage, the intended parents become the parents of the child. If consent is not granted, the parties may make a court application to establish parentage.[518]

No Canadian jurisdiction allows for a birth parent to relinquish their entitlements to parentage prior to birth.[519] This is often seen to have a threefold purpose. First, to permit the surrogate time to decide regarding the child after birth. Second, to provide consistency across Canadian jurisdictions to prevent or limit forum

512. See *The Children's Law Act, 2020*, *supra* note 120, s 62.

513. *Ibid*.

514. *Ibid*.

515. *The Family Law Act*, *supra* note 124, ss 22 (6), 23 (2).

516. See *Children's Law Reform Act*, *supra* note 115, s 10.

517. *Ibid.*

518. *Ibid*.

519. See Manitoba Law Reform Commission, *Assisted Reproduction*, *supra* note 90 at 33.

shopping for surrogates. Third, to ensure that surrogacy is not used to avoid adoption.[520]

United States of America: Uniform Parentage Act. In the USA, some jurisdictions do allow for pre-birth court declarations of parentage for surrogacy arrangements.[521] The Uniform Parentage Act is one instance of this model.

Article 8 of the Uniform Parentage Act attends to surrogacy. It should be noted, this article contains many aspects which are very different from the current Canadian legal framework. The Uniform Parentage Act is far more extensive and prescriptive in its language.[522]

Of special interest to this issue is section 811, which governs orders of parentage. This section states that "before, on, or after the birth of a child conceived by assisted reproduction under a gestational surrogacy agreement" the parties can apply to court for an order: (1) "declaring that each intended parent is a parent of the child and ordering that parental rights and duties vest immediately on the birth of the child exclusively in each intended parent," (2) excluding the surrogate and their spouse (if any) as parents, (3) dictating that the birth record show only the intended parents.[523]

A court order can be granted before a child is born; however, enforcement is stayed until birth.[524]

Brief description of the issue

Recently amended Canadian parentage legislation designates that the intended parents and surrogate share powers and responsibilities during the period between birth and consent.

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520. See Law Reform Commission of Saskatchewan, *supra* note 119 at 58–60.

521. See Manitoba Law Reform Commission, *Assisted Reproduction*, *supra* note 90 at 33.

522. A few examples include: (1) differentiation between traditional and gestational surrogacy, (2) requiring a surrogate to have previously given birth, (3) requiring both the surrogate and the intended parents be over 21, and have completed a medical and mental health evaluation, have received independent legal advice, (4) the surrogate's spouse, if any, must be party to the agreement, (5) no medical procedures may begin prior to the agreement being completed, (6) the surrogate must have ultimate authority over their health and welfare with respect to the pregnancy. These are just a few of the areas covered by the Uniform Parentage Act with respect to surrogacy.

523. Uniform Parentage Act (2017), *supra* note 156, § 811.

524. See *ibid.*

In the USA, the Uniform Parentage Act allows for pre-birth court orders designating the intended parents as the parents of the child. This is another mechanism that would remove the gap between birth and consent by a surrogate; thereby allowing for important decisions to be made.

Should BC create a mechanism to provide for decision making during the gap between a child's birth and the granting of consent by the surrogate to relinquish the child?

Discussion of options for reform

The options to consider in response to this issue for reform are: (1) amend part 3 to create a provision allowing for pre-birth parentage orders for surrogacy; (2) amend part 3 to create a provision designating power and responsibility for the child during the period after a child is born, but before consent is granted by a surrogate to relinquish the child; (3) maintain the status quo.

Advantages and disadvantages of creating a provision to apply to court for a pre-birth order declaring parentage. The Uniform Parentage Act allows the parties to apply for a pre-birth determination of parentage, thereby granting immediate authority for the child to the intended parents to make all decisions.

As pointed out by one scholar, to some extent the current law is *creating the problem* by providing for a gap following birth. A simple solution would be to remove the gap entirely and designate the intended parents as parents from time of birth: "if intended parents are the parents of their child at the moment of that child's birth . . . the possibility of the traditional surrogate changing her mind is eliminated. It is time for intent to matter."[525]

In other words, the legislative gap creates the space for a legal dispute. If the law permitted a pre-birth order that a surrogate is not a parent and has no right to change that decision, then there is no grey area as to who has decision-making authority for a child.

This is at odds with the common position that a surrogate cannot possibly make the decision to relinquish a child prior to birth.[526] However, many scholars have pointed

525. Bewkes, *supra* note 497 at 165.

526. See *ibid* at 168.

out that this position is paternalistic and portrays women as emotional decision makers rather than purposeful agents.[527]

Moreover, one author makes the point that the current model may be not only demeaning to women's agency but also contrary to a child's best interests:

> [t]he . . . court worried that the surrogate would not be making an informed and voluntary decision since she is agreeing to give up the child before knowing the strength of her bond with that child. This is exactly the wrong test to use. *Imagine the possible effects on a child's self-esteem when he is told that his surrogate mother gave him up after having had ample time to assess the strength of her bond with him.*[528]

Further, in BC, there are several points of no return in the law for potential parents. For example, once a child is conceived there is no ability to renege on an agreement to become a parent both under section 27 and section 30. This position could be echoed for surrogacy. Once a pre-birth order is made, a party's decision cannot be changed.

An American scholar has argued that surrogacy legislation often attempts to straddle the line between biology and intention—unsure which direction to follow.[529] In an intention-based model, the law looks to the parties who instigated and planned for the creation of the child regardless of biological connections.[530] In the biological-based model, the law looks to who shares a genetic connection to the child. The scholar points out that surrogacy is intention based.[531] It is logically inconsistent to attempt to use a biological or gestational connection to preserve the surrogate's parental interest in an intention-based model.

This same scholar argued that determining parentage before birth is in the best interests of the child by meeting policy objectives similar to those that underpin part 3.[532] Namely, by eliminating the gap, the legislation would provide greater certainty and stability around parentage.[533] Moreover, "[d]elays in establishing

527. See *ibid*.

528. Mark Strasser, "Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law" (2015) 18:1 J Health Care L & Pol'y 85 at 91–92 [emphasis added; footnotes omitted].

529. See Bewkes, *supra* note 497 at 166.

530. See *ibid.*

531. See *ibid.*

532. See, above, at 24.

533. See Bewkes, *supra* note 497 at 169.

parentage may, among other consequences, interfere with a child's medical treatment in the event of medical complications arising during or shortly after birth."[534]

In addition, pre-birth determinations may be preferable for both surrogates and intended parents. In Manitoba Hansard debates featuring presentations by intended parents and surrogates, it appeared that surrogates and intended parents might *prefer* for the decision to be finalized pre-birth.[535]

On the other hand, there are limitations with a pre-birth determination.

One issue with transposing the Uniform Parentage Act solution to the Canadian context is the view that surrogates are vulnerable and require protection. This sentiment is reflected in certain common Canadian legislative mechanisms like the delay in consent and the unenforceability of agreements—all of which are perceived to protect vulnerable surrogates and children.[536]

Further, the Uniform Parentage Act solution is contrary to British Columbia's expressed preference for out-of-court options to resolve disputes.[537]

There are other potential concerns related to assigning parentage prior to birth. The Saskatchewan Law Reform Commission received interesting consultation feedback on this issue:

> [r]easons for this response [preference for transfer of parentage after birth] included ensuring that the surrogate mother be responsible for all decisions regarding the child while in utero as these decisions will inevitably impact the surrogate and a reluctance to assign parentage (and arguably by extension, personhood) to a fetus.[538]

Advantages and disadvantages of a legislative provision directly addressing the gap. In the alternative, BC could adopt a provision similar to legislation in Ontario, Manitoba, and Saskatchewan which specifically states who has power and

534. *Ibid.*

535. Manitoba Debates, *supra* note 495.

536. See Stefanie Carsley, *Surrogacy in Canada: Lawyer's Experiences, Practices and Perspective* (Doctor of Civil Law, McGill University, 2020) [unpublished] at 45 [Carsley, *Surrogacy in Canada*]. This section is specifically discussing Québec's provisions for unenforceability and the policy reasoning behind this.

537. See *Proposals for a new Family Law Act*, *supra* note 3 at 31.

538. See *supra* note 119 at 70.

authority over a child during the period between birth and the granting of consent by the surrogate to relinquish the child.

This would continue to honour the policy concerns discussed above regarding the protection of surrogates and children—and provide an out-of-court option. However, it would also clearly establish who has authority to make decisions for a child.

Moreover, these provisions provide some freedom to the parties in determining who has this authority. As noted above, all the sections include the language *subject to* the surrogacy agreement for the period where consent is not yet permitted.

Thus, this could grant decision-making authority to the intended parents where a surrogate does not want this responsibility.[539]

Advantages and disadvantages of the status quo. Maintaining the status quo is a further option. In a research study that interviewed fertility lawyers, most viewed BC's current provision as working well. A majority of the lawyers viewed the current administrative process with favour and felt the legislation was clear.[540]

Some lawyers did experience disputes regarding post-birth medical procedures for the child.[541] However, the majority expressed that these issues were mitigated earlier in the surrogacy relationship through negotiation of the pre-conception agreement.[542] Moreover, many lawyers echoed the sentiment stated above, that most surrogates do not wish to make medical decisions for the child post-birth.[543]

At present, BC's legislation does not have a mandatory waiting period for a surrogate's consent. Thus, in theory, a surrogate may consent immediately to relinquish their parentage entitlements to the child. In other words, creating a clearly specified legislative gap per option (2) may create a problem that currently doesn't exist.

539. See Carsley, *Surrogacy in Canada*, *supra* note 536 at 151.

540. See *ibid* at 317.

541. See *ibid* at 202–203.

542. See *ibid* at 151.

543. See *ibid* at 299.

The committee's tentative recommendation for reform

The committee favoured option (2). In its view, this option provided a good way to clarify the legislation.

There are examples of cases where the parties have attempted to address this issue by obtaining a court order. Sometimes, events happen so quickly that it's not possible to obtain an order in time. This demonstrates that there is a gap here, which should be closed by a legislative amendment.

The committee also noted that, in practice, some lawyers are trying to address these issues in ways similar to what is proposed in option (2). It would be beneficial to have legislation that deals with these issues, rather than having to rely on work arounds.

In the committee's view, option (2) also best aligns with the expectations of intended parents and surrogates.

The committee tentatively recommends:

15. Part 3 of the Family Law Act should be amended to create a provision assigning full decision-making power for the child to the intended parents for the period between birth and the granting of consent by the surrogate to relinquish the child, unless otherwise provided for in the surrogacy agreement.

Chapter 7. Parentage If Assisted Reproduction After Death

Introduction

This chapter considers a series of legal issues that arise as a result of posthumous conception. Unlike the other chapters in this consultation paper, this one engages two statutes: the *Family Law Act*[544] and the *Wills, Estates and Succession Act*.[545]

The latter statute governs legal issues that arise after a person's death. Its inclusion in this chapter is an indication that the subject this chapter considers is on the borderline of the law of parentage. It has dimensions that engage both fertility law and estate law.

Background Information on Parentage If Assisted Reproduction After Death

What is posthumous conception?

The law has for a long time had rules dealing with the parentage of children who have been conceived but not yet born when a parent died.[546] This is a so-called posthumous birth.

A parallel rule operates within estates law. One of the main principles of estates law is that rights to inherit from a deceased's estate are determined at the time of the deceased's death. A strict application of this rule would work to the disadvantage of a posthumously born child. So an exception was created, preserving the inheritance rights of posthumously born children. The *Wills, Estates and Succession Act* has codified this rule for BC's estate law.[547]

544. See *supra* note 1.

545. SBC 2009, c 13.

546. See Alberta Law Reform Institute, *Assisted Reproduction after Death: Parentage & Implications,* Report 106 (2015) at 1, online: <www.alri.ualberta.ca/2015/03/assisted-reproduction-after-death-parentage-and-implications-final-report-106/>.

547. See *supra* note 545, s 8 ("Descendants and relatives of an intestate, conceived before the intestate's death but born after the intestate's death and living for at least 5 days, inherit as if they had been born in the lifetime of the intestate and had survived the intestate.").

Posthumous conception effectively extends this concept into a world that has assisted reproduction. Now, thanks to advances in medical technology, it's possible to preserve a person's human reproductive material, which may be used to conceive a child after the person has died.[548]

Simplifying things for this overview, for the law, posthumous conception raises two distinct but related questions: (1) who are the posthumously conceived child's parents? and (2) does the posthumously conceived child have any rights to the deceased person's estate? The answers to these questions are found in two places in BC's legislation. For question (1), the parentage provisions of part 3 of the *Family Law Act* govern; for question (2), it's necessary to look at a provision in the *Wills, Estates and Succession Act*.

Overview of parentage and posthumous conception in BC

If a child is born through posthumous conception, the *Family Law Act* sets out who can be declared a parent. Part 3 of this act contains the following rules on parentage that apply when there is posthumous conception:

- assisted reproduction is used;
- the deceased person provides their sperm or eggs in order to conceive a child they intend to be the parent for;
- the deceased person dies prior to conception;
- the deceased person has provided written consent to be a parent to a child conceived after death;
- the deceased person has provided written consent to allow a person who was married to, or in a marriage-like relationship with the deceased person, to use their sperm, eggs, or embryos after their death to conceive a child;
- the deceased person did not withdraw their consent prior to their death; and
- there is proof of the deceased person's written consent.[549]

These rules are set out in section 28. Section 28 states that if a child is born through posthumous conception, there are two people who can be named the child's parents—the person who has died, and the deceased person's spouse when they

548. See *Assisted Human Reproduction Act*, *supra* note 37, s 8 (requiring written consent).

549. See *supra* note 1, s 28 (1) (c). Note the word spouse is not used section 28, and which avoids the 2 year timing rule in the Family Law Act's definition of spouse

died.[550] The spouse can be married or in a marriage-like relationship with the deceased person. The spouse does not have to have contributed the sperm, egg, or embryos to be declared the parent.[551]

Section 28 does not allow for anyone else to be named a parent to a child born through posthumous conception.[552] Section 30, which allows for a child conceived by assisted reproduction to have more than two parents, states that an agreement under that section is deemed revoked if one of the parties has died.[553] So a parentage agreement is not relevant in the case of posthumous conception.

Development of and rationale for BC's law on parentage and posthumous conception

BC legislation on posthumously conceived children only dates back to the *Family Law Act*. The government publication that set out the policy rationale for part 3 didn't discuss a particular rationale for legislation on posthumously conceived children. It may be seen as helping to fulfill the general policy goals of part 3,[554] in particular treating children fairly, regardless of the circumstances of their birth. Legislation addressing posthumous conceived children also helped to ensure that BC had a comprehensive legal framework on parentage, addressing all issues that may arise.

Developing a law on parentage of posthumously conceived children, the government publication noted, would have "implications for the related field of wills and estates."[555] These implications were addressed by adding a new provision to the *Wills, Estates and Succession Act*, which implemented a model proposed by the Manitoba Law Reform Commission.[556]

550. See *ibid,* s 28 (2).

551. See *ibid,* s 28 (2) (b).

552. See *ibid,* s 28 (2).

553. See *ibid,* s 30 (3).

554. See, above, at 26.

555. *Proposals for a new Family Law Act*, *supra* note 3 at 33.

556. See *ibid* (referring to Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief*, Report 118 (2008) [Manitoba Law Reform Commission, *Posthumously Conceived Children*]).

Posthumous conception and the Wills, Estates and Succession Act

Recall here that estates law has long had a rule for posthumously born children, which essentially preserves the right of a posthumously born child to inherit from a deceased parent's estate. A rule for posthumously conceived children only appeared 10 years ago, in the wake of the *Family Law Act*. When that act came into force, a new provision was added to the *Wills, Estates and Succession Act* for posthumously conceived children.[557]

This new provision didn't simply apply the rule for posthumous births to posthumously conceived children. Posthumous birth and posthumous conception differ significantly, in that the latter have much longer timelines (human reproductive material may be preserved for years after a person has died) and uncertainty about whether or not a child will even be born.

So applying a rule that simply preserves the right to inherit for posthumously conceived children would create significant disadvantages for any other person who has an interest in the deceased's estate. Under such a rule, these other people would have to wait (maybe for years, maybe even indefinitely) as a decision is made on posthumously conceiving a child. During this time, the estate wouldn't be distributed.

Instead of effectively holding estates at a standstill whenever there could be a posthumously conceived child, BC adopted a provision in the *Wills, Estates and Succession Act* that tried to balance the interests of a posthumously conceived child with the interests of anyone else who might benefit from the estate. In simple terms, this balance is struck through the use of (1) a notice provision (requiring the deceased's spouse, who wants to use the deceased's human reproductive material to posthumously conceive a child, to notify—within a 180-day notice period—the other people interested in the deceased's estate of this plan) and (2) a time limit of two years after notice is given in which the plan must be carried out by conceiving and birthing the child.[558]

557. See *supra* note 545, s 8.1.

558. See *ibid*, s 8.1 (1) (a), (b).

The full text of Family Law Act, section 28 and Wills, Estates and Succession Act, section 8.1

Parentage if assisted reproduction after death

28 (1) This section applies if

(a) a child is conceived through assisted reproduction,

(b) the person who provided the human reproductive material or embryo used in the child's conception

(i) did so for that person's own reproductive use, and

(ii) died before the child's conception, and

(c) there is proof that the person

(i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,

(ii) gave written consent to be the parent of a child conceived after the person's death, and

(iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death.

(2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are

(a) the deceased person, and

(b) regardless of whether he or she also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.

Posthumous births if conception after death

8.1 (1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:

(a) a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written

notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;

(b) the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;

(c) the deceased person is the descendant's parent under Part 3 of the *Family Law Act*.

(2) The right of a descendant described in subsection (1) to inherit from the relatives of a deceased person begins on the date the descendant is born.

(3) Despite subsection (1) (b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.

Issues for Reform

Should section 28 of the Family Law Act continue to require a genetic connection between parent and child as a basis for parentage?

Background information

Current law in British Columbia: a genetic connection is required. For a child who is conceived posthumously, the *Family Law Act* sets out specific requirements for when the deceased person can be named that child's parent. Section 28 requires a genetic connection between the deceased person and the child.[559]

The deceased person must have provided their own sperm, eggs, or embryos.[560] This material must be used for the deceased person's own reproductive use.[561] The deceased person must have consented to be the parent for a child conceived posthumously, with the other parent being their spouse.[562]

559. See *supra* note 1, s 28.

560. See *ibid*, s 28 (1) (b).

561. See *ibid*.

562. *Ibid,* s 28 (1) (c).

Ontario and Saskatchewan don't require a genetic connection between the deceased person and the posthumously conceived child. Ontario does not require there to be a genetic connection between the deceased person and the child. The Ontario legislation does not require a deceased person's sperm, eggs, or embryos to be used. The deceased person only has to have consented to being the parent.[563]

Saskatchewan's legislation mirrors the legislation in Ontario. Saskatchewan does not require there to be a genetic connection between the deceased person and the child. The Saskatchewan legislation does not require a deceased person's sperm, eggs, or embryos to be used. The deceased person only has to have consented to being the parent.[564]

For whether there needs to be a genetic connection between the deceased parent and the child, Saskatchewan and BC take opposite approaches. BC requires the deceased's sperm, eggs, or embryos to be used, but Saskatchewan does not require any genetic connection.

Prince Edward Island requires a genetic connection. The last of the four provinces that has legislation on the parentage of posthumously conceived children also requires a genetic connection. PEI's legislation mirrors the legislation in BC.

The PEI legislation requires the deceased person to have contributed their sperm, eggs, or embryos. The material must be used for the deceased person's own reproductive use. The deceased person must have consented to be the parent for a child conceived posthumously, with the other parent being their spouse.[565]

For whether there needs to be a genetic connection between the deceased parent and the child, PEI and BC take the same approach, requiring the deceased person to provide the sperm, eggs, or embryos.

Brief description of the issue

When posthumous conception has occurred, section 28 of the *Family Law Act* requires that there be a genetic connection between the deceased parent and the child. The deceased must have provided the sperm, eggs, or embryos for their own

563. See *Children's Law Reform Act*, *supra* note 115, s 12 (1), (3).

564. See *The Children's Law Act, 2020*, *supra* note 120, s 63 (1), (3).

565. See *Children's Law Act*, *supra* note 317, s 22.

reproductive use, in addition to consenting to be the parent of a child conceived posthumously.

Requiring a genetic connection narrows the scope of BC's legislation in way that two other Canadian provinces avoid doing. It also departs from the standard typically adopted for children conceived by assisted reproduction, which typically sees intention used as the criterion to determine parentage. Should BC retain the requirement for a genetic connection or move to an intention-based option?

Discussion of options for reform

This issue poses what is essentially a yes-or-no question, which generates two options to consider: either (1) amend section 28 to remove the requirement that there be a genetic connection between the deceased person and the posthumously conceived child or (2) the status quo, in which section 28 requires the person who provided sperm, eggs, or embryos do so for their own reproductive use.

Arguments in favour of removing the genetic-connection requirement. There are several arguments for removing the genetic-connection requirement.

First, it would be consistent with the general approach to parentage for children conceived by assisted reproduction, which is favour intention over genetics in determining parentage. It would also be consistent with several of the policies underlying part 3.[566] In particular, removing this requirement could be seen to promote family stability and to treat children fairly, regardless of the circumstances of their conception.[567]

Commentators have stressed the importance of the latter two goals, arguing that a restrictive approach to posthumous conception that emphasizes genetic connection may work to the disadvantage of posthumously conceived children and families that rely on assisted reproduction.[568]

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566. See, above, at 26.

567. See *Proposals for a new Family Law Act*, *supra* note 3 at 31.

568. See Laura Cardenas, "Un/Related: Discrimination in Posthumous Conception for LGBTQ+ Families in Canada" (2021) 99:2 Can Bar Rev 213 at 24, 26–34, 69; Kristine S Knaplund, "Reimagining Postmortem Conception" (2021) 37:3 Ga St U L Rev 905 at 943; Patrick Grecu, "The New Ice Age: Addressing the Deficiencies in Arkansas's Posthumously Conceived Children Statute" (2019) 72:3 Ark L Rev 631 at 643, 648, 657; Courtney Retter, "Introducing the Next Class of Bastards: An Assessment of the Definitional Implications of the Succession Law Reform Act for After-Born Children" (2011) 27:2 Can J Fam L 147 at 237–238; Shelly Simana, "Creating life after death: should posthumous reproduction be legally permissible without the deceased's prior consent?" (2018) J L & Biosciences 329 at 341; Alison Jane Walker, "Evaluating the

Taking a child-centered approach would mean recognizing all intended parents. Parentage can be an important part of a person's identity. If a child is not allowed to have their intended parent recognized, this could harm their dignity. Additionally, recognizing all intended parents is central to recognizing the actual circumstances of the child's family. It would recognize all genetic, intended, and living parents. Recognizing all the child's parents also gives them ties to their siblings and extended family. Who provided the genetic material is only one small aspect of the relationships shaping parentage, identity, and family.[569]

Many rights, responsibilities, and benefits flow from parentage. Denying posthumously conceived children the ability to have all their parents recognized would deny them access to inheritances, death-related benefits, citizenship status, and other rights and benefits. Posthumously conceived children are often in single-parent or blended families, and these family structures can face barriers. Allowing a child to inherit or get other benefits would support these children financially. The child and their surviving parent may not have to rely on income supports as much.[570]

Allowing all parents to be recognized, regardless of whether they contributed genetic material, would be in the interest of the deceased person and the other intended parents. It would promote their interests in procreating and not restrict their reproductive choices. If the intended parents wanted to have a child, even after one of the parents have died, this should be respected. Authors have argued that the law shouldn't alter the intended parent's intentions and treat the deceased as a donor. Because of the stringent consent rules in the *Assisted Human Reproduction*

Constitutionality of Marital Status Classifications in the Regulation of Posthumous Reproduction and Postmortem Sperm Retrieval" (2022) 54:3 Conn L Rev 799 at 824-825; Jenna M F Suppon, "Life after death: The need to address the legal status of posthumously conceived children" (2010) 48:1 Fam Ct Rev 228 at 237; Jessica Knouse, "Liberty, Equality, and Parentage in the Era of Posthumous Conception" (2014) 27:1 JL & Health 9 at 14, 19, 22; Access to Justice & Law Reform Institute of Nova Scotia, *supra* note 36 at 167, 171–172.

569. See Cardenas, *supra* note 568 at 49–54; Alberta Law Reform Institute, *supra* note 546 at 11, 21; Suppon, *supra* note 568 at 239; Knouse, *supra* note 568 at 19, 22; Access to Justice & Law Reform Institute of Nova Scotia, *supra* note 36 at 167, 171–172; Simana, *supra* note 568 at 342–343; Christine E Doucet, "From *en Ventre Sa Mere* to Thawing an Heir: Posthumously Conceived Children and the Implications for Succession Law in Canada" (2013) 22 Dalhousie J Legal Studies 1 at 19.

570. See Retter, *supra* note 568 at 165–166, 214–215, 228–231; Suppon, *supra* note 568 at 239; Jeffrey Walters, "Thawing the Inheritance Rights of Maybe Babies: An Answer to Indiana's Statutory Silence on Posthumously Conceived Children" (2014) 48:4 Val U L Rev 1229 at 1255–1256; Manitoba Law Reform Commission, *Posthumously Conceived Children*, *supra* note 556 at 8–10, 16.

Act and its regulations, the parents' intentions and consents must be clearly written down.[571]

Finally, Ontario and Saskatchewan do not require a genetic connection between the deceased person and the posthumously conceived child. Their broader approach to parentage for posthumously conceived children doesn't appear to have caused any significant problems in practice.

Arguments in favour of retaining the genetic-connection requirement. There are several arguments for retaining the genetic-connection requirement.

First, there may need to be more procedural steps created to allow a person who is not genetically related to the child to be named a parent. The deceased person would need to consent in writing to be a parent to a child to whom they are not genetically related and consent to all the other things that flow from parentage, such as inheritances. For example, allowing people who aren't spouses to have a posthumously conceived child may require the *Family Law Act* to impose additional consent requirements above what is currently in the *Assisted Human Reproduction Act*. These procedural steps may be too burdensome and require too many court resources to be practical, given how infrequently posthumous conception occurs.[572]

Second, requiring a genetic connection between the deceased parent and the posthumously conceived child may reduce fraudulent claims. Being named a parent brings with it the potential to claim inheritance and other benefits, and this may mean people would try to bring fraudulent claims against the estate. Requiring a genetic connection is a way to prevent this. DNA testing is easy to do and not too costly.[573]

Third, the requirement for a genetic connection could be retained in order to limit who can receive inheritance and death-related benefits.

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571. See Manitoba Law Reform Commission, *Posthumously Conceived Children*, *supra* note 556 at 9–10, 22; Retter, *supra* note 568 at 212–213, 226–228; Walters, *supra* note 570 at 1259; Simana, *supra* note 568 at 342, 345, 348–349; Walker, *supra* note 568 at 824-826; Access to Justice & Law Reform Institute of Nova Scotia, *supra* note 36 at 170.

572. See Alberta Law Reform Institute, *supra* note 546 at 22; Simana, *supra* note 568 at 341; Walker, *supra* note 568 at 825; Access to Justice & Law Reform Institute of Nova Scotia, *supra* note 36 at 167, 172–173; Nicola Peart, "Life beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46:3 Victoria U Wellington L Rev 725 at 734.

573. See Manitoba Law Reform Commission, *Posthumously Conceived Children*, *supra* note 556 at 19–20; Suppon, *supra* note 568 at 237.

The committee's tentative recommendation for reform

The committee favoured proposing an amendment to section 28. This amendment would eliminate the requirement for a genetic connection between the deceased person and the child in cases involving posthumous conception—so long as a deceased person consents to be a parent and names the other parent.

In the committee's view, this approach would be more in keeping with the model of intentional parenthood that part 3 employs for all other cases involving assisted reproduction.

The committee tentatively recommends:

16. Section 28 of the Family Law Act should be amended to provide that, in order for a deceased person to be a parent of a child conceived after that person's death,
(a). The human reproductive material or embryo used in the child's conception must be either
i. the deceased person's own human reproductive material, which they provided for their own reproductive use either before their death or posthumously, or
ii. human reproductive material or an embryo which was obtained by the deceased for their own reproductive use prior to their death (e.g., donor sperm, eggs or embryo which had been obtained by the deceased during their lifetime for their own reproductive use);
and
(b). all other conditions of s. 28 must be met.

Should section 28 of the Family Law Act continue to require a spousal relationship between parents?

Background information

Current law in British Columbia. For a child who is conceived posthumously, the *Family Law Act* sets out specific requirements for when the deceased person can be named that child's parent. Section 28 requires that the parents are the deceased person and their spouse. The parents can be married or in a marriage-like relationship. The deceased person must have consented to their spouse using their genetic material to conceive a child posthumously.[574]

574. See *supra* note 1, s 28.

Current federal law. The *Assisted Human Reproduction Act* requires a person to consent to use of their reproductive material, to the posthumous removal of their sperm or eggs after death, or to use of their *in vitro* embryos.[575]

The *Assisted Human Reproduction (Section 8 Consent) Regulations* add details to the act's consent requirements. For both use of reproductive material and posthumous removal of reproductive material, the deceased person must have consented to use of this material for the reproductive use of their spouse.[576]

For the use of *in vitro* embryos, the couple must have consented to the use of the embryos for their own reproductive use.[577]

Relevant laws in other jurisdictions also require a spousal relationship: Ontario. Ontario requires a spousal relationship between the parents of a posthumously conceived child. Its act states that the surviving spouse can bring an application for the deceased person to be declared a parent. Additionally, the deceased person and surviving spouse must have consented to become a parent to the child. The other parent is the surviving spouse of the deceased person.[578]

Saskatchewan. Saskatchewan's legislation mirrors the legislation in Ontario. Saskatchewan requires a spousal relationship between the parents of a posthumously conceived child. Its legislation states that the surviving spouse can bring an application for the deceased person to be declared a parent. Additionally, the deceased person and surviving spouse must have consented to become a parent to the child. The other parent is the surviving spouse of the deceased person.[579]

Prince Edward Island. PEI's legislation mirrors the legislation in BC. PEI does require that the deceased person be in a spousal relationship with the other parent. Its act requires that the parents are the deceased person and their spouse. The parents can be married or in a marriage-like relationship. The deceased person must have consented to their spouse using their genetic material to conceive a child posthumously.[580]

575. See *supra* note 37, s 8.

576. See SOR/2007-137, ss 4, 8.

577. See *ibid,* s 13.

578. See *Children's Law Reform Act*, *supra* note 115, s 12.

579. See *The Children's Law Act, 2020*, *supra* note 120, s 63.

580. See *Children's Law Act*, *supra* note 317, s 22.

Brief description of the issue

For a deceased person to be recognized as a parent to a posthumously conceived child, the two parents must be married or in a marriage-like relationship. This requirement for a spousal relationship isn't found in other provisions of part 3 dealing with the parentage of children conceived by assisted reproduction. Should BC continue to require the parents of a posthumously conceived child to be in a spousal relationship?

Discussion of options for reform

There are two options to consider in response to this issue for reform: (1) amend section 28 of the *Family Law Act* to remove the requirement for a spousal relationship between the parents of a posthumously conceived child; or (2) maintain the current rule requiring the parents of a posthumously conceived child to be in a spousal relationship.

Arguments for and against removing the requirement for a spousal relationship. The primary argument in favour of amending section 28 to do away with the spousal-relationship requirement is that it would treat all children on the same footing. A similar requirement doesn't apply to other children who were conceived by assisted reproduction. This limitation may work to the disadvantage of some posthumously conceived children.

In addition, the spousal-relationship requirement may exclude some families from the legislation's scope. As one commentator has observed, "LGBTQ+ couples are more likely to co-parent non-conjugally," which means "they are more likely to be excluded from the legislation's ambit."[581] This may be an instance where assumptions about how families are formed have a negative impact on some children and their parents.

On the other hand, the fact that all provincial legislation in Canada that addresses parentage of posthumously conceived children requires a spousal relationship and federal legislation does as well may bear on this issue. It may militate against doing away with this requirement for British Columbia.

Arguments for and against retaining the requirement for a spousal relationship. The main argument for retaining the status quo relates to this question about the scope of federal legislation. It is possible that the *Assisted Human Reproduction Act* may require a spousal relationship between the intended parents.

581. Cardenas, *supra* note 568 at 231.

The act's regulations require a person to consent to use of their genetic material. This material may just be used for the person's own reproductive use, for the spouse's reproductive use if the person is dies prior to conception, or for a third party's use. A third party does not include the deceased person's spouse. If the *Assisted Human Reproduction Act* requires the genetic material to be used by a spouse, then the *Family Law Act* could not remove the requirement for a spousal relationship on its own.[582]

The committee's tentative recommendation for reform

The committee favoured doing away with the requirement that parents of a posthumously conceived child must be in a spousal relationship, due to the requirement's adverse impacts on some children and families.

The committee was concerned about whether this proposal could end up putting part 3 of the *Family Law Act* into conflict with the federal *Assisted Human Reproduction Act*. But the committee noted that there is a live debate over the interpretation of the federal act's spousal requirement. The committee's tentative recommendation is designed, in part, to nudge that debate in favour of a more liberal interpretation of the federal act—or better yet, to encourage the federal government to consider reforms to the federal act.

The committee tentatively recommends:

17. Section 28 of the Family Law Act should be amended, removing the requirement that, for a posthumously conceived child, the parents be in a spousal relationship.

Should part 3 of the Family Law Act continue to limit the maximum number of parents of a posthumously conceived child to two?

Background information

Current law in British Columbia. BC limits the parents of posthumously conceived children to a maximum of two. This requirement doesn't actually appear in the *Family Law Act*'s dedicated section on the parentage of posthumously conceived children (section 28). Instead, it's covered off in a section dealing generally with

582. See *Assisted Human Reproduction Act*, *supra* note 37, s 8; *Assisted Human Reproduction (Section 8 Consent) Regulations*, *supra* note 576, ss 4, 8, 10, 13; Access to Justice & Law Reform Institute of Nova Scotia, *supra* note 36 at 171–173.

written agreement for children conceived by assisted reproduction to have more than two parents (what the *Family Law Act* calls "parentage if other arrangement").[583] The section provides that if such an arrangement "is made but, *before a child is conceived, a party* withdraws from the agreement or *dies*, the agreement is deemed to be revoked."[584] The italicized words describe a posthumous conceived child and the closing clause ("the agreement is deemed to be revoked") has the effect of denying such a child more than two parents.

Relevant laws in other jurisdictions: Ontario and Saskatchewan. Ontario and Saskatchewan do not allow more than two people to be parents of the posthumously conceived child. Their legislation states that the surviving spouse can bring an application for the deceased person to be declared a parent. Additionally, the deceased person and surviving spouse must have consented to become a parent to the child. No other party is discussed in the legislation.[585]

Prince Edward Island. PEI's legislation mirrors the legislation in BC. For a posthumously conceived child, PEI only allows there to be two parents. The parents are the deceased person, and the person they were married to or in a marriage-like relationship at the time of their death. A third person could not be named the child's parent.[586]

Brief description of the issue

For a posthumously conceived child, the *Family Law Act* only allows two people to be named parents. This limitation is out of step with the rule applying to all other children conceived by assisted reproduction in BC. It also has the potential to exclude some children, based on how their families were formed. Should part 3 of the *Family Law Act* be amended to align the maximum number of parents allowed for posthumously conceived children with the maximum allowed for other children conceived by assisted reproduction?

Discussion of options for reform

There are essentially two options to consider for this issue: either (1) amend part 3 and allow a posthumously conceived child to have more than two parents or (2) retain the status quo, which limits a posthumously conceived child to two parents.

583. See *Family Law Act*, *supra* note 1, s 30.

584. *Ibid*, s 30 (3).

585. See Ontario: *Children's Law Reform Act*, *supra* note 115, s 12; Saskatchewan: *The Children's Law Act, 2020*, *supra* note 120, s 63.

586. See *Children's Law Act*, *supra* note 317, s 22.

Arguments for and against allowing a posthumously conceived child to have more than two parents. The main argument in favour of amending part 3 is that it would make the rules for posthumously conceived children consistent with those for all other children conceived by assisted reproduction. Parentage in these cases is typically determined by reference to intention. It's broadly recognized that this intention-based approach allows a child to have more than two parents.

Further, the limitation for posthumous conceived children may have the effect of excluding some families from realizing their desired form.[587]

But proposing this change would leave British Columbia at odds with all other legislation on the parentage of posthumously conceived children in Canada.

Arguments for and against retaining the status quo. The main argument in favour of the status quo is that it is consistent with how this issue is approached across Canada. Further, it isn't clear that there is a groundswell calling for reform. This is a little-used area of the law. An argument could be made that the time isn't ripe for reform.

On the other hand, the current law does seem both at odds with how parentage of children conceived by assisted reproduction is typically handled in legislation and does appear to exclude some children based on their family's composition.

The committee's tentative recommendation for reform

The committee favours proposing that part 3 be amended to allow a posthumously conceived child to have more than two parents. In the committee's view, this proposal is consistent with its approach to section 28 of the *Family Law Act* and with intention-based parentage for children conceived by assisted reproduction.

Strictly speaking, the committee is aware that its proposed reforms would likely require changes not to part 3's provision dealing with posthumously conceived children, but rather with its provision on multiple parents for children conceived by assisted reproduction.[588]

587. See Cardenas, *supra* note 568 at 231–232.

588. See *supra* note 1, s 30.

The committee tentatively recommends:

18. Part 3 of the Family Law Act should be amended, allowing more than two people to be named as parents for a posthumously conceived child, provided the deceased person consents to be parent to a child conceived through assisted reproduction and lists the other intended parents.

Should section 8.1 of the Wills, Estates and Succession Act continue to require a genetic connection between the deceased person and the descendant as a basis for inheritance?

Background information

Current law in British Columbia. BC has a dedicated provision setting out the inheritance rights of a posthumously conceived child. This provision appears in the *Wills, Estates and Succession Act*. It largely parallels the provision on the parentage of posthumously conceived children in the *Family Law Act*.

The *Wills, Estates and Succession Act* currently requires a genetic connection between the deceased and the descendant. Section 8.1 requires the deceased's sperm, eggs, or embryos be used to conceive a child.[589]

Relevant laws in other jurisdictions: Ontario. In the rest of Canada, the only other jurisdiction to directly address the inheritance rights of posthumously conceived children is Ontario.[590] While Saskatchewan has family-law legislation[591] addressing parentage when there is posthumous conception (which mirrors the BC legislation), Saskatchewan's wills-and-estates legislation does not address inheritance for a posthumously conceived child.

589. See *supra* note 545, s 8.1. See also, above, at 141–142 (for the full text of section 8.1).

590. Doucet, *supra* note 569 at 2, 5–6.

591. See *The Children's Law Act, 2020*, *supra* note 120, s 63.

Related issue: a comprehensive review of section 8.1 of the Wills, Estates and Succession Act

The committee grappled extensively with how far it could go under its mandate to review part 3 of the *Family Law Act* in making recommendations to reform section 8.1 of the *Wills, Estates and Succession Act*. In the end, the committee decided that it was limited to proposals that would ensure the two acts remain in alignment. But there is more to section 8.1: it contains significant notice provisions and time limits. In the committee's view, section 8.1 would benefit from the kind of law-reform project that the committee was able to carry out for part 3. Such a project should be led by estates lawyers, but it could draw on some of the committee's expertise. To that end, the committee has made available its research on broader issues with section 8.1, as a way to encourage another law-reform group to take up this project. See Appendix B, below, at 289–320.

In Ontario, the *Succession Law Reform Act*[592] states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met. None of the conditions require the deceased and the child to have a genetic connection. The deceased person must have intended to become a parent.[593]

Brief description of the issue

When there is posthumous conception, section 8.1 of the *Wills, Estates and Succession Act* requires there to be a genetic connection between the deceased and the child for the child to inherit. The committee has tentatively recommended that, for parentage under the *Family Law Act,* a genetic connection should not be required for the deceased to be declared a parent. Should the *Wills, Estates and Succession Act* be amended to align with a reformed *Family Law Act* by removing the genetic-connection requirement?

Discussion of options for reform

This issue essentially poses a yes-or-no question: either amend the *Wills, Estates and Succession Act* to remove the genetic-connection requirement for posthumously conceived children or retain the status quo.

Further, this issue is linked to the previous discussion of the genetic-connection requirement for parentage of posthumously conceived children. The main argument for amending the *Wills, Estates and Succession Act* is to ensure that it remains in alignment with the *Family Law Act*.

592. RSO 1990, c S.26.

593. See *ibid*, ss 1.1 (1), 47 (10).

For obvious reasons, inheritance rights are an especially large component of the rights and responsibilities conferred by parentage for posthumously conceived children. If the two acts had different rules on genetic connections for posthumously conceived children, this would likely work to the disadvantage of those children. It would also potentially introduce an element of confusion to the law, as different rules would apply to parentage under the *Family Law Act* and inheritance rights under the *Wills, Estates and Succession Act*.

On the other hand, it's difficult to make a case for leaving the *Wills, Estates and Succession Act* as it currently stands, even after amending the *Family Law Act*. While one law-reform organization has recommended the enactment of parentage provisions dealing with posthumously conceived children without a corresponding right to inheritance in wills-and-estates legislation[594] (and one province has taken this approach with its legislation),[595] it's something else altogether to have legislation addressing both issues with differing rules.

The committee's tentative recommendation for reform

The committee is in favour of removing the genetic-connection requirement from section 8.1 of the *Wills, Estates and Succession Act*. This tentative recommendation follows from an earlier tentative recommendation that a similar requirement be removed from section 28 of the *Family Law Act*.[596] In the committee's view, it is important that the two provisions remain aligned on their key details.

Part 3 of the *Family Law Act* is intended to define parentage for all purposes in British Columbia. Any departures from part 3 in other statutes should be clearly justified. The committee wasn't able to find a reason to justify such a departure for the *Wills, Estates and Succession Act*.

The committee tentatively recommends:

19. Section 8.1 of the Wills, Estates and Succession Act should be amended to remove the requirement that there be a genetic connection between the deceased person and the posthumously conceived child.

594. See Alberta Law Reform Institute, *supra* note 546.

595. See, above, at 28 (briefly discussing the development of Saskatchewan's legislation).

596. See, above, at 142–147.

Should section 8.1 of the Wills, Estates and Succession Act continue to require that only the deceased person's spouse may use the human reproductive material of the deceased person to conceive a child through assisted reproduction?

Background information

Current law in British Columbia. Currently, the *Wills, Estates and Succession Act* follows the *Family Law Act* on this issue. One of the conditions set out in section 8.1 of that act for a posthumously conceived child to have a right to inherit from a deceased person states "the deceased person is the descendant's parent under Part 3 of the *Family Law Act*."[597] This condition forges a link between the two acts.

Relevant laws in other jurisdictions: Ontario. In Ontario, the *Succession Law Reform Act*[598] states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met.[599] The legislation requires that the deceased person's spouse use assisted reproduction to conceive a child and provide notice to the Estate Registrar.[600]

California. In California, the Probate Code states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met.[601] California does not require a spousal relationship between the parents. The deceased person chooses a designated person to control their sperm, eggs, or embryos.[602]

Brief description of the issue

When there is posthumous conception, section 8.1 of the *Wills, Estates, and Succession Act* requires there to be a spousal relationship between the parents. This requirement mirrors a similar requirement in the parentage provisions of the *Family Law Act*. The committee is proposing to remove this requirement for the *Family Law Act*. Should the *Wills, Estates and Succession Act* be amended to follow suit?

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597. See *supra* note 545, s 8.1 (1) (c).

598. See *supra* note 592.

599. See *ibid*, s 47 (10).

600. See *ibid*.

601. Cal Prob Code § 249.5.

602. *Ibid.*

Discussion of options for reform

This issue is similar to the previous one. The case for amending section 8.1 largely rests on ensuring that the rules for posthumously conceived children in the *Wills, Estates and Succession Act* and the *Family Law Act* remain aligned.

The committee's tentative recommendation for reform

Similar to its tentative recommendation for the previous issue, the committee favours proposing that section 28 of the *Family Law Act* and section 8.1 of the *Wills, Estates and Succession Act* be aligned. Since the committee has proposed removing the spousal-relationship requirement from section 28, it proposes a similar amendment for section 8.1.

The committee tentatively recommends:

20. Section 8.1 of the Wills, Estates and Succession Act should be amended to remove the requirement that there be a spousal relationship between the intended parents.

Chapter 8. Declarations of Parentage by the Court and Parentage Agreements

Introduction

This chapter contains a thorough examination of the BC Supreme Court's power under part 3 to make a declaration of parentage. It considers ways to expand this power by, for example, creating a simplified desk-order procedure (an order which generally does not require a court appearance), removing the conditions on making an order declaring parentage, and clarifying its relationship to the court's *parens patriae* power.

Each of these issues respond to concerns that have arisen in practice since the advent of part 3. This chapter also considers perennial concerns such as explicitly acknowledging the role of the best interests of the child in making decisions about parentage and defining the court's territorial jurisdiction with an express statutory provision.

Finally, the chapter concludes with an examination of issues related to surrogacy and other parentage agreements, which are often the focal point of litigation. The chapter considers whether to liberalize strict rules calling for surrogacy agreements to be in writing and whether to add a legislative requirement for witnessing signatures to agreements.

Background Information on Orders Declaring Parentage

Rationale for legislation empowering a court to make an order declaring parentage

One of the principles that guided the development of part 3 was "preferring out-of-court processes where possible."[603] In light of this principle, it may seem odd that one of the major reforms brought in by part 3 was a section that set out the court's powers to make an order declaring parentage.

The rationale for this section is hinted at by the qualifying words "where possible." While the overriding goal of part 3 is to limit the need for people to go to court to

603. *Proposals for a new Family Law Act*, *supra* note 3 at 31.

establish parentage, the part also recognizes that there will always be situations in which a court application is necessary. After all, the law on parentage is always in a race to catch up with new developments in medical technology and social attitudes toward the composition of families. Even the most progressive legislation can't be expected to provide for everything the future may hold on these two fronts.[604]

Parentage legislation can also be highly directory. Part 3 has examples of this quality, particularly as it relates to children conceived by assisted reproduction. Part 3 has some detailed provisions on things such as pre-conception agreements in these circumstances. This raises the question of what to do with people who, as the old saying goes, have complied with the spirit but not the letter of the law. Courts may have a role to play in granting remedies in such cases.[605]

Origin of BC legislation on orders declaring parentage

As this consultation paper has examined the law of parentage, it's found over and over again that the first legislation in BC on some aspect of that law only appeared in part 3 of the *Family Law Act*. The same point holds for orders declaring parentage. Legislation on this topic first appeared in section 31 of the *Family Law Act*. Prior to this legislation, BC's supreme court appeared to have "inherent jurisdiction to make declarations of parentage where appropriate" under common-law principles.[606] (There's more discussion of this jurisdiction later in this consultation paper.)[607]

The full text of section 31

Orders declaring parentage

31 (1) Subject to subsection (5), if there is a dispute or any uncertainty as to whether a person is or is not a parent under this Part, either of the following, on application, may make an order declaring whether a person is a child's parent:

(a) the Supreme Court;

(b) if such an order is necessary to determine another family law dispute over which the Provincial Court has jurisdiction, the Provincial Court.

604. See *Re KG*, *supra* note 298 at para 38.

605. See *ibid*.

606. *Ibid* at para 34.

607. See, below, at 163–164 (discussing the court's *parens patriae* power).

(2) If an application is made under subsection (1), the following persons must be served with notice of the application:

(a) the child, if the child is 16 years of age or older;

(b) each guardian of the child;

(c) each adult person with whom the child usually resides and who generally has care of the child;

(d) each person, known to the applicant, who claims or is alleged to be a parent of the child;

(e) any other person to whom the court considers it appropriate to provide notice, including a child under 16 years of age.

(3) To the extent possible, an order under this section must give effect to the rules respecting the determination of parentage set out under this Part.

(4) The court may make an order under this section despite the death of the child or person who is the subject of the application, or both.

(5) An application may not be made respecting a child who has been adopted.

Issues for Reform

Should part 3 be amended to add a simplified procedure for obtaining an order declaring parentage?

Brief description of the issue

It's not uncommon in practice for parties to apply for an order declaring parentage in cases in which there's no significant dispute over a child's parentage. Typically this is done when there is some extraterritorial element to the case: for example, if the intended parents reside outside British Columbia. Should these cases have to go through the same process under section 31 as every other case under that section or should they have a simplified procedure?

Discussion of options for reform

This issue essentially poses a yes-or-no question: either part 3 should be amended to create a simplified procedure for orders declaring parentage or it shouldn't.

The main advantage of creating a simplified procedure is that it would enhance access to justice. A simplified procedure would be cheaper and quicker for the parties.

A simplified procedure would also help to conserve judicial resources. The cases using the procedure wouldn't feature disputes that require sustained judicial attention. Moving them into a simplified procedure would benefit the courts as well as the parties.

On the other hand, there may be downsides to creating a new simplified procedure. Its scope could sweep in cases that should receive judicial scrutiny. In addition, there hasn't been any public commentary calling for this change.

The committee's tentative recommendations for reform

In the committee's view, amending part 3 to add a simplified procedure for obtaining an order declaring parentage would be a helpful reform to part 3.

The procedure would be available when all parties consent to the order and have complied with all applicable requirements under the *Family Law Act*. Such cases could usefully proceed, for example, through the desk-order process.

The committee understands that there are a reasonable number of cases that come within these two criteria. These cases now proceed through section 31, and they have to furnish evidence to meet that section's condition of an uncertainty in parentage. In the committee's view, it would benefit both the parties and the courts to move these cases into a simplified procedure.

The committee tentatively recommends:

21. A simplified desk-order process should be available for an order declaring parentage if all the parties consent to the order and have complied with the legislation.

Should part 3 contain a provision declaring that it isn't a complete code or otherwise acknowledging the court's parens patriae power in relation to parentage cases?

Background information

Meaning of *complete code*. Lawyers describe a statute as a *complete code* when it "is meant to set out the entire body of rules on a subject in a coherent, systematic way."[608] A code, in this sense, is "a complete and definitive statement of the law on the subject, dispensing with the need to refer to previous law."[609] Labour-relations legislation, such as BC's *Labour Relations Code*[610] and the *Canada Labour Code*,[611] provides some examples of complete codes.[612]

Is the *Family Law Act* a complete code? While the word *code* crops up a few times in the *Family Law Act*,[613] it isn't used to characterize the act as a complete code like the *Labour Relations Code*. So the issue appears to be open. People have turned to the courts to answer this question as it relates to specific parts of the act.[614]

The act does contain a handful of interpretive provisions that give some support to the view that it's not a complete code. For example, one such provision preserves property rights acquired under the previous law when separating spouses are dividing family property.[615] Another provision is more relevant for parentage. It

608. Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 25.

609. *Ibid*.

610. RSBC 1996, c 244.

611. RSC 1985, c L-2.

612. See Sullivan, *supra* note 608 at 25.

613. See *supra* note 1, ss 182, 189 (2) (b) (referring to the *Criminal Code*, *supra* note 195), 249 (5)–(6) (declaring that a regulation made under the *Family Law Act* may adopt by reference provisions in any "code").

614. See e.g. *VJF v SKW*, 2016 BCCA 186, Newbury JA ("With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a 'complete code' that 'descends as between the spouses' and eliminates common law and equitable principles relating to property. Rather, the scheme *builds on* those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses" at para 74 [emphasis in original]).

615. See *supra* note 1, s 104 (2) ("The rights under this Part are in addition to and not in substitution for rights under equity or any other law.").

declares that "[n]othing" in the *Family Law Act* "limits or restricts the inherent jurisdiction of the Supreme Court to act in a parens patriae capacity."[616]

What is *parens patriae*? A court's *parens patriae* (= parent of the nation) jurisdiction is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves."[617] People who can't care for themselves are understood to fall into two groups. One group is "mentally incapable adults."[618] The other group is children. And, as the Supreme Court of Canada has put it, "the care of children constitutes the bulk of the courts' work involving the exercise of the *parens patriae* jurisdiction."[619]

Legal writing on the *parens patriae* jurisdiction tends to be vague and expansive, trying to capture "a capacious or amorphous power of protection."[620] These qualities reflect the way the jurisdiction entered the law, starting in England, which transmitted the concept to its colonies.

No one ever sat down and deliberately defined the *parens patriae* jurisdiction in a piece of writing like a statute. Instead, beginning from an origin that's "lost in the mists of antiquity,"[621] the jurisdiction developed slowly over time. It appears to have been perceived as one of the foundational principles of the state's political organization, first as a monarchy,[622] and later as one of the roles assigned to the courts within a more broadly representative government.

This jurisdiction to protect people who can't care for themselves may be invoked across a broad, potentially "unlimited,"[623] range of subjects.[624] If a litigant

616. *Ibid*, s 192 (3).

617. *E (Mrs) v Eve*, 1986 CanLII 36 at para 73 (SCC), La Forest J [*Eve*].

618. Margaret Hall, "The Vulnerability Jurisdiction: Equity, *Parens Patriae*, and the Inherent Jurisdiction of the Court" (2016) 2:1 Can J Comp & Contemp L 185 at 188.

619. *Eve*, *supra* note 617 at para 35.

620. Hall, *supra* note 618 at 188.

621. *Eve*, *supra* note 617 at para 32 [citation omitted].

622. See Hall, *supra* note 618 ("The *parens patriae* jurisdiction originated in the personal authority and responsibility of the King" at 189).

623. *Eve*, *supra* note 617 at para 77.

624. See *ibid* ("The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. . . . [T]he categories under which the jurisdiction can be exercised are never closed. . . . [I]t can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations" at para 74).

successfully invokes the *parens patriae* jurisdiction in a case, then the court has an expansive power to fashion an appropriate remedy: "[s]imply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised."[625]

All that said, the courts' *parens patriae* jurisdiction is subject to some limits. The most important limit concerns its relationship to legislation. While legislation wasn't needed to establish the *parens patriae* jurisdiction, legislation can take the jurisdiction away in relation to specific subjects. As the leading BC case on this point has said, "[w]here there is a legislative scheme, this protective jurisdiction of the court applies only when there is a gap in that legislation."[626]

This point can be made in a way that is more germane to this issue for reform. Whenever a court interprets a statute and decides that it is a complete code, the court is in effect saying that the statute doesn't contain any gaps. So when a court is faced with a complete code its *parens patriae* jurisdiction has no room in which to operate.

Application to part 3 of the *Family Law Act*. Is part 3 a complete code for the law of parentage in British Columbia? To answer this question it's helpful to step back and take a brief look at the development of parentage legislation in this province.[627]

Before the *Family Law Act*, BC only had a threadbare legal framework for parentage. Notably, this older parentage legislation had nothing to say about the parentage of children born from assisted human reproduction. As more and more children were born as a result of assisted human reproduction, legal issues relating to their parentage mounted. This was a major gap in the legislation. Ultimately, the courts stepped in to fill this gap by issuing declarations of parentage.[628]

Part 3 was enacted to remedy the deficiencies of BC's previous parentage legislation. Prior to its enactment, the government said that the goal of part 3 was to create "a

625. *Ibid* at 427 [citation omitted].

626. *LM v British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 367, Saunders JA (citing *Beson v Director of Child Welfare (NFLD)*, 1982 CanLII 32 (SCC), Wilson J, at para 33).

627. See, above, at 15–26 (discussing the development of parentage legislation in BC).

628. See *Rypkema v British Columbia*, 2003 BCSC 1784; *BAN v JH*, 2008 BCSC 808. See also *AA*, *supra* note 12 (sustained discussion of using *parens patriae* jurisdiction to fill a similar gap in Ontario's parentage legislation).

comprehensive scheme for determining who a child's legal parents are that takes into account the potential use of assisted conception."[629]

The question inevitably arose in litigation whether this "comprehensive scheme" amounted to a complete code that had ousted the courts' power to issue declarations of parentage under the *parens patriae* jurisdiction. A handful of early decisions contained comments to the effect that part 3 is a complete code.[630]

But a more recent judgment has arrived a nuanced position on this issue.[631] After finding that part 3 "contains two different regimes for determining parentage: one regime that applies to children conceived through sexual intercourse, and one that applies to children conceived through assisted reproduction,"[632] the court said that "[p]art 3 of the *FLA* comprehensively codifies parentage when a child is conceived through assisted reproduction."[633] But the court found "there is a gap in the *FLA* with regard to children conceived through sexual intercourse who have more than two parents."[634] So the current position is that part 3 is a complete code in some respects and it contains gaps that need to be filled by the courts in other areas.[635]

Brief description of the issue

Court decisions have considered whether to characterize part 3 as a complete code. The most recent decision has said it is a code for some purposes but not for others. This is a rather complicated conclusion. It also limits the courts' powers to develop the law, notably in connection with parentage of children born through assisted human reproduction. Should part 3 be amended by adding a provision clarifying that

629. *Proposals for a new Family Law Act*, *supra* note 3 at 31.

630. See *Re Family Law Act*, 2016 BCSC 22 at para 16 [*Re DD*], Fitzpatrick J; *Re KG*, *supra* note 298 at para 13; *Cabianca v British Columbia (Registrar General of Vital Statistics)*, 2019 BCSC 2010 at para 7 [*Cabianca*], MacDonald J.

631. See *Birth Registration Case*, *supra* note 10.

632. *Ibid* at para 58.

633. *Ibid* at para 59.

634. *Ibid* at para 68.

635. At first glance, this may seem like an odd position to land on. How can legislation both be and not be a complete code? It may be an indication of how lawyers and judges can compartmentalize the interpretation of legislation, but this conclusion isn't that unusual. The classic example of it is the interpretation of the *Criminal Code*, *supra* note 195, which is considered to be a complete code for offences (so the state can't range through the historical record and charge someone with a long-forgotten common-law crime) but not a complete code for defences (so someone accused of a crime can take the benefit of any common-law defences that exist outside the *Criminal Code*). See Sullivan, *supra* note 608 at 25–26.

courts shouldn't interpret it as a complete code or otherwise acknowledging the court's *parens patriae* power in parentage cases?

Discussion of options for reform

The options to consider in response to this issue for reform are (1) amend part 3 by adding a provision declaring that the part shouldn't be interpreted as a complete code and (2) retain the status quo.

The first option has a number of advantages. It would promote certainty and also create some flexibility in the legislation. An amendment would clearly settle an issue that has come up in litigation, and that likely would come up again under the current legislation. In this sense, it would foster certainty about the status of part 3 as a complete code.

Creating clarity on this narrow interpretive issue would have the effect of introducing flexibility in the application of part 3 as a whole. The part does contain a provision allowing a court to make a declaration of parentage,[636] but this provision isn't comprehensive. Many questions about parentage don't appear to come within its scope. Broadening the court's reach by allowing litigants to seek remedies under its protective jurisdiction would enhance part 3. It would give the court some additional tools to deal with novel cases. Since parentage is profoundly affected by new developments in society and reproductive technology, it is likely to continue generating novel cases that may be difficult to account for in legislation.

Option (1) may also help to promote some of the underlying policy objectives of part 3. In particular, the goal of "treating children fairly, regardless of the circumstances of their birth"[637] would likely be advanced by opening up part 3 to development under the courts' protective jurisdiction.

Finally, an amendment as proposed in the first option would be consistent with other provisions in the *Family Law Act*. Notably, the act already has a provision declaring that it doesn't oust the courts' *parens patriae* jurisdiction. The amendment proposed in option (1) would go hand-in-hand with this existing provision.

On the other hand, there may be drawbacks to amending part 3 by adding an interpretive provision declaring the part not to be a complete code. Such a provision would amount to a reversal on the goal of having part 3 create "a comprehensive

636. See *supra* note 1, s 31. This provision is the subject of the next issue for reform taken up in this consultation paper.

637. *Proposals for a new Family Law Act*, *supra* note 3 at 31.

scheme for determining who a child's legal parents are that takes into account the potential use of assisted conception."[638]

Option (1) may undercut other stated goals of part 3, particularly the goal of "preferring out-of-court processes where possible."[639] Declaring that part 3 isn't a complete code would have the effect of enhancing the court's role in determining the law of parentage.

There are other concerns in declaring that part 3 isn't a complete code. One commentator has argued that the failure to draft the *Family Law Act* as a complete code has raised barriers to access to justice.[640] This argument turns on two points.

First, it makes the law more difficult to grasp, as readers must consider the impact of rules embedded in case law in addition to those set out in the statute.[641] This sets a particularly challenging interpretive task for readers who don't have formal legal training.[642]

Second, "by injecting the uncodified principles of the common law" into the *Family Law Act* it creates uncertainty and ambiguity, which "has a number of negative effects in family law matters: it makes the results of disputes indeterminate and potentially unknowable; it broadens the range of likely outcomes; in broadening the range of outcomes, it unfetters spouses' hopes and expectations as to the end result; and, in unfettering spouses' expectations, it exacerbates conflict."[643]

Finally, opening the door to developing the law of parentage through court cases (which would be the effect of a provision declaring that part 3 isn't a complete code) "encourages a single-serving approach to justice that, in serving the individual well, creates uncertainty and a muddled body of case law for everyone else."[644] While this argument may overstate the effects of this approach on case law, it does hit on a point that's hard to deny. Court cases are meant to resolve individual disputes, so it's

638. *Ibid*.

639. *Ibid*.

640. See John-Paul Boyd, "Access to Justice and Drafting Family Law Legislation as a Complete Code" (15 May 2015), *Slaw* (blog), online: <slaw.ca/2015/05/15/access-to-justice-and-drafting-family-law-legislation-as-a-complete-code/>.

641. See *ibid* at para 6.

642. See *ibid*.

643. *Ibid* at para 7.

644. *Ibid* at para 8.

institutionally difficult for courts to take in the broader context surrounding their judgments. Court-driven reform is also expensive and time-consuming, so it may be slanted toward the small number of individuals who have the means to pursue it.

The committee's tentative recommendation for reform

The committee favoured amending part 3 to confirm that the court retains jurisdiction under its *parens patriae* power to make orders declaring parentage. Such a reform wouldn't necessarily change the law, but it would help to clarify the law.

The committee noted that the *Family Law Act* already contains a general provision declaring that "[n]othing in this Act limits or restricts the inherent jurisdiction of the Supreme Court to act in a parens patriae capacity."[645] Nevertheless, a specific provision in part 3 regarding orders declaring parentage would help to clarify the law.

The committee tentatively recommends:

22. Part 3 of the Family Law Act should be amended by adding a provision that declares that nothing in this part limits or restricts the inherent jurisdiction of the supreme court to make an order declaring parentage in its parens patriae capacity.

Should part 3 give the court an expanded range to make a declaration of parentage?

Background information

The legislation and its purpose. Section 31 of the *Family Law Act* addresses court orders declaring parentage. The section was included in part 3 as "a mechanism for the courts to determine parentage."[646] Through this mechanism "the *FLA* anticipates that not all situations may be addressed by its provisions, and that circumstances may arise where relief is appropriate even without strict compliance with the statutory provisions."[647]

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645. *Supra* note 1, s 192 (3).

646. British Columbia, Ministry of Attorney General, "The Family Law Act Explained" (last visited 21 March 2019), online (pdf): Government of British Columbia <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/notes-binder.pdf> [perma.cc/86CD-RSWD] [Ministry Transition Guide] at s 31.

647. *Re KG*, *supra* note 298 at para 38.

This statement gives a good sense of section 31's purpose. Parentage legislation governs an area that's highly influenced by developments in reproductive technology and social attitudes. Developments in medicine and reproductive technology may occur rapidly. Social attitudes, also, can change significantly in a short time. These changes can easily outrun the legislature's ability to keep parentage legislation comprehensive and up to date.[648]

Certain aspects of parentage legislation also contain detailed, exacting rules. Their existence raises the perennial question of what to do with people who have—in good faith—failed to comply with these rules.[649] Should they be told that strict compliance to the letter of the law is absolutely necessary in all cases? Or should they be allowed to make the case that substantial compliance in good faith is enough to establish their claims to parentage?

Related issue: judicial education on orders declaring parentage

In reviewing section 31, the committee noted that supreme-court judges who are asked to make orders declaring parentage can seem hesitant, due to a failure to grasp the purposes of the legislation and its place in family and fertility law. Groups providing education for judges should consider a module on the law of parentage.

Finally, there may be cases in which people can't agree on parentage, creating a dispute over the identity of a child's parents.

Section 31 is the *Family Law Act*'s response to these concerns.[650] Through section 31, people may come to the court for a remedy if, for example, they have failed to strictly comply with a provision of part 3 or if part 3 is somehow wanting in application because it has failed to keep pace with advances in medicine or with changing social attitudes.

What conditions apply to section 31? The preceding section dwelled on the concrete situations in which someone might turn to the court under section 31. But, of course, section 31 isn't drafted with a list of specific, concrete fact patterns for people to try to fit their cases within. This would be an almost impossible task, given

648. See *Re DD*, *supra* note 630 ("In large part, the law has lagged behind the science of reproduction and the social forces that have arisen from the resulting family dynamics" at para 10).

649. See e.g. *Re KG*, *supra* note 298 ("The difficulty that arises here is that the parties did not enter into any *written* surrogacy agreement before the Child's conception, as required by s. 29" at para 28 [emphasis in original]).

650. See Ministry Transition Guide, *supra* note 646 (noting that section 31 is a new addition to family-law legislation—"[p]rior to the Family Law Act, the court used its inherent jurisdiction to make declarations of parentage"—to be used in "in cases which the parentage provisions do not otherwise cover or where there is a dispute about who the parents are" at s 31).

that one of the purposes of section 31 is to provide people with a remedy for parentage cases based on unforeseen developments in technology and society.

But section 31 does have conditions that must be met before it applies to a given case. These conditions are framed in broad, general terms. The section applies "if there is *a dispute* or *any uncertainty* as to whether a person is or is not a parent under" part 3.[651]

These two conditions have been considered in a handful of court cases.[652] None of these cases involved a dispute for the purposes of section 31, either because the parties conceded that there wasn't a dispute in their case[653] or because they were all in agreement on the outcome they desired for the case.[654] Nevertheless, it's not difficult to imagine disputes that could arise over parentage. One law professor has even created a lengthy table of "permutations of conceptual arrangements," as a way "[t]o illuminate the number of situations where disputes over parentage in assisted procreation contexts might arise."[655]

As for *uncertainty*, one court has said that the term should be given a "broad interpretation."[656] Another court has added that the legislation's use of the phrase *any uncertainty* is actually "broader than just 'uncertainty'. . . . allow[ing] many situations to fall within its purview, including mistakes."[657] But a more-recent court decision has emphasized the limits of section 31, saying that while its language "is broad enough to allow the court to correct mistakes, it does not give the court the

651. *Supra* note 1, s 31 (1) [emphasis added]. Regarding the characterization of this language as creating *conditions* in section 31, one court has said the terms create "preconditions for the court to exercise its jurisdiction under s. 31 of the *FLA*." See *Cabianca*, *supra* note 630 at para 17. Other courts have described the terms in language that hints at them creating conditions without using that word. See *Re DD*, *supra* note 630 ("the court must find that there is either a 'dispute' or 'uncertainty' regarding a person's parentage before exercising this statutory jurisdiction" at para 43); *Re KG*, *supra* note 298 ("prior to exercising its statutory jurisdiction, the court must find that there is either a dispute or uncertainty regarding a person's parentage" at para 39).

652. See *Re DD*, *supra* note 630 at paras 42–44; *Re KG*, *supra* note 298 at paras 38–46; *Cabianca*, *supra* note 630 at paras 22–48; *Birth Registration Case*, *supra* note 10 at paras 28–39.

653. See *Re KG*, *supra* note 298 at para 40; *Cabianca*, *supra* note 630 at para 29.

654. See *Birth Registration Case*, *supra* note 10 at para 29.

655. Angela Campbell, "Conceiving Parents Through Law" (2007) 21:2 Intl JL Pol'y & Fam 242 at 246–247.

656. *Re KG*, *supra* note 298 at para 45.

657. *Cabianca*, *supra* note 630 at para 40.

overarching power to make parentage declarations not otherwise provided for in the *FLA*."[658]

What does other Canadian legislation on court declarations of parentage say about conditions? Two other provinces have legislation on court declarations with conditions similar to those in British Columbia. Alberta's legislation on this point is virtually identical to British Columbia's ("[i]f there is a dispute or any uncertainty as to whether a person is or is not a parent of a child").[659] And Prince Edward Island's is substantially the same—it just lacks the word *any* before *uncertainty* ("[w]here there is a dispute or uncertainty as to whether a person is or is not a parent of a child under this Part").[660]

But other provinces don't use this language in their legislation. Saskatchewan allows "[a]ny person having, in the court's opinion, a sufficient interest may apply to the court for a declaratory order that a person is or is not recognized in law to be a parent of a child."[661] Québec,[662] New Brunswick,[663] Manitoba,[664] and Ontario[665] have similar language in their legislation.

One Ontario case has described that province's legislation as creating "a broad provision" to make declarations of parentage.[666] It could even be said that the legislation's reference to "any person having an interest"[667] is tantamount to having no conditions at all, as it would, in all likelihood, only bar someone who sought a

658. *Birth Registration Case*, *supra* note 10 at para 38.

659. *Family Law Act*, *supra* note 232, s 9 (1).

660. *Children's Law Act*, *supra* note 317, s 24 (2).

661. *The Children's Law Act, 2020*, *supra* note 120, s 64 (2).

662. See *Civil Code of Québec*, *supra* note 126, art 531.

663. See *Family Services Ac*t, SNB 1980, c F-2.2, s 100 (1).

664. See *Family Law Act*, *supra* note 124, s 21 (1).

665. See *Children's Law Reform Act*, *supra* note 115, s 13 (1). It should be noted that while Ontario's provision doesn't have any front-end conditions to its application, it does place a constraint on the range of orders that a court may make, restricting it from making a declaration "that results in the child having more than two parents" or "results in the child having as a parent one other person, in addition to his or her birth parent, if that person is not a parent of the child under section 7, 8 or 9," unless four conditions set out later in the act are met (*ibid*, s 13 (4)) This approach has been criticized in a recent Ontario judgment, which called the legislation "awkwardly constructed" and "quite constrained." See *ML v JC*, 2017 ONSC 7179 at para 76, Madsen J.

666. *MRR*, *supra* note 118 at paras 85–86.

667. *Children's Law Reform Act*, *supra* note 115, s 13 (1).

declaration of parentage and had no stake in the outcome of the proceedings. It's difficult to conceive of concrete situations in which this might occur, outside of flagrantly abusive or bad-faith litigation.

Brief description of the issue

There has been litigation over the scope of section 31 of the *Family Law Act*, which is part 3's section on court declarations of parentage. In a recent case, the court found that section 31 wasn't available for the parties, but a declaration could be granted under common-law principles. Should section 31 be amended to give the court an expanded scope or clearer basis for making a declaration of parentage?

Discussion of options for reform

There is potentially a wide range of options that could respond to this issue for reform.

One option to consider is simply retaining the status quo. The Manitoba Law Reform Commission has examined section 31 and concluded that it would be "a useful model for reform in Manitoba."[668] But there could be concerns about how section 31 is being applied. For example, a recent case found section 31 wasn't available for a remedy but the court's traditional *parens patriae* jurisdiction was.[669] This conclusion could lead people to believe that section 31 has come up short and needs to be reformed. The reforms could cut in opposite directions: section 31 could be expanded, to better respond to these kinds of cases, so litigants wouldn't have to resort to the prior law; or it could be further constrained, as a way to open up more space for the *parens patriae* jurisdiction.

But if the clarity of section 31 is a pressing issue, then there are options that could address this problem. One option would be to limit the section's reach. The section's conditions (a dispute and any uncertainty) place some limits on section 31, but they are expansive limits that could be seen as unclear. Adding language to make these conditions more concrete and specific could serve to clarify section 31. It could also go hand-in-hand with an expanded role for the court's *parens patriae* jurisdiction in making declarations of parentage.

Another option may be suggested by the approach to court declarations in the *Uniform Child Status Act*.[670] This uniform act has several different provisions, each

668. Manitoba Law Reform Commission, *Assisted Reproduction*, *supra* note 90 at 39.

669. See *Birth Registration Case*, *supra* note 10.

670. *Supra* note 121.

tailored to court declarations in specific types of cases. For example, one section addresses court declarations in surrogacy cases,[671] another is meant for posthumous conception,[672] a third addresses adding additional parents,[673] and finally there is a provision that deals with general applications.[674] This approach may clarify the law on court declarations of parentage by setting out detailed provisions that relate directly to the main features of specific types of cases.

But there may also be drawbacks with the uniform act's approach. Employing it in part 3 would make the part longer and much more complex. It also may be difficult to adopt the uniform act's provisions without paying heed to its policy on when court declarations are appropriate. The uniform act requires court declarations as a routine matter in many more circumstances than is the case under part 3.

There may be other concerns with section 31. It could be seen as overly restrictive, excluding cases that go on to find a remedy in old common-law principles. If this is the main concern with section 31, then it would call for a different approach to reform.

One approach would be to expand the list of conditions that would need to be fulfilled in order to obtain a declaration of parentage. It may be possible to incorporate the concerns that have been addressed by the court's protective, *parens patriae* jurisdiction. This approach would have the advantage of consolidating all the bases on which a court declaration of parentage may be obtained in one place, making the law simpler and more accessible. But there may also be downsides to this option. In particular, the approach of adding more conditions to section 31 could be questioned. It may still be vulnerable to the concern of new cases arising that don't fit within the section's conditions, leaving people without a remedy under the section.

Finally, another option would be to do away with section 31's conditions. Legislation on court declarations of parentage in other provinces allows any person having a "sufficient interest"[675] or simply "an interest"[676] to apply for a declaration, without reference to conditions such as the existence of a dispute or any uncertainty about

671. See *ibid*, s 8.

672. See *ibid*, s 7.

673. See *ibid*, s 9.

674. See *ibid*, s 6.

675. *The Children's Law Act, 2020*, *supra* note 120, s 64 (2).

676. *Children's Law Reform Act*, *supra* note 115, s 13 (1).

parentage. Having an interest in a case is probably the lowest barrier that legislation could provide. It would amount to having no conditions to be met before arguing, in the words of Saskatchewan's legislation, "on the balance of probabilities that a person is or is not in law a parent of a child."[677] This approach could be particularly helpful in accommodating new or unusual cases in which all the parties are substantially in agreement. It may have the drawback of being too accommodating, though. It could be argued that some conditions are necessary to filter out cases.

The committee's tentative recommendation for reform

The committee favoured doing away with the conditions set out in section 31 as a way to expand the section's reach. A recent case showed how those conditions could close down an application for a declaration of parentage, as the litigants weren't able show any uncertainty or dispute in the litigation.[678] Nevertheless, the court turned to the common law to give the parties a remedy.

Other Canadian jurisdictions have similar legislation that avoids the use of conditions. The committee favoured following Ontario's lead, noting that its legislation (which allows anyone with "an interest" to apply for a declaration) has been around for years and hasn't caused any problems or generated any vexatious litigation.

The committee tentatively recommends:

23. For cases that don't come within the scope of the proposed simplified process to obtain an order declaring parentage, section 31 of the Family Law Act should be amended as follows:

- *(a) by striking out the conditions that provide that an order declaring parentage is only available if there is a dispute or any uncertainty as to whether a person is or is not a parent; and*
- *(b) by adding a provision that any person having, in the court's opinion, an interest may apply to the court for an order declaring parentage.*

677. *The Children's Law Act, 2020*, *supra* note 120, s 64 (3).

678. See *Birth Registration Case*, *supra* note 10.

Should section 31 of the Family Law Act be amended to address when service of an application on the vital statistics agency is necessary?

Brief description of the issue

Section 31 (2) of the *Family Law Act* lists the parties that must be served with notice of an application for a declaration of parentage. The list doesn't include the vital statistics agency, which is responsible for registering births in British Columbia. Should section 31 (2) be amended to address this omission?

Discussion of options for reform

This issue is relatively straightforward. There are two options for addressing it: (1) amend section 31 (2) by adding a provision to the list dealing with when the vital statistics agency must be served in an application for an order declaring parentage; (2) retain the status quo.

The main argument in favour of option (1) is that it would help to clarify the law. In some cases, service on the vital statistics agency is required. The existing statutory list in section 31 could helpfully be used to spell out the circumstances that call for service on the vital statistics agency.

On the other hand, it could be argued in favour of option (2) that amending section 31(2) isn't necessary. These procedural issues are more properly dealt with in court rules, such as the *Supreme Court Family Rules*.[679]

The committee's tentative recommendation for reform

The committee decided that it would be helpful to amend section 31 (2) because it would clarify the law. The question of when to serve the vital statistics agency is a point that's caused some confusion in practice.

The committee is aware that implementing its tentative recommendation may require a consequential amendment to the *Supreme Court Family Rules*.

The committee tentatively recommends:

24. Section 31 (2) of the Family Law Act, which lists the people who must be served with notice of an application to court for an order declaring parentage, should be

679. BC Reg 169/2009.

amended by adding a new paragraph, which reads as follows: "the vital statistics agency, if the order will result in a change of the registration of parentage."

What role should the best interests of the child test play in part 3?

Background information

Origins and scope of the best interests of the child. The best interests of the child is a longstanding concept, with its origins in judge-made law in England. "Although this power was at first only exercised in respect of the property rights of the child," explained a leading Canadian judgment, "the concept of the best interests of the child was gradually expanded to include the emotional, physical and spiritual welfare of the child."[680]

UN Convention. The United Nations' *Convention on the Rights of the Child*[681] (which Canada has ratified)[682] provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[683]

Legislation on best interests of the child. In contemporary British Columbia, the best interests of the child has been enshrined in legislation that addresses children. The typical approach is to set out a list of factors that courts will draw on to determine the best interests of the child. These factors can vary from statute to statute. For example, the factors listed in the *Child, Family and Community Service Act* are tailored to the concerns of child protection.[684] The *Family Law Act*, in contrast, sets out a longer and more expansive list of factors:

> To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
>
> (a) the child's health and emotional well-being;
>
> (b) the child's views, unless it would be inappropriate to consider them;

680. *Young v Young*, 1993 CanLII 34, [1993] 4 SCR 3 at 35–36, L'Heureux-Dubé J.

681. 30 November 1989, 1577 UNTS 3 (2 September 1990).

682. See Can TS 1992 No 3.

683. *Supra* note 681, art 3 (1).

684. See RSBC 1996, c 46, s 4.

(c) the nature and strength of the relationships between the child and significant persons in the child's life;

(d) the history of the child's care;

(e) the child's need for stability, given the child's age and stage of development;

(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.[685]

The best interests of the child and part 3. Under the *Family Law Act*, the best interests of the child is particularly relevant to "guardianship, parenting arrangements or contact with a child": in making "an agreement or order" addressing one of these issues, "the parties and the court must consider the best interests of the child *only*."[686] In contrast, the words *best interests of the child* don't even appear in the part of the *Family Law Act* that addresses parentage.

Despite the absence of the words *best interests of the child* in part 3, commentators and judges have made the point that this concept is an important principle in parentage legislation. But the role it plays in this legislation is complex. It isn't the sole basis on which decisions may be made, as is the case for decisions on guardianship, parenting arrangements, and contact with the child. Instead, it is seen as one factor among many that a decision-maker should take into account.[687] Taking a long view on the historical development of this area of the law, one law professor has concluded that "parentage in law has never been governed solely by the best

685. *Supra* note 1, s 37 (2).

686. *Ibid*, s 37 (1) [emphasis added].

687. See *Birth Registration Case*, *supra* note 10 ("While the best interests of the child are not the only consideration under Part 3 of the *FLA*, it would be contrary to the overall objective and purpose of the *FLA* to ignore the best interests of the child when making parentage declarations which by their very nature always affect a child/children" at para 52).

interests of children but rather has largely been determined on the basis of biological maternity, marriage to the mother, and actual or presumed paternity. Thus, the law of parentage itself has reflected to some degree a convergence of the interests of both parents and children."[688]

Although the best interests of the child wasn't listed among the principles underlying part 3,[689] it was discussed as a consideration in the framing of part 3.[690] In particular, protecting the best interests of the child has been seen as being bound up with one of the part's principles—promoting family stability.[691]

What does other Canadian parentage legislation say about the best interests of the child? Ontario's section on court declarations of parentage refers to the best interests of the child as one of four conditions that must be met when an order is applied for in two types of cases.[692] These cases involve (1) "[a] declaration of parentage that results in the child having more than two parents" or (2) "[a] declaration of parentage that results in the child having as a parent one other person, in addition to his or her birth parent, if that person is not a parent of the child under" the provisions on parentage that apply to cases involving sexual intercourse, assisted reproduction or insemination by a sperm donor, or pre-conception parentage agreements.[693]

Saskatchewan's and Ontario's acts refer to the best interests of the child in provisions on parents under a surrogacy agreement.[694] These provisions require a

688. Wanda Wiegers, "Assisted Conception and Equality of Familial Status in Parentage Law" (2012) 28:2 Can J Fam L 147 at 153.

689. See *Proposals for a new Family Law Act*, *supra* note 3 at 31.

690. See *ibid* ("The proposed changes are intended to provide a scheme for determining legal parentage, including where assisted conception is used, in a way that protects the child's best interests and promotes stable family relationships" at 29).

691. See Manitoba Law Reform Commission, *Assisted Reproduction*, *supra* note 90 ("While questions around legal parentage are frequently approached from the perspective of the rights of persons carrying out assisted reproduction, parentage decisions must be informed and guided by the principle that underlies all of family law, that the best interests of the child are paramount. Legal parentage status confers authority on parents so that they are able to care for their children, and imposes duties on them to do so. All children, regardless of the circumstances of their conception, benefit from having certainty in their family relationships and from being parented by persons who have clear legal rights and obligations" at 3 [footnote omitted]).

692. *Children's Law Reform Act*, *supra* note 115, s 13 (5).

693. *Ibid*, s 13 (4).

694. See Saskatchewan: *The Children's Law Act, 2020*, *supra* note 120, s 62; Ontario: *Children's Law Reform Act*, *supra* note 115, s 10.

court declaration in each case to establish parentage. They distinguish between court declarations after a surrogate has provided consent in the manner the legislation spells out and court declarations when a surrogate doesn't provide this consent. In the latter case, the legislation provides that "[t]he paramount consideration by the court in making a declaratory order . . . shall be the best interests of the child."[695]

Two acts don't refer to the best interests of the child in their parentage provisions but do contain a general interpretive provision that establishes the best interests of the child as a paramount consideration for decision-makers under the act.[696]

But most parentage legislation in Canada is similar to part 3 of BC's *Family Law Act* in that the legislation doesn't mention the best interests of the child at all.

Brief description of the issue

While part 3 of the *Family Law Act* doesn't refer to the best interests of the child, courts have said that this is a consideration that should be taken into account in making decisions under part 3. The concept of the best interests of the child has historically had a complex relationship to other concepts underlying parentage legislation. Should part 3 be amended to set out how the best interests of the child should be considered in making decisions under the part?

Discussion of options for reform

There is a range of options that could be considered for this issue.

At one end, part 3 could be amended by adding a provision similar to one found elsewhere in the *Family Law Act* directing decision-makers to "consider the best interests of the child only."[697] This approach would have the advantage of clarity. It would treat court applications for parentage declarations similar to other court

695. Saskatchewan: *The Children's Law Act, 2020*, *supra* note 120, s 62 (11); Ontario: *Children's Law Reform Act*, *supra* note 115, s 10 (8). See also Manitoba: *The Family Law Act*, *supra* note 124, s 24 (5) ("The most important consideration for the court in making a declaratory order under this section is the best interests of the child.").

696. See Prince Edward Island: *Children's Law Act*, *supra* note 317, s 2 ("In all proceedings under this Act, the best interests of the child shall be the primary consideration of the court."); Yukon: *Children's Law Act*, *supra* note 325, s 1 ("This Act shall be construed and applied so that in matters arising under it the interests of the child affected by the proceeding shall be the paramount consideration, and if the rights or wishes of a parent or other person and the child conflict the best interests of the child shall prevail.").

697. *Supra* note 1, s 37 (1).

applications under the *Family Law Act*, fostering a kind of unity across the act. And it would provide a strong statement of support for children's rights.

But, all that said, there could be significant disadvantages to this option. It would mark a dramatic change in how the best interests of the child has traditionally been considered in parentage law, as one factor among many for decision-makers to consider. This change could undermine other goals for part 3. An Ontario judge has worried that "[t]o examine the 'best interests of the child' in a parentage case could produce results that directly contradict the spirit and purpose" of the legislation.[698]

It could also be argued that cases involving guardianship, parenting arrangements, and contact with the child—which are decided on the basis that the best interests of the child is the only consideration—differ significantly from parentage cases and don't provide a suitable model for deciding parentage cases.[699]

Another option would be to propose an amendment to part 3 that captures the way the best interests of the child has typically been applied in parentage cases. This approach would involve setting out the best interests of the child as one principle among a group of principles and clarifying the relationships among this group of principles.

Such an approach would have the advantage of clarifying the law while respecting its nuances. But it would also set a complex drafting challenge. There is a large number of ways to craft the proposed amendments.

A third option to consider would be proposing to maintain the status quo. Part 3—like most Canadian parentage legislation—doesn't mention the best interests of the child. This effectively leaves it to the courts to develop how the concept applies to decision-making under part 3. The courts may be well-placed to develop the law on a case-by-case basis. But this could be seen as a missed opportunity to clarify and reform the law.

The committee's tentative recommendation for reform

The committee found this to be a difficult issue, to which it gave extended consideration.

698. *MRR*, *supra* note 118 at para 149.

699. See *ibid* ("The 'best interests of the child' test in the sense it might be applied in a custody, access or child support matter may not readily translate into a determination of a declaration of parentage" at para 148).

While the committee was concerned with advancing the best interests of the child, it was reluctant to adopt this concept as the sole basis of decision-making under part 3. This is how the best interests of the child operates under part 4 of the *Family Law Act*, and it is appropriate to use that concept to make decisions about guardianship and parenting responsibilities after the child is born. But court cases under part 3 typically involve an examination of what has happened before a child has been born, to establish (depending on the context) the intentions of the child's parents or a genetic connection between the child and parent. It is difficult to see how the best interests of the child could add to the analysis of these factual questions.

It's also worth noting that decision-making that's guided by the best interests of the child is very fact driven and highly sensitive to surrounding circumstances. But this method of decision-making is difficult to apply to parentage cases. Because the focus is on events that have taken place before the child has been born, there aren't any facts that the decision-maker can logically draw on yet about the child's relationship to the parents. The committee was concerned that this could create a factual vacuum, into which could flow stereotypes about how families should be created.

While an argument could be made that a broad conception of the best interests of the child is already implicit in the principles that were used to develop part 3 (such as, for example, protecting family stability), the committee decided it was not in favour of going further by explicitly recognizing the best interests of the child as a basis for decision-making under part 3.

However, one member felt strongly that the best interests of the child is a critically important principle in all decisions involving children, as set out in the UN Convention on the Rights of the Child and is also "trite law" in BC as set out in recent parentage declaration cases. It is used legitimately to bolster recognition of parentage by consent.

The committee tentatively recommends:

25. Part 3 of the Family Law Act should not be amended to directly address how the best interests of the child is to be addressed by the court in making an order under the part.

Should section 31 of the Family Law Act be amended to address the territorial jurisdiction of the court to make a declaration of parentage?

Background information

What is territorial jurisdiction? Territorial jurisdiction arises as an issue when a British Columbia court is asked to resolve a dispute that either (1) has parties from outside BC or (2) has facts pertaining to the dispute that occurred outside BC.

A court's territorial jurisdiction is one of the main preoccupations of a subject lawyers call conflict of laws.[700] This subject gets its name from the fact that "[w]hen different legal systems formulate their answers to legal problems, there is a distinct likelihood those answers will differ," and "[t]hese differing answers" may "give rise" to conflicts between the different legal systems.[701]

Conflicts issues have a "highly procedural nature."[702] Laws addressing these issues "regulate the process of dispute resolution rather than determine its outcome."[703] In the case of territorial jurisdiction, the focus is on "whether a court has jurisdiction to hear and resolve a particular dispute"—which is another way of saying that what is "[a]t issue here is the court's power to render a decision that will be treated as binding on the parties."[704]

Territorial jurisdiction is determined by "examining the relationship between the country in which the dispute is to be heard and both the parties to the dispute and the facts on which the dispute is based."[705] This examination will be guided by

700. See Stephen G A Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 1. The other main preoccupations of conflict of laws are "what law a court will apply in resolving a dispute" and "whether a court will recognize and enforce a decision of a court in another jurisdiction" (*ibid*).

701. *Ibid*.

702. *Ibid*.

703. *Ibid*.

704. *Ibid* at 4.

705. *Ibid*. The authors use the word *country* in a special, expansive way. "The conflict of laws also sometimes uses words such as 'country' and 'nation' in a special sense. The subject is concerned with the division of the world into separate geographic entities that each have a separate legal system. The country of New Zealand would be one such entity, but so would the various states of the United States of America or Australia and the various provinces of Canada. . . . So for the purposes of the conflict of laws, Ontario and Michigan can be considered countries" (*ibid* at 3–4).

applying either (1) rules found in the jurisdiction's rules of court (particularly those rules concerning service of process) and in its judge-made law or (2) provisions in a statute enacted by the jurisdiction's legislature.

How does British Columbia determine the territorial jurisdiction of its courts? British Columbia falls into the second camp. It has legislation dealing with its courts' territorial jurisdiction. This legislation is called the *Court Jurisdiction and Proceedings Transfer Act*.[706]

The *Court Jurisdiction and Proceedings Transfer Act* is based on a law-reform project carried out by the Uniform Law Conference of Canada.[707] Over the course of the 1990s, the ULCC developed a uniform act that was intended to "clarify and advance the law of judicial jurisdiction."[708]

The way the *Court Jurisdiction and Proceedings Transfer Act* works is by setting out a series of default rules[709] that govern when a BC court has the territorial jurisdiction to make a decision in a dispute that will be binding on the parties. These rules are stated at a very high level of generality. So, for example, if someone wished to find out whether a BC court had the territorial jurisdiction to grant an order declaring parentage, that person wouldn't be able to find a rule in the *Court Jurisdiction and Proceedings Transfer Act* that deals specifically with declarations of parentage or, even, family-law disputes. Instead, it would be necessary to apply one of the act's general rules. The precise rule to apply in a given case would turn on how the proceedings in that case have been brought.

706. SBC 2003, c 28. Note that this act doesn't use the words *territorial jurisdiction*. Instead, it employs an equivalent expression, *territorial competence*, which it defines to mean "the aspects of a court's jurisdiction that depend on a connection between (a) the territory or legal system of the state in which the court is established, and (b) a party to a proceeding in the court or the facts on which the proceeding is based" (*ibid*, s 1 "territorial competence").

707. See Uniform Law Conference of Canada, *Uniform Court Jurisdiction and Proceedings Transfer Act* (2021), online: <www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Court-Jurisdiction-and-Proceedings-Transfer-Act-(2021).pdf>.

708. Janet Walker, "Judicial Jurisdiction in Canada: The *CJPTA*: A Decade of Progress" (2018) 55:1 Osgoode Hall LJ 9 at 10.

709. See *Court Jurisdiction and Proceedings Transfer Act*, *supra* note 706, s 12 ("If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly (a) confers jurisdiction or territorial competence on a court, or (b) denies jurisdiction or territorial competence to a court, that other Act prevails.").

Based on published court decisions for declarations of parentage under section 31 of the *Family Law Act*,[710] some of these cases are "proceedings with no named defendant."[711] In these cases, the BC court has territorial jurisdiction "if there is a real and substantial connection between British Columbia and the facts upon which the proceeding is based."[712]

But, again based on published court decisions,[713] some cases under section 31 are "proceedings against a person."[714] The rules in the *Court Jurisdiction and Proceedings Transfer Act* that apply in these cases state that "[a] court has territorial competence in a proceeding that is brought against a person only if":

> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction,
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or

710. See *Re KG*, *supra* note 298; *Re DD*, *supra* note 630. See also *Re TTKO*, 2011 ONSC 6601, Czutrin J ("This case raises the novel question of whether adult children, one residing in Ontario and one in Alberta, and their non-biological parent residing in Switzerland, can apply for and be granted a declaration of parentage in Ontario when an Ontario adoption is not an available option" at para 1). This appears to be the one reported case in Canada that has considered a court's territorial jurisdiction to grant an order declaring parentage. There was no named defendant in the case (see *ibid* at paras 3–7, 32), though the court did "[ask] that the Attorney General for Ontario be put on notice to see if they will support, oppose or take no position" (*ibid* at para 8). (The attorney general "appeared, filed a comprehensive factum 'to provide the court with its submissions on the relevant law,' but took no position 'with respect to the facts or the merits of this case' and sought no specific order"—at para 9). The court concluded that it "[did] not have the jurisdiction and authority to grant this declaration" (*ibid*), but its remarks on its jurisdiction were cursory ("[t]he appropriate jurisdiction for the issues to be considered appears to be Switzerland"—*ibid* at para 52), as most of the court's reasons focused on its lack of authority to declare what may be called a functional parent (that is, someone who wasn't a biological parent of children conceived by sexual intercourse but who had raised the children as his own from their early childhoods) to be the applicants' legal parent.

711. *Court Jurisdiction and Proceedings Transfer Act*, *supra* note 706, s 4.

712. *Ibid*, s 4.

713. See *Birth Registration Case*, *supra* note 10 (Registrar General, Vital Statistics Agency, and Attorney General of British Columbia, defendants); *KMS v AH*, 2021 BCPC 201; *KMS v AH*, 2021 BCPC 116; *Cabianca*, *supra* note 630; *X v Y*, 2015 BCSC 1327; *JR v JS*, 2013 BCPC 404.

714. *Court Jurisdiction and Proceedings Transfer Act*, *supra* note 706, s 3.

(e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.[715]

Notice that paragraph (e) on this list overlaps with the rule for proceedings with no named defendant.

How do these rules apply to orders declaring parentage? Before applying these rules to an order declaring parentage there are three things to bear in mind.

First, there is the nature of the proceedings. These are applications under section 31 of the *Family Law Act*, which may be made "if there is a dispute or any uncertainty as to whether a person is or is not a parent under" part 3 of that act. The proceedings may result in "an order declaring whether a person is a child's parent."[716] Cases decided under section 31 have included adding an additional parent to reflect that the parents "have been living together in a committed polyamorous relationship,"[717] adding a parent in an assisted-reproduction case in which the parties "did not strictly follow the statutory scheme,"[718] and a case involving "a verbal surrogacy agreement."[719]

Second, there are the people who are typically going to be involved in such a proceeding. Section 31 actually spells them out, in a list of "persons [who] must be served with notice of the application."[720] First, there is the child (if the child is 16 years of age or older).[721] Next there are the potential parents of the child—or, as section 31 puts it, "each person, known to the applicant, who claims or is alleged to be a parent of the child."[722] (Note that "the applicant" here is the equivalent of what the *Court Jurisdiction and Proceedings Transfer Act* calls a *plaintiff*, who is "a person

715. *Ibid*, s 3. The use of *only* in this section is a bit inapt, because the act goes on to give the court this "residual discretion": "[a] court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that (a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required" (*ibid*, s 6).

716. *Supra* note 1, s 31 (1).

717. *Birth Registration Case*, *supra* note 10 at para 1.

718. *Cabianca*, *supra* note 630 at para 2. See also *Family Law Act*, *supra* note 1, s 30.

719. *Re KG*, *supra* note 298 at para 5.

720. *Supra* note 1, s 31 (2).

721. See *ibid*, s 31 (2) (a).

722. *Ibid*, s 31 (2) (b).

who commences a proceeding" in court.)[723] Then, there is a guardian of the child or an adult with whom the child lives, generally having care of the child—to the extent that these people may be different in a given case from potential parents.[724] Based on published court decisions, the parties in most of the cases under section 31 appear to be potential parents.

The third thing to bear in mind is that the *Court Jurisdiction and Proceedings Transfer Act*'s rules for proceedings against a person are really meant only to apply to defendants in a proceeding. The thinking is that the plaintiff picked the court in which to commence the proceeding. It wouldn't be fair to allow the plaintiff to make that decision and then, at some later time, to try to make an issue out of the territorial jurisdiction of the plaintiff's chosen court. But the defendant hasn't made a choice, so it's necessary for the law to tell us under what circumstances a defendant will be bound by the decisions of the plaintiff's chosen court.[725]

Keeping these three points in mind—and beginning with a case that is a proceeding against a person—when a plaintiff applies to a British Columbia court for an order declaring parentage, the *Court Jurisdiction and Proceedings Transfer Act* tells readers that the court will have territorial jurisdiction—that is, its order will be binding on the defendants—in three circumstances.

First, the BC court will have territorial jurisdiction if the defendant does something that shows the defendant consents to the court's jurisdiction. Paragraphs (a), (b), and (c) from the list set out earlier in this discussion[726] describe what amounts to consent to a BC court's territorial jurisdiction.

- Paragraph (a): the defendant is a plaintiff in the original proceeding and is now a defendant by counterclaim.
- Paragraph (b): the defendant "submits" to the BC court's territorial jurisdiction. A defendant submits by taking any steps in a proceeding "that

723. *Supra* note 706, s 1 "plaintiff."

724. *Supra* note 1, s 31 (2) (c), (d). To round out the list, note that the court has discretion to require notice to "any other person to whom the court considers it appropriate to provide notice, including a child under 16 years of age" (*ibid*, s 31 (2) (e)).

725. See Pitel & Rafferty, *supra* note 700 at 4.

726. See, above, at 184.

go beyond challenging the court's jurisdiction."[727] Essentially, anything done in court to "contest the case on the merits" amounts to submission.[728]

- Paragraph (c): the defendant agrees in advance that the BC court has jurisdiction over a dispute. Recall that part 3 of the *Family Law Act* requires agreements for surrogacy and donor cases—it's not hard to imagine these agreements having provisions dealing with the BC court's territorial jurisdiction.

Second, the BC court will have jurisdiction over the defendant—even in the absence of the defendant's consent—if the defendant "is ordinarily resident in British Columbia at the time of the commencement of the proceeding."[729] (This is covered by paragraph (d) on the list.) So if someone applies for an order declaring parentage under section 31 of the *Family Law Act* in a BC court, a defendant (think mainly a potential parent, though it could be child older than 16 years or a guardian or an adult living with and caring for that child) will be bound by the BC court's decision in that application if the defendant is ordinarily resident in BC.

Related issue: using "custody" in an order declaring parentage for a case with international dimensions
Often the word *custody* is used in connection with a child in an order declaring parentage for a case with international dimensions. This word appears to be favoured because it's also used in the Hague Convention. But *custody* has been increasingly frowned on in Canadian family law. Both the BC *Family Law Act* and the federal *Divorce Act* have been amended to remove this word. Courts should bear the negative connotations of *custody* in mind in making these orders and consider an alternative, such as *guardianship*.

Finally, the third circumstance turns attention away from the people involved and toward the facts underlying the dispute. (It also applies to both proceedings against a person and proceedings with no known defendant.) Under paragraph (e), the BC court has jurisdiction if there is a "real and substantial connection" between these facts and BC.

What is a real and substantial connection? This is a question of fact, which will vary from case to case. But the *Court Jurisdiction and Proceedings Transfer Act* provides some general guidance by setting out a long list of circumstances in which a real and substantial connection "is presumed to exist."[730] None of the items on this list is

727. Pitel & Rafferty, *ibid* at 68.

728. *Ibid* at 67.

729. *Court Jurisdiction and Proceedings Transfer Act*, *supra* note 706, ss 3 (d), 4.

730. *Ibid*, s 10.

relevant to orders declaring parentage, except for one, which provides that a real and substantial connection is presumed if the proceeding "is for a determination of the personal status or capacity of a person who is ordinarily resident in British Columbia."[731] Depending on how section 31 is interpreted,[732] an order declaring parentage, is all about determining the personal status of a child or a parent.

So, in summary, a BC court has territorial jurisdiction over an application for an order declaring parentage if: (1) the defendant parties consent to the court's jurisdiction; (2) the defendant parties are ordinarily resident in British Columbia; or (3) there is a real and substantial connection between the facts underlying the case and British Columbia—and this real and substantial connection will be presumed if the order is determining the personal status of a child or a potential parent ordinarily resident in British Columbia.

How do other Canadian provinces and territories deal with the territorial jurisdiction of their courts to make an order declaring parentage? The other provinces and territories fall into three groups on this question.

The first group is made up of Saskatchewan, Nova Scotia, and Yukon. The law in these jurisdictions is similar to the law in British Columbia: each of them has parentage legislation that is silent on the territorial jurisdiction of their courts to make orders declaring parentage, and each has enacted its own version of the *Court Jurisdiction and Proceedings Transfer Act*, so the issue is determined by the general rules found in that act.[733]

The second—and largest—group includes Manitoba, Ontario, New Brunswick, Prince Edward Island, Newfoundland and Labrador, the Northwest Territories, and Nunavut. Like BC, each of these jurisdictions has parentage legislation that provides for orders declaring parentage but doesn't say anything about the territorial

731. *Ibid*, s 10 (j).

732. Some commentators make the point that "[l]egal parental status is principally intended to protect children" (Victorian Law Reform Commission, *supra* note 17 at 112). For this reason, some commentators and even some statutes refer to parentage as *child status* (as in the ULCC's *Uniform Child Status Act*, *supra* note 121). That said, the wording of section 31 refers to "declaring whether a person is a child's parent" (*supra* note 1, s 31 (1)), which implies that it's the parent's status that is at stake.

733. See Saskatchewan: *The Children's Law Act, 2020*, *supra* note 120, s 61 (declaratory order re parentage); *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1; Nova Scotia: *Birth Registration Regulations*, *supra* note 132, s 5 (declaratory order with respect to parentage—limited to surrogacy cases); *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2; Yukon: *Children's Law Act*, *supra* note 325, ss 8–9 (declaration as to mother; declaration as to father); *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7.

jurisdiction of the court to make such an order.[734] But, unlike BC, these jurisdictions haven't enacted a version of the *Court Jurisdiction and Proceedings Transfer Act*. So in these jurisdictions it would be necessary to turn to other sources, such as their rules of court (particularly those rules concerning service of process), and to identify leading precedents from court cases and apply the rules found in those decisions.[735]

Finally, the third group is made up of Alberta and Québec. Both of these provinces have parentage legislation that spells out when their courts have territorial jurisdiction to make an order declaring parentage.[736] In Alberta's case, the court has jurisdiction "if (a) the child is born in Alberta, or (b) an alleged parent resides in Alberta."[737] In Québec, "Québec authorities have jurisdiction in matters of filiation if the child or one of his parents is domiciled in Québec."[738]

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734. See Manitoba: *The Family Law Act*, *supra* note 124, s 21 (declaratory order re parentage—general); Ontario: *Children's Law Reform Act*, *supra* note 115, s 13 (declaration of parentage); New Brunswick: *Family Services Ac*t, *supra* note 663, s 100 (declaratory orders of parentage); Prince Edward Island: *Children's Law Act*, *supra* note 317, s 24 (application for declaration); Newfoundland and Labrador: *Children's Law Act*, *supra* note 326, ss 6–7 (declaration of motherhood; declaration of fatherhood); Northwest Territories and Nunavut: *Children's Law Act*, *supra* note 311, ss 4–5.1 (declaration of maternity; declaration as to paternity; declaration of parentage: assisted reproduction).

735. See e.g. *Club Resorts Ltd v Van Breda*, 2012 SCC 17.

736. And neither has enacted the *Court Jurisdiction and Proceedings Transfer Act*—though Québec has extensive provisions in its civil code that cover the same ground as the *Court Jurisdiction and Proceedings Transfer Act*. See *Civil Code of Québec*, *supra* note 126, arts 3076–3168.

737. *Family Law Act*, *supra* note 232, s 9 (6).

738. *Civil Code of Québec*, *supra* note 126, art 3147. *Filiation* is the civil-law equivalent to the common law's *parentage*. As for "domiciled," a leading case explains the concept as follows: "[t]o use non-legal terminology, a person's 'domicile' indicates where, legally, a person lives—to what jurisdiction a person is most closely and persistently associated." (*Re Foote Estate*, 2009 ABQB 654 at para 1, Graesser J.) Domicile plays the same role in this Québec provision that residence plays in the Alberta provision quoted immediately before it. But, while determining residence is simply a question of fact (where is a person spending their time?), locating a person's domicile is a more complicated inquiry. To quote again from a leading case: "A person has one domicile at any point in their life, no matter what their circumstances or actions. That domicile may change from time to time, but there is always only one domicile for a person. A new domicile 'displaces' an older domicile. The circumstances into which one is born (generally, parental domicile) dictate a person's first domicile, which is known as a 'domicile of origin.' Other domiciles are ones in which a person has chosen to live, and are called 'domiciles of choice.' " (*Re Foote Estate*, *ibid* at para 19.) Further, "[a] domicile of choice may be acquired when a person forms an intention to permanently reside in a new jurisdiction, and puts that intention into effect by taking positive steps to move to this new jurisdiction and establish a permanent residence there." (*ibid* at para 25.) Most Canadian provinces and territories have come to favour residence over domicile as a basis for territorial jurisdiction. (For British Columbia, see *Court Jurisdiction and Proceedings Transfer Act*, *supra* note 706.) This Québec provision's use of domicile makes it

Brief description of the issue

Part 3 of the *Family Law Act* contains a provision (section 31) that empowers the BC Supreme Court to make orders declaring parentage, but section 31 doesn't address the court's territorial jurisdiction to make such orders. This means that whenever a party to an application for an order declaring parentage resides outside BC or facts relevant to the application took place outside BC there is an issue concerning territorial jurisdiction, which has to be resolved by applying legislation of general application. Should section 31 be amended by adding a provision on the territorial jurisdiction of the court to make an order declaring parentage that is specifically crafted for these declaratory orders?

Discussion of options for reform

There are essentially two options to consider for this issue: either (1) propose amending section 31, adding a new provision addressing territorial jurisdiction, or (2) propose retaining the status quo, in which there is no special rule for the territorial jurisdiction of the court to make an order declaring parentage, but there are general provisions in other legislation that do apply.

This issue hasn't garnered much attention, but one law professor has made the case for amending legislation like section 31.[739] This case rests on two points.

The first point is that an amendment would clarify and simplify the law. The *Court Jurisdiction and Proceedings Transfer Act* was developed with civil and commercial litigation in mind, not family law. This wasn't an oversight; the people who developed the uniform act that the *Court Jurisdiction and Proceedings Transfer Act* is based on noted that the major family-law issues engaging territorial jurisdiction were already covered by specific legislation,[740] so they wanted to steer clear of creating overlapping rules.[741] If there wasn't any special legislation for a given

difficult to draw on as a model for reform for British Columbia, so the discussion of options for reform focuses on the Alberta provision alone.

739. See Martha Bailey, "Protecting Children in Canada" [2017] Int'l Surv Fam L 39.

740. See e.g. *Family Law Act*, *supra* note 1, ss 74 (territorial jurisdiction for orders respecting guardianship, parenting arrangements, or contact with a child), 106 (territorial jurisdiction for property division).

741. See *Uniform Court Proceeding and Jurisdiction Transfer Act*, *supra* note 707 ("Section 10 does not include any presumptions relating to proceedings concerned with family law. Since territorial competence in these proceedings is usually governed by special statutes, it was felt that express rules in section 10 would lead to confusion and uncertainty because they would often be at variance with the rules in those statutes, which may have priority by virtue of section 10. For

family-law case, then it was thought that the *Court Jurisdiction and Proceedings Transfer Act*'s provisions could be extended to family-law proceedings.[742] In practice, this "legal fiction" often doesn't work so well, leaving "[c]onfusion" in its wake.[743] This is made readily apparent by comparing Alberta's provision on the territorial jurisdiction of a court to make an order declaring parentage[744] with the kind of extended analysis that is necessary to apply BC's *Court Jurisdiction and Proceedings Transfer Act*.

The second point "relates to surrogacy tourism, where parties from countries where surrogacy is banned or prohibitively expensive obtain services in a country where it is permitted or relatively inexpensive."[745] The argument is that a clear rule on the court's territorial jurisdiction would help to dispel attempts by people with no real connection to British Columbia to use its courts to establish parentage in a surrogacy case.[746]

A third point worth bearing in mind is that there is an existing model for an amendment to BC's *Family Law Act*, and that is the provision found in Alberta's legislation. Under this provision, the court has jurisdiction "if (a) the child is born in Alberta, or (b) an alleged parent resides in Alberta."[747] The provision has been in force since 2005,[748] and it doesn't appear to have raised any concerns. No published decisions in Alberta have cited this provision. Alberta's provision on territorial jurisdiction is comparable to the law in British Columbia, though it appears to be somewhat broader in its reach. If it were adopted as a model for reform in British

this reason it was felt better to leave the matter of territorial competence for the special family law statutes" at comment 10.4).

742. See *ibid* ("If the question of territorial competence in a particular family matter was not dealt with in a special statute, the general rules in section 3 of this Act, including ordinary residence and real and substantial connection, would govern.").

743. Walker, *supra* note 708 at 46–47.

744. See *Family Law Act*, *supra* note 232, s 9 (6).

745. Bailey, *supra* note 739 at 52.

746. *Ibid* ("Because surrogacy is permitted in most Canadian provinces and relatively inexpensive compared with other countries, surrogacy tourism is a live issue. If foreign parties obtain a declaration of parentage in respect of a child born to a surrogate in Canada, or are simply registered as the parents, their home country may be forced to recognise the parentage determination, despite the home country's public policy against surrogacy, in order to protect the child's right to family life or the best interests of the child." [footnotes omitted]).

747. *Family Law Act*, *supra* note 232, s 9 (6).

748. See *Family Law Act*, *ibid*, s 9 (4) (in force 1 October 2005: OC 380/2005).

Columbia, it likely would result in a wider range of cases coming within the territorial jurisdiction of the BC courts.

On the other hand, there may be reasons that support retaining the status quo. While the lack of a dedicated provision in section 31 addressing territorial jurisdiction has been criticized in a law-review article, it isn't clear that the current law is causing any problems in practice. The one published decision under section 31 with potential parents residing outside British Columbia didn't feature the court's territorial jurisdiction as an issue.[749] The court made the requested orders, declaring the out-of-province parties to be the child's parents. So it could be argued that proposing an amendment to section 31 to deal with territorial jurisdiction is a bit of a solution in search of a problem. The issue doesn't appear to come up frequently, and if it did arise in a case, it wouldn't meet a gap in the law. There is existing legislation (the *Court Jurisdiction and Proceedings Transfer Act*) that would apply.

It could also be argued that a provision on territorial jurisdiction won't do much to address surrogacy tourism. Such a provision may have an impact in provinces such as Alberta[750] and Nova Scotia,[751] which provide for an order declaring parentage as a routine part of the surrogacy process. But this isn't the case in British Columbia, which allows the intended parents in a surrogacy case to be recognized as the child's legal parents without the need to obtain a court order.

Surrogacy tourism is a serious problem. Addressing it would likely require both substantive provisions that go beyond a simple amendment to clarify the law on a court's territorial jurisdiction and cooperation between jurisdictions. Since 2011, the Hague Conference on Private International Law—a world-wide intergovernmental organization that pursues law reform in conflict of laws—has been carrying out a large-scale project that addresses surrogacy tourism.[752] An experts group "explor[ing] the feasibility of advancing work in this area" completed its work in 2022.[753] "In March 2023," a working group was formed with a mandate

749. See *Re DD*, *supra* note 630. The potential parents were "a same-sex couple who reside in Quebec" (*ibid* at para 1), but since they were the petitioners in the application, they were in no position to make an issue out of territorial jurisdiction (as they had chosen to bring their application in a BC court).

750. See *Family Law Act*, *supra* note 232, s 8.2.

751. See *Birth Registration Regulations*, *supra* note 132, s 5.

752. See Hague Conference on Private International Law, "The Parentage/Surrogacy Project" (last visited 27 July 2023), online: *Hauge Conference on Private International Law* <hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

753. *Ibid*.

to examine "private international law (PIL) matters related to legal parentage generally, including legal parentage resulting from an international surrogacy arrangement."[754]

The committee's tentative recommendation for reform

The committee favoured option (1)—amending section 31 to add a provision setting out the court's territorial jurisdiction.

In the committee's view, a provision similar to the one found in Alberta's act would help to clarify BC law. Territorial jurisdiction actually comes up frequently in practice—even if this point isn't reflected in published court decisions. A dedicated provision addressing territorial jurisdiction would be of considerable benefit to practitioners and their clients.

As the committee considered this specific issue, it noted that there may be other areas (such as in vital statistics) where conflict of laws may raise some concerns. A broader examination of conflict of laws, parentage, and related areas would be outside the scope of this project, but it should be considered by the government or another group.

The committee tentatively recommends:

26. Section 31 of the Family Law Act should be amended to address the territorial jurisdiction of the court to make an order declaring parentage by providing that the court has jurisdiction, in addition to any other basis of jurisdiction under the Court Jurisdiction and Proceedings Transfer Act

(a) if the child is born in British Columbia or

(b) an alleged parent resides in British Columbia.

Should part 3 address constructive or non-written surrogacy agreements?

Background information

Part 3 and BC case law. Part 3 contains a section (section 29) dealing with parentage in "surrogacy arrangements,"[755] but one of the conditions to its application is that "before a child is conceived through assisted reproduction, a

754. *Ibid*.

755. See, above, at 121–123 (for the full text of section 29).

written agreement is made between a potential surrogate and an intended parent or the intended parents."[756]

Nevertheless, there has been a recent court case involving an unwritten "verbal surrogacy agreement."[757] While the court concluded that "s. 29 of the *FLA* does not apply in these circumstances,"[758] it decided to grant the parties a declaration of parentage under section 31[759]—and then went on to say that its decision shouldn't be taken to "stand as a precedent for future parties to disregard the clearly expressed statutory requirements in terms of recognizing parenting roles within a surrogacy arrangement."[760]

What does other Canadian parentage legislation say about surrogacy agreements? At the outset, it's worth acknowledging that there's a division of legislative authority in Canada when it comes to surrogacy agreements between the federal parliament, on the one hand, and provincial and territorial legislatures, on the other. A law professor has summarized the division as follows: "[a]lthough Canadian federal law prohibits commercial surrogacy, the provinces have exclusive legislative competence in regard to all other aspects of surrogacy."[761]

Only about half of the provinces have exercised this legislative competence and enacted legislation on surrogacy agreements.[762] This legislation essentially takes two approaches in relation to surrogacy agreements.

One approach is to declare surrogacy agreements to be unenforceable. Alberta's act provides that a surrogacy agreement "is not enforceable."[763] In a similar vein, Québec currently provides that "[a]ny agreement whereby a woman undertakes to

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756. *Supra* note 1, s 29 (2) (a) [emphasis added].

757. *Re KG*, *supra* note 298 at para 5.

758. *Ibid* at para 30.

759. See *ibid* at para 43 ("[I]t strikes me as anomalous that the clearly intended parents, namely the petitioners, and the Child, would be denied this relief simply by reason of a lack of a written surrogacy agreement as contemplated by s. 29(2)(a). Further, I see no reason why the Child, or the family unit, should suffer by reason of the petitioners' unsatisfactory legal research as to the requirements of the *FLA* in these circumstances.").

760. *Ibid* at para 46.

761. Bailey, *supra* note 739 at 51 [footnote omitted].

762. Parentage legislation in New Brunswick, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut doesn't address surrogacy agreements.

763. *Family Law Act*, *supra* note 232, s 8.2 (8) (a).

procreate or carry a child for another person is absolutely null."[764] That's all these two provinces currently have to say about surrogacy agreements.[765] They don't require surrogacy agreements—written or otherwise—as part of their parentage legislation. Saskatchewan's, Manitoba's, and Ontario's acts also provide that a surrogacy agreement "is unenforceable in law."[766]

The other approach that some provinces take is to require surrogacy agreements and to regulate aspects of their form and content. Interestingly, Saskatchewan and Ontario take this approach, in addition to the first one of declaring surrogacy agreements unenforceable. Both provinces define *surrogacy agreement* as "a written agreement."[767] Like BC, both provinces make a surrogacy agreement a condition to the application of their sections on surrogacy and parentage.[768] Prince Edward Island also makes "a written agreement" a condition to the application of its provision.[769]

Manitoba's new parentage provisions don't actually use the word *written* in connection with surrogacy agreements, but they clearly contemplate that surrogacy agreements must be in writing, because they require a certificate of legal advice to be "attached" to the agreement (something that obviously can't be done with an oral agreement).[770]

None of this legislation addresses unwritten surrogacy agreements. But Nova Scotia, which deals with what it calls *surrogacy arrangements* in a regulation under its *Vital*

764. *Civil Code of Québec*, supra note 126, art 541. After the committee considered this issue, Québec enacted legislation taking a new, regulatory approach to surrogacy. See QC Bill 12, *supra* note 130, s 20 (adding arts 541.1–541.37 to the *Civil Code of Québec*). See also, above, at 29–30 (discussing the development of parentage legislation in Québec).

765. Parentage in surrogacy cases in Alberta and Québec is established after the child's birth through a process that unfolds in court. But see Québec: QC Bill 12, *supra* note 130, s 20 (enacting new provisions to regulate surrogacy, which will no longer require a court order).

766. Saskatchewan: *The Children's Law Act, 2020*, *supra* note 120, s 61 (12); Manitoba: *The Family Law Act*, *supra* note 124, s 24 (6); Ontario: *Children's Law Reform Act*, *supra* note 115, s 10 (9).

767. Saskatchewan: *The Children's Law Act, 2020*, *supra* note 120, s 62 (1) Ontario: *Children's Law Reform Act*, *supra* note 115, s 10 (1).

768. See Saskatchewan: *The Children's Law Act, 2020*, *supra* note 120, s 62 (2) (a); Ontario: *Children's Law Reform Act*, *supra* note 115, ss 10 (2) 1 (surrogacy, up to four intended parents), 11 (surrogacy, more than four intended parents).

769. *Children's Law Act*, *supra* note 317, s 23 (1) (a).

770. See *The Family Law Act*, *supra* note 124, s 22 (5).

Statistics Act,[771] doesn't appear to require that a surrogacy arrangement be in writing.[772]

Brief description of the issue

Part 3 of the *Family Law Act* requires surrogacy agreements to be written agreements. But there are examples of parties using unwritten agreements. In one case, the parties to an unwritten agreement were able to obtain a declaration of parentage from the court. Should part 3 be amended to address unwritten surrogacy agreements?

Discussion of options for reform

There are two options at the ends of a spectrum to consider, along possibly with a range of other approaches between these two.

One option that could be considered would be to strike out the references to *written* in front of *agreement* in the provisions of part 3 that deal with surrogacy. This would effectively treat written and unwritten surrogacy agreements the same. Such an approach would be consistent with the traditional views of contract law, which only required a small number of types of contacts to be in writing.[773]

But this option would represent a significant change to the law, which could be seen to have several disadvantages. These disadvantages would tie into the reasons for requiring written agreements in part 3 in the first place. The judgment noted earlier granting a declaration of parentage to parties to an unwritten surrogacy agreement actually summarizes these reasons well. As the court noted, "[t]he provisions in s. 29 are intended to provide a clear path for all persons concerned as to what will happen upon the child's birth and what rights will arise on the part of the respective

771. See *supra* note 131.

772. See *Birth Registration Regulations*, *supra* note 132, s 5 (2) ("On application by the intended parents in a surrogacy arrangement, the court may make a declaratory order with respect to the parentage of the child if all of the following apply: (a) the surrogacy arrangement was initiated by the intended parents; (b) the surrogacy arrangement was planned before conception; (c) the woman who is to carry and give birth to the child does not intend to be the child's parent; (d) the intended parents intend to be the child's parents; (e) one of the intended parents has a genetic link to the child."). See also, above, at 30–31 (briefly discussing Access to Justice and Law Reform Institute of Nova Scotia project reviewing Nova Scotia's parentage legislation.

773. See John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) ("Although the common law no longer requires that agreements must be recorded in writing in order to be enforceable, there are a number of statutory schemes that require certain types of agreements to be written in form" at 117). See also *Law and Equity Act*, *supra* note 106, s 59.

parties."[774] Further, "[t]he requirement of a written agreement has the salutary effect of clearly setting out the expectations and intentions of the parties before the conception of a child," while "[a] lack of a written agreement raises the risk that a surrogate mother will have a change of heart and that there will be a contest concerning parentage once the child is born."[775] Embracing the first option would run the risk of losing a good deal of this clarity.

At the other end of the spectrum is a choice to retain the status quo. This would retain the references to *written* agreements in section 29. Parties to an unwritten surrogacy agreement would be able to seek a court declaration of parentage under section 31. The court would decide, on a case-by-case basis, whether to grant a declaration. This approach would continue to create strong incentives to use written agreements. It would benefit from the advantages in certainty and clarity that written agreements hold over unwritten agreements. But this approach could be faulted for doing little to address parties to unwritten agreements.

Between these two options there are a range of other options that could be considered involving some level of regulation of unwritten agreements. Section 29 could be amended to recognize that unwritten agreements are used and are acceptable in some cases. It would then have to spell out when these unwritten agreements could be brought within the scope of the section. But it could be a difficult task to identify features of unwritten agreements that would be needed to bring them within section 29.

The committee's tentative recommendation for reform

The committee favoured retaining the status quo on this issue. The committee came to this decision mainly due to concerns about what could follow in the wake of loosening the requirement that surrogacy agreements be written.

The committee noted that surrogacy can be rife with vulnerability. Allowing unwritten agreements in this area could lead to exploitation and abuse. Unwritten agreement would also pose significant administrative problems for the vital statistics agency. Finally, there is a danger that this proposal could end up being self-defeating, as the parties to an unwritten agreement end up in court to settle any disputes over the terms of their agreement.

774. *Re KG*, *supra* note 298 at para 46.

775. *Ibid*.

The committee tentatively recommends:

27. Section 29 of the Family Law Act, which deals with surrogacy arrangements, should not be amended to address unwritten surrogacy agreements.

Should part 3 contain provisions regarding the witnessing of written agreements?

Background information

Rationale for witnessing requirements. Legal documents sometimes require a person's signature to be witnessed. Whether or not a contract should be witnessed is usually left to the parties to determine. Legislative requirements for witnessing tend to be a feature of life- and estate-planning documents, such as powers of attorney,[776] representation agreements,[777] and wills.[778]

A law-reform report on powers of attorney that delved into the purposes of witnessing requirements made a number of comments that can be helpfully applied to this issue for reform.[779]

The main role of a witness is to authenticate a signature on a document.[780] Witnesses can also play a number of the following subsidiary roles:

- confirm the absence of physical duress;
- confirm the identity of the donor [i.e., the person who gives a power of attorney; for an agreement, the equivalent person is called a *party*] and minimize the risk of forgery;
- may serve to impress upon the donor the seriousness of the proposed action; . . .
- provide evidence of authenticity to third parties relying on the [enduring power of attorney]; . . .
- may discourage a fraudulent prospective attorney by forcing the attorney to justify the attorney's actions to the witnesses; . . .

776. See *Power of Attorney Act*, *supra* note 397, ss 16 (1), 17 (1).

777. See *Representation Agreement Act*, RSBC 1996, c 405, s 13.

778. See *Wills, Estates and Succession Act*, *supra* note 545, ss 37 (1), 40.

779. See Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform* (2008), online: <alri.ualberta.ca/2008/06/enduring-powers-of-attorney-areas-for-reform/>.

780. See *ibid* at 19.

- can protect the donor from manipulation because they must be satisfied that the donor is acting freely and competently; . . .
- attest to the apparent capacity of the donor to sign.[781]

Part 3 and witnessing of surrogacy and other parentage agreements. Section 29—the section of part 3 that deals with parentage and surrogacy arrangements—doesn't require a surrogacy agreement to be witnessed. Section 30, which deals with parentage if an "other" arrangement for parentage is used, also calls for "a written agreement"—and it doesn't contain a requirement that a party's signature must be witnessed.[782]

What does other Canadian parentage legislation say about requiring a surrogacy or other parentage agreement to be witnessed? Five provinces, apart from BC, have legislation that addresses the contents of surrogacy or other parentage agreements. None of these provinces (Saskatchewan, Manitoba, Ontario, Prince Edward Island, and Nova Scotia) requires a surrogacy or other parentage agreement to be witnessed.[783]

Brief description of the issue

Witnessing requirements can bolster agreements in many ways. Should part 3 be amended to require that signatures to a surrogacy agreement must be witnessed?

Discussion of options for reform

There are two options to consider for this issue: (1) propose amending sections 29 and 30 in part 3 by adding a witnessing requirement for surrogacy and other parentage agreements; or (2) retain the status quo.

A witnessing requirement would draw on the advantages listed earlier. It would provide a means for authenticating signatures. And it could also supply some safeguards against duress, manipulation, and other forms of abuse. But a legislative

781. *Ibid*.

782. See *supra* note 1, s 30 (1).

783. One of the conditions in Saskatchewan's legislation is that "the surrogacy agreement meets the prescribed requirements" (*The Children's Law Act, 2020*, *supra* note 120, s 62 (2) (c); see also *ibid*, s 61 (2) (b)—equivalent provision for parentage agreements). Formal requirements, such as witnessing, are often set out in regulations prescribed under a statute. But, in this case, Saskatchewan doesn't appear to have adopted any regulations applying to surrogacy or parentage agreements. See also Manitoba: *The Family Law Act*, *supra* note 124, s 22 (4) (c) (surrogacy agreement must include "any provision required by the regulations"). Manitoba also doesn't appear to have adopted any regulations relating to surrogacy agreements.

requirement could be criticized for adding time and (potentially) expense to surrogacy and other parentage agreements. And support for it would likely turn on how pressing people see concerns about authenticating signatures and avoiding abuses to be in relation to surrogacy or other parentage agreements. If these aren't pressing problems, then there likely would be little support for amending the legislation to add a witnessing requirement.

The committee's tentative recommendation for reform

The committee favours option (2), which would not require witnesses for surrogacy and other parentage agreements. However, this opinion is contingent on parties being required to obtain independent legal advice.

If independent legal advice is not legislatively required, the committee feels it would be desirable to establish this best practice as a legislative requirement.

Surrogacy and other parentage agreements are important, far-reaching legal documents. Creating a sense of formality around the execution of these agreements would benefit the parties, as would the added certainty that comes from using witnesses.

The committee also noted that provisions currently in the *Family Law Act* allude to the witnessing of agreements regarding property division and spousal support.[784] Witnessing (along with other formalities) bolsters the credibility of these agreements, setting a higher hurdle for a litigant to clear in arguing for a court to set the agreement aside. In the committee's view, witnessing could play a similar role for surrogacy and other parentage agreements.

However, if the legislation requires independent legal advice, this will adequately protect vulnerable parties. Further, it will avoid the addition of a technical requirement that may be overlooked by some individuals, and thus require a court application to correct.

The committee tentatively recommends:

28. If independent legal advice is required for agreements under Sections 29 and 30 of the Family Law Act, which deal with parentage in cases of surrogacy arrangements and other arrangements, these provisions should not be amended to add a requirement

784. See *supra* note 1, ss 93 (1), 164 (1) (reading the same in each case: "[t]his section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person").

that the signatures to the written agreements referred to in those sections must be witnessed by at least one other person.

Chapter 9. Independent Legal Advice and Counselling

Introduction

With this chapter, the consultation paper turns its attention to a pair of emerging issues. Currently, part 3 of the *Family Law Act* doesn't require either independent legal advice or counselling. Both are in widespread use, nevertheless, whenever parents conceive by assisted reproduction. This chapter considers whether the legislation should be amended to require one or both.

Issues for Reform

Should part 3 contain a requirement for independent legal advice?

Background information

Independent legal advice is when "each person involved in a legal issue gets [advice] from their own lawyer."[785] This may include disputes, as in litigation. It may also include other legal contexts, like contract negotiation.

Current law in British Columbia. Part 3 of the *Family Law Act* does not contain the words *independent legal advice*.[786] However, when speaking to a lawyer or a clinic in British Columbia, independent legal advice will likely be recommended.[787]

Relevant laws in other jurisdictions. Several provinces require independent legal advice in certain circumstances. For example, Saskatchewan's parentage legislation explicitly requires a surrogate and intended parents to receive legal advice "before entering into the surrogacy agreement."[788] The act otherwise does not mention legal advice or how it must be proven. However, the *Children's Law Regulations, 2021*, set

785. Legal Aid BC, "What is independent legal advice?" (last modified 30 May 2019) online: *Family Law in BC* <family.legalaid.bc.ca/bc-legal-system/legal-help/legal-advice-and-legal-aid/what-independent-legal-advice> at para [3].

786. Independent legal advice is not mentioned anywhere in the act. Counselling is mentioned in relation to parenting time (see *supra* note 1, ss 61 (2) (b), 61 (3), 63 (2)). The act also enables a court to order parties to obtain counselling (see *ibid*, s 224).

787. See Carsley, *Surrogacy in Canada*, *supra* note 536.

788. *The Children's Law Act, 2020*, *supra* note 120, s 62.

out contractual requirements for sperm donation by sexual intercourse, parentage agreements (under section 61), and surrogacy agreements.[789] This includes "a certificate of independent legal advice for each party" in all the above situations.[790]

Manitoba's parentage legislation requires independent legal advice for the surrogate and intended parents, "and a certificate to that effect must be attached to the agreement."[791] However, like Saskatchewan's legislation, the act otherwise does not mention independent legal advice. Note that Manitoba does not permit multiple-parent arrangements or sperm donation by sexual intercourse.

Ontario's act also only references independent legal advice with respect to surrogacy.[792] The provision requires legal advice for the surrogate and intended parents but does not specify that it must be proven by a certificate or other method.

PEI requires that the surrogate and intended parents "complete a declaration in the form approved by the Director" indicating that they completed an agreement as required and obtained independent legal advice on the agreement and "the legal effect of relinquishing the child."[793]

Brief description of the issue

The *Family Law Act* does not require independent legal advice in part 3. Other provinces have begun to include independent legal advice as a requirement in parentage legislation, but primarily in the context of surrogacy.

Should BC require independent legal advice for the following parties: (1) surrogates; (2) intended parents; (3) donors; (4) donors by sexual intercourse?

Discussion of options for reform

The options to consider in response to this issue for reform are: (1) amend part 3 to require independent legal advice for surrogates; (2) amend part 3 to require independent legal advice for intended parents; (3) amend part 3 to require independent legal advice for donors; (4) amend part 3 to require independent legal advice for sperm donors by sexual intercourse; (5) maintain the status quo.

789. Sask Reg 9/2021.

790. *Ibid*, ss 6, 7, 8.

791. *The Family Law Act, supra* note 124, s 22 (5).

792. See *Children's Law Reform Act, supra* note 115, s 10.

793. *Children's Law Act*, *supra* note 317, s 23.

Surrogates. As discussed above, surrogacy is the area targeted by most other jurisdictions for independent legal advice.

One reason for this is the perceived vulnerability of surrogates.[794] Commentary and public debate often express concerns about the risk of exploitation of surrogates and children.[795]

These concerns are not unfounded. Some surrogates do experience exploitation and suffer coercion due to power imbalances.[796] However, there is also social-science research that paints a very different picture of surrogates: namely, that they are individuals in their thirties, who've already built their families, and who see surrogacy as a gift to infertile or same-sex couples.[797]

A second reason to require independent legal advice is the legal stakes surrounding surrogacy. Surrogacy contains criminal and security-of-the-person implications. Individuals engaging in surrogacy arrangements are not always familiar with these concerns. For example, lawyers participating in a research study shared that most of the contracts brought in by clients were in fact illegal because they provided for payment.[798] Many such contracts were downloaded off the internet through American sources. Further, often agreements would contain provisions that were inappropriate, including attempts to dictate the surrogate's behaviours, diet, and medical choices while pregnant.[799]

Independent legal advice is also important because surrogacy agreements are increasingly complex. One scholar estimated the average contract at 30–60 pages in length.[800] Moreover, lawyers have expressed repeatedly that clients do not read agreements. In other words, most surrogates and intended parents do not know what is in the agreement let alone understand the content.[801]

794. See Carsley, *Surrogacy in Canada*, *supra* note 536 at 45.

795. See Motluk, *supra* note 501.

796. See *ibid.*

797. See Busby & Vun, *supra* note 484.

798. See Carsley, *Surrogacy in Canada*, *supra* note 536 at 131.

799. See *ibid* at 128. See also *ibid* at 217.

800. *Ibid* at 148.

801. See *ibid* at 139.

One drawback is that surrogacy agreements are seen as largely unenforceable (although BC's *Family Law Act* does not expressly state this).[802] Ontario, Saskatchewan, and Manitoba all require independent legal advice for the intended parents and the surrogate—while simultaneously stating that the agreements are not enforceable at law.[803]

This causes confusion among parties.[804] On the one hand, if parties believe they must have an agreement, they often procure one from the internet as discussed above. On the other hand, if clients are aware that the agreements are unenforceable, they can be apathetic toward investing in legal advice as the agreement is perceived as symbolic.[805]

Nevertheless, a primary value of independent legal advice is to set expectations.[806] Regardless of enforceability, contract negotiation proved useful in determining whether the arrangement was likely to be successful. For example, where the parties had completely opposite views on abortion, the surrogacy arrangement often did not proceed.[807] Moreover, contract negotiation allows the parties to clarify expectations and roles surrounding potential challenges (e.g., medical decisions after birth), thereby avoiding conflict later.[808]

Intended parents. Much of the above discussion is relevant to intended parents in the surrogacy context.

While the vulnerability of the surrogate is generally discussed and well understood, the risks associated with becoming an intended parent are less apparent. This is a key reason to obtain independent legal advice.

One concern is that intended parents are potentially on the hook for criminal charges if a surrogacy arrangement is deemed to cross the line.[809] As the issue of

802. See *ibid* at 164.

803. See Ontario: *Children's Law Reform Act, supra* note 115, s 10 (9); Manitoba: *The Family Law Act, supra* note 124, s 22 (5); and Saskatchewan: *The Children's Law Act. 2020*, *supra* note 120, s 62 (12).

804. See Carsley, *Surrogacy in Canada*, *supra* note 536.

805. See *ibid*.

806. See *ibid* at 129.

807. See *ibid* at 154.

808. See *ibid.*

809. See *ibid* at 240.

expenses is extremely complicated, intended parents are best guided by legal counsel. This is not only to determine what expenses are appropriate, but also to understand just how costly expenses can become.[810]

A second concern is around results. In a research paper that interviewed lawyers across Canada, there was much debate around who would win a battle for parentage in surrogacy litigation.[811] Given the lack of published cases, lawyers struggled to adequately advise clients absent the court's direction.[812] Intended parents may not appreciate the possibility that they may not obtain parentage post birth if litigation ensues.

Beyond surrogacy, intended parents are included in the section 30 framework for multiple-parent configurations. Legal support in this context is important to ensure parties check the boxes necessary to become legal parents.[813] Further, as discussed earlier, independent legal advice is valuable to ensure clients understand the uncertain nature of the agreements. Many families drafting section 30 pre-conception agreements include terms on issues like parenting time, support, and relocation.[814] While this is a general practice, it appears that only the terms relating to legal parentage are actually enforceable.[815] This is due to section 44 of the *Family Law Act*, which states that agreements between guardians respecting parenting arrangements are "binding only if the agreement is made (a) after separation, or (b) when the parties are about to separate, for the purpose of being effective on separation."[816] It is important for parties to understand what aspects of their agreements are enforceable.

Donors. There is little discussion of donors in the context of independent legal advice.

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810. See Motluk, *supra* note 501.

811. See Carsley, *Surrogacy in Canada*, *supra* note 536 at 211.

812. See *ibid* at 185.

813. See e.g. *Cabianca*, *supra* note 630, in which the three-parent configuration failed to obtain an agreement for the first child, then did an online registration of the second child without realizing it could not be amended—thus effectively excluding one intended parent from legal parentage for both children.

814. See Kelly, "Multiple-Parent Families," *supra* note 186 at 589.

815. See *ibid*.

816. *Supra* note 1, s 44.

There are two kinds of donors—known and unknown. Unknown (or anonymous) donors present a particular challenge.[817] For example, a large portion of donor sperm is sourced from the United States. As a result, there can be complications in locating a donor to ensure independent legal advice was obtained. Moreover, as litigation largely involves known donors, it is unclear if an anonymous donor is in a position of risk requiring independent legal advice.

Known donors are generally advised to obtain independent legal advice, although not required by the *Family Law Act*. While the legislation clearly indicates that donors are not parents, legal advice ensures that individuals understand the implications of their decisions. Litigation surrounding known donors has generally been around parties changing their mind (or disagreeing) as to status once the child is born. By obtaining independent legal advice, parties can ensure they are on the same page regarding care and parentage of the child.

Donors (as they are called) involved in section 30 agreements should obtain independent legal advice for the same reasons listed for intended parents.

Sperm donors by sexual intercourse. Sperm donation by sexual intercourse can present unique challenges.[818] A major concern is with parties conceiving through sexual intercourse, and the sperm contributor later claiming to be a donor rather than a parent to avoid responsibility.

A pre-conception agreement is of considerable assistance in managing these concerns. However, where parties draft their own agreement, or where the donor is given an agreement by a birth parent and fails to receive independent legal advice on its contents, issues can later arise.

Unfortunately, individuals may choose to conceive through sexual intercourse due to financial constraints. Financial limitations can impact a party's ability to obtain independent legal advice. Moreover, parties using sperm donation by sexual intercourse may be less likely to attend at a clinic or other location that indicates the legal requirements associated with donation. Thus, this group may be at particular risk to fall through the cracks.

Compliance. As discussed above, PEI, Saskatchewan, and Manitoba require evidence that the parties received independent legal advice—either a certificate

817. See Kelly, "Multiple-Parent Families," *supra* note 186 at 570–571.

818. See, above, at 67–74 (discussion of sperm donation by sexual intercourse and the committee's tentative recommendation to amend part 3 of the *Family Law Act* to allow it in BC).

(Manitoba and Saskatchewan)[819] or a declaration (PEI).[820] Other provinces requiring independent legal advice do not require evidence.

There are obvious benefits to requiring evidence that the parties have received independent legal advice. Clarity is one such benefit. Another benefit is that parties take the requirement seriously because it must be proven.

However, there are also pitfalls. As noted in earlier, increasing legal requirements inevitably result in some individuals failing to meet them. For example, individuals who are donating sperm by sexual intercourse, or otherwise conceiving outside a clinic setting may simply be unaware of legal requirements. Moreover, even individuals who are aware of legal requirements may fail to meet them.

For example, in one case, intended parents failed to follow various legal requirements for both of their children, and thus parentage was denied to the sperm provider. The first child was conceived without an agreement in place pre-conception.[821] The second child's birth was registered online, where only two parents could be listed (with the erroneous assumption it could be later modified).[822]

In that case, the parties applied to court under section 31 to establish parentage for all three parents. The court was clear that it is important to meet legislative requirements, and remedies should not be assumed:

> [t]he requirements of s. 30 of the *FLA* are set out in detail precisely because the Legislature deemed those rules would best address situations that arise as a result of assisted reproductions. I agree with Fitzpatrick J. that this decision should not be interpreted as a license for parties to ignore the technical requirements of Part 3. Section 31 should not be used to circumvent the legislative scheme. This Court should not be expected to remedy every situation where an agreement regarding parentage is not executed prior to conception. *While each case will be decided on its own facts, relief should not be presumed.*[823]

819. See Saskatchewan: *Children's Law Regulations, 2021*, *supra* note 789, ss 6, 7, 8; Manitoba: *The Family Law Act, supra* note 124, s 22 (5).

820. See *Children's Law Act*, *supra* note 317, s 23.

821. See *Cabianca, supra* note 630 at para 6.

822. See *ibid*.

823. *Ibid* at para 49 [emphasis added].

While a pre-conception agreement is a different matter than independent legal advice, the above still raises the question whether the legislation should include backup alternatives where parties have failed to meet the legal requirements.

At present, other provinces do not appear to have any saving provisions to remedy where parties have failed to obtain independent legal advice. However, as discussed above, several provinces also do not require clear evidence that independent legal advice was actually obtained.

The committee's tentative recommendation for reform

The committee wrestled with this issue. In the end, it decided to propose that part 3 require independent legal advice.

While the committee discussed independent legal advice specifically in relation to participants in assisted reproduction—considering the positions of surrogates, donors, and intended parents in turn—it decided that its proposals should call for independent legal advice for all parties to any of the agreements required under part 3.

Even though there may be differences between these parties, they all share in common entering into a complex, wide-ranging legal agreement. Both the parties to these agreements and the children conceived by assisted reproduction by those parties will benefit from having legal advice.

The committee also noted that, as it has considered many of the issues for reform in this consultation paper, it had to address the vulnerability of a person or group of people. In the committee's view, independent legal advice can act as a curative for vulnerability. It is a more effective means to protect vulnerable people than taking a restrictive view of parentage.

The committee was concerned about the cost of its tentative recommendation. Adding another layer of cost to an already expensive procedure did give the committee some pause. But, in the end, it viewed the benefits of independent legal advice as outweighing the costs.

The committee tentatively recommends:

29. Part 3 of the Family Law Act should be amended to require independent legal advice for all parties to legal agreements required under part 3.

Should part 3 contain a requirement for counselling?

Background information

Counselling "is the skilled and principled use of relationship to facilitate self-knowledge, emotional acceptance and growth and the optimal development of personal resources."[824]

In BC, counsellors are not regulated under the *Health Professions Act*.[825] However, the BC Association of Clinical Counsellors offers voluntary membership to individuals who meet the requirements.[826]

Current law in British Columbia. Part 3 of the *Family Law Act* does not mention counselling. However, akin to legal advice, when engaging with a clinic in British Columbia, counselling is often a pre- or co-requisite to obtaining fertility treatments.[827]

Counselling is mentioned elsewhere in the act.[828] However, counselling is not defined, nor does the act require that a counsellor be approved or have certain qualifications (unlike other jurisdictions, as will be discussed below).

Relevant laws in other jurisdictions. Parentage legislation across Canada does not explicitly reference counselling in the parentage context.

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824. Canadian Counselling and Psychotherapy Association, "Who are Counsellors/Psychotherapists?" (last visited 2 August 2023), online: *Canadian Counselling and Psychotherapy Association* <ccpa-accp.ca/profession-and-regulation/> at para [1].

825. See British Columbia Association of Clinical Counsellors, "Regulation" (last visited 2 August 2023), online: *British Columbia Association of Clinical Counsellors* <bcacc.ca/regulation/> at para [1]. See also *Health Professions Act*, RSBC 1996, c 183. In November 2022, BC enacted the *Health Professions and Occupations Act*, SBC 2022, c 43 (not in force), which will repeal and replace the *Health Professions Act* when it's brought into force. The *Health Professions and Occupations Act* also creates a framework for the future regulation of counsellors in BC. See Government of British Columbia, Ministry of Health, News Release, 2022HLTH0202-001566, "Patients the focus of new health legislation" (19 October 2022), online: <news.gov.bc.ca/releases/2022HLTH0202-001566> at para [4].

826. For example, a master's degree in an approved field, completion of required prerequisite courses, and clinical supervision.

827. See Carsley, *Surrogacy in Canada*, *supra* note 536.

828. See e.g. *Family Law Act, supra* note 1, s 61 (denial of parenting time or contact).

Québec's *Civil Code* currently does not require counselling. However, proposed reforms for the surrogacy provision (as discussed earlier)[829] would require the surrogate and the intended parents to "obtain information about the psychosocial consequences of the parental project and the ethical questions it raises."[830] The professional conducting the assessment must be "a member of a professional order designated by the Minister of Justice."[831]

As noted earlier, the American *Uniform Parentage Act* language does require both the surrogate and any intended parent to undergo a "mental health consultation by a licensed mental health professional" as a prerequisite.[832] What this consultation entails is not specified.

In New Zealand, surrogacy is regulated by the *Human Assisted Reproductive Technology Act 2004*. Gestational surrogacy arrangements usually require approval by the Ethics Committee on Assisted Reproductive Technology, which uses procedures set out by order.[833] In 2020, new guidelines were released for approval regarding gestational surrogacy. This includes joint and independent counselling from an approved individual. The counsellor reports back to the Ethics Commission.[834]

Brief description of the issue

The *Family Law Act* does not require counselling in Part 3. Some jurisdictions are moving toward a counselling requirement in the context of surrogacy.

Should BC require counselling for the following parties: (1) surrogates; (2) intended parents; (3) donors; (4) sperm donors by sexual intercourse?

829. See, above, at 29–30 (briefly discussing the development of Québec's parentage legislation).

830. See Carsley, *Surrogacy in Canada*, *supra* note 536 at 55.

831. See QC Bill 2, *supra* note 127, cl 96 (proposing the addition of new art 541.29 to the *Civil Code of Québec*, *supra* note 126. After the committee had completed its review of this issue, this provision was enacted in Québec. See QC Bill 12, *supra* note 130, s 20 (adding new art 541.11 to the *Civil Code of Québec*, *supra* note 126).

832. Uniform Parentage Act (2017), *supra* note 156, § 802.

833. See Te Aka Matua o te Ture–New Zealand Law Commission, *Review of Surrogacy*, Report 146 (April 2022), online: <lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-Report146-Review-of-Surrogacy.pdf> at 97.

834. See *ibid* at 99.

Discussion of options for reform

The options to consider in response to this issue for reform are: (1) amend part 3 to require counselling for surrogates; (2) amend part 3 to require counselling for intended parents; (3) amend part 3 to require counselling for donors; (4) amend part 3 to require counselling for sperm donors by sexual intercourse; (5) maintain the status quo.

There are general benefits and limitations to a counselling requirement.

An obvious benefit of counselling is that it offers an additional level of protection to vulnerable parties and assists in preventing later conflict. Counselling should not be conflated with or covered off by independent legal advice. As noted by one scholar, lawyers do not possess the skills necessary to guide parties through the myriad of psychological issues associated with becoming a parent or forfeiting parenting entitlements.[835]

A second benefit is that counselling may strengthen the relationship between the parties. In the surrogacy context, it has been noted that a strong relationship between surrogate and intended parents is the best indicator of success.[836]

Finally, according to one scholar, counselling is sometimes used to overcome disputes between parties (in the context of surrogates and intended parents).[837] By requiring counselling, this may establish relationships that can be later used to avoid court.

However, there are also drawbacks to requiring counselling. While counselling is valuable, it is also expensive, time-consuming, and an additional hurdle. Heterosexual couples conceiving through sexual intercourse do not require counselling to have a child. Thus, it could be implied that those not conceiving in the traditional manner are assumed to need psychological help.

In addition, a counselling requirement may be distressing to certain populations. For example, a family involving marginalized or poorly understood individuals (e.g., those identifying as nonbinary, trans, or aromantic) may fear being deemed

835. See Busby & Vun, *supra* note 484 at 94.

836. See Andrew W Vorzimer, "The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surrogacy Contract" (1999) 21:2 Whittier L Rev 415 at 429.

837. See Carsley, *Surrogacy in Canada*, *supra* note 536.

unhealthy or unfit to become parents simply because of their identity or family model.

Further, parties can feel that they must pass the counselling test in order to be permitted to proceed with fertility treatments and their goals of becoming parents. This concern may not engender the most honest discussion with a counsellor.

Surrogates. Much of the discussion undertaken under independent legal advice is relevant to counselling. Surrogates are often perceived as a vulnerable population. For this reason, scholars recommend safeguards to ensure an arrangement is not coercive.[838]

Much of the discussion around counselling focuses on ensuring potential issues are discussed prior to an arrangement proceeding. In other words, much like independent legal advice, it is seen as a way to prevent later conflict.[839]

Intended parents. Likewise, many of the arguments for independent legal advice are relevant to counselling.

For a section 30 agreement, counselling is often required by a clinic prior to beginning the process. Counselling is valuable in establishing whether the multi-party grouping is suited to parenting together. However, as discussed above, it may also have limitations including fear of judgment or lack of honesty.

Donors. Counselling has different implications for the two types of donors.

For unknown donors, counselling may be of value prior to donating in order to understand the potential consequences. For example, if the donor has agreed to identification and contact, this may have psychological implications worthy of investigation with a counsellor.[840]

For known donors, counselling may be of assistance in understanding the potential psychological consequences of becoming a donor—for example, the implications of relinquishing parentage to a biologically related child.[841]

838. See *ibid* at 122.

839. See Busby & Vun, *supra* note 484 at 92.

840. See Kelly, "Is It Time to Tell?," *supra* note 342 at 186.

841. See *ibid* at 185.

With respect to section 30 agreements, counselling is often required by clinics prior to beginning the process. As the donor is also an intended parent, counselling is valuable in establishing whether the multi-party grouping is suited to parenting together.

Sperm donors by sexual intercourse. In some respects, sperm donors by sexual intercourse may have more need of counselling than donors contributing through assisted reproduction. This may be of special concern where a party is donating through sexual intercourse to a former romantic partner. There are many possible ways this could lead to confusion around expectations and roles.

Moreover, as discussed earlier in relation to surrogacy, there may be instances where sexual intercourse is an issue. For example, where donors have familial or other close relationships, sexual intercourse may cause psychological distress. Likewise, where a donor is a relative stranger, it may be distressing for parties to engage in sexual intercourse.[842]

The committee's tentative recommendation for reform

On this issue, the committee decided to propose maintaining the status quo.

The committee is aware that counselling frequently occurs in practice in connection with assisted reproduction. In the committee's view, counselling can be a helpful part of this process. But the committee's concerns aren't with the value of counselling; they are with the implications of making counselling mandatory.

The committee was concerned about what may happen if someone missed a required counselling appointment or if a counsellor were belatedly found out to be unqualified. How would these scenarios affect the child's parentage?

The committee also had concerns about the cost of mandatory counselling adding to costs of an already expensive procedure.

The committee tentatively recommends:

30. Part 3 of the Family Law Act should not be amended to require counselling.

842. See Bewkes, *supra* note 497.

Chapter 10. Language, Definitions, and Interpretation

Introduction

This chapter tackles a couple of big-picture issues for part 3. It begins by considering whether part 3 should be redrafted using gender-neutral terminology. It closes by wrestling with whether part 3 would benefit from a provision listing the part's legislative purposes.

In between these two issues, the chapter considers a pair of issues that look more narrowly at how some specific terms are used in part 3.

Issues for Reform

Should the language of part 3 be made gender neutral?

Brief description of the issue

Part 3 of the *Family Law Act* contains a number of gender-specific terms. *Birth mother*, one of the part's defined terms, fits into this category.[843] Part 3's provision on parentage when assisted reproduction isn't employed sets out presumptions that are meant to determine when "a male person" is "a child's biological father."[844] Finally, the part uses in a number of places a gender-specific pronoun to refer to people collectively.[845]

These terms may create the impression that part 3 excludes transgender and non-binary people. In some cases, their use may no longer reflect the full range of assisted-reproduction options. For these reasons, law-reform organizations have recommended using gender-neutral terms in parentage legislation. Three Canadian provinces have implemented these recommendations in their legislation. Should British Columbia amend part 3 to adopt gender-neutral terminology?

843. See *Family Law Act*, *supra* note 1 s 20 (1) "birth mother" ("means the person who gives birth to, or is delivered of, a child, regardless of whether her human reproductive material was used in the child's conception").

844. See *ibid*, s 26 (2).

845. See *ibid*, ss 20 (1) "donor" ("him or her"), 24 (2) ("his or her").

Discussion of options for reform

At a basic level, the options for addressing this issue can be reduced to two: either (1) amend part 3 to have it adopt gender-neutral terminology or (2) retain the status quo.

In a recent issue paper, the Manitoba Law Reform Commission examined this issue, and it identified a number of concerns with gender-specific terminology. The commission pointed to "emerging issues surrounding gender terminology, sex reassignment and human rights," which may cast the use of gender-specific terminology in parentage legislation in an exclusionary, or even a "discriminatory," light.[846] This terminology has also not kept pace with medical advances in the field of assisted reproduction.[847] Finally, the commission identified using gender-neutral terminology as a remedy to these concerns: "it is in the best interests of children born in these circumstances if the terminology used was sensitive to these matters, so far as possible, so that discriminatory assumptions and inappropriate terms are avoided."[848]

Related issue: using gender-neutral language on forms
The committee's mandate was to review legislation: part 3 of the *Family Law Act*. But gender-specific language isn't limited to legislation. The government bodies responsible for forms—such as the vital statistics agency—should also consider whether gender-neutral language is appropriate for their forms. For example, at present, there can be M, F, X on a birth certificate. So a person is entitled to change the gender to X, after making an application. But there's no parallel provision at birth, to enable parents who want to raise their children outside of the strictures of the gender

In identifying "its preferred approach" to this issue,[849] the Manitoba commission connected its approach to the principle of the best interests of the child. It's worthwhile to examine this option for reform in light of the broader principles that support the specific provisions of BC's parentage legislation.[850]

Arguably, the implementation of each of these principles may be compromised by the use of gender-specific

846. Manitoba Law Reform Commission, *Assisted Reproduction*, *supra* note 90 at 41.

847. See *ibid* ("Eventually, children will be born in Manitoba following the use of assisted reproduction by persons whose reproductive capacity does not match the gender identified on their birth registration documents" at 41).

848. *Ibid* at 41.

849. *Ibid* at ii.

850. See, above, at 26 (listing the principles identified by the government as supporting the development of part 3).

terminology. To the extent that this terminology sends the message that some people are excluded from the scope of part 3, it draws distinctions between children based on the circumstances of their birth in ways that may be seen as unfair and discriminatory. This may have the effect of harming vulnerable persons and undermining family stability and certainty of parental status. Once this uncertainty has crept in, part 3 may no longer provide a comprehensive framework for parentage in all cases, inevitably leading people to turn to the courts to resolve their legal issues.

Finally, it's worth noting that there may be an emerging consensus on using gender-neutral terminology in parentage legislation, as well as in other statutes and regulations. In addition to what the Manitoba commission called its preferred approach to the issue, the Saskatchewan Law Reform Commission has recommended using gender-neutral terminology.[851] And three provinces that have enacted parentage legislation since the advent of part 3 have employed gender-neutral terminology: Ontario in 2016,[852] Saskatchewan in 2020,[853] and Manitoba in 2021.[854] British Columbia has recently amended a swath of regulations,[855] moving to "inclusive language that acknowledges gender equity and diversity."[856] This work is ongoing.[857]

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851. Law Reform Commission of Saskatchewan, *supra* note 119 at 38 ("The Commission recommends that the terms 'parent' and 'birth parent' be used in the *CLA, 1997* to replace 'mother' and 'father' to the extent possible. If it remains necessary to use the terms 'father' and 'mother' in some instances, the Commission recommends the *CLA, 1997* refer to 'a father/mother' as opposed to 'the father/mother.' "). See also Access to Justice & Law Reform Institute of Nova Scotia, *supra* note 36 (tentatively recommending that Nova Scotia's "[p]arentage legislation should use the word 'parent' and 'birth parent' instead of 'father,' 'mother' and/or 'birth mother' " at 199).

852. See *Children's Law Reform Act*, *supra* note 115, ss 1–17.6.

853. See *The Children's Law Act, 2020*, *supra* note 120, ss 55–77.

854. See *The Family Law Act*, *supra* note 124, ss 13–34.

855. See British Columbia, Ministry of Jobs, Economic Recovery and Innovation, News Release, "Gendered language changes reduce barriers" (10 March 2021), online: <news.gov.bc.ca/releases/2021JERI0020-000443> ("Six hundred instances of outdated gendered language in nearly 70 regulations have been addressed through the Better Regulations for British Columbians annual regulatory process in 2021. The changes will take effect on March 11, 2021" at para [10]).

856. *Ibid* ("Gendered words have been changed to inclusive language that acknowledges gender equity and diversity. For example, terms like 'he' or 'she,' 'brother' and 'wife' have been updated with more neutral language to consider all gender identities" at para [5]).

857. See *ibid* ("This is the start of a process to remove a remaining estimated 3,400 instances of gendered language in regulations and legislation" at para [11]). See also *Miscellaneous Statutes (Modernization) Amendment Act, 2023*, SBC 2023, c 10 (latest statute in the process; adopted after the committee had considered this issue).

In contrast, there is not much commentary setting out a positive case for using gender-specific language in part 3. Two sources that discuss the policies part 3 was intended to implement don't explain why the current approach to the part's language was adopted.[858]

The one law-reform organization that gives some support to a gender-specific approach to language is the Uniform Law Conference of Canada. Its *Uniform Child Status Act 2010* has been acknowledged as a source for part 3.[859] One of the principles underlying this uniform act involves "recogniz[ing] that women and men perform distinct roles in reproduction, which may merit distinct treatment for the woman who gives birth."[860]

Commentary on the uniform act doesn't connect this principle with employing gender-specific language. (In fact, it doesn't explain how this principle would be implemented by specific legislative provisions.) The ULCC also didn't grapple with whether this principle should override the concerns about potentially excluding some cases from the scope of parentage legislation. But it's likely that the strict application of this principle would form the basis of any argument to retain the terminology currently used in part 3 of the *Family Law Act*.

The committee's tentative recommendation for reform

The committee favoured amending part 3 to move to gender-neutral language.

In the committee's view, gender-neutral language is more inclusive. It's also clearer for medical practitioners. In contrast, the current gender-specific language appears to ignore—or even exclude—trans and non-binary people.

Finally, amending part 3 would be consistent with a government-wide initiative to revise BC's legislation and adopt gender-neutral language.

858. See *Proposals for a new Family Law Act*, *supra* note 3; Ministry Transition Guide, *supra* note 646.

859. See *Proposals for a new Family Law Act*, *supra* note 3 at 31; Ministry Transition Guide, *supra* note 646 at part 3 (introduction).

860. Uniform Law Conference of Canada, *Civil Section Minutes for the 2010 Halifax NS Annual Meeting* (August 2010), online: <ulcc.ca/images/stories/2010_pdf_en/2010ulcc0029_Civil_Section_Minutes.pdf> at 6. See also *Assisted Human Reproduction Act*, *supra* note 37, s 2 (c). But it's worth noticing that this principle didn't make it into the list of principles underlying the development of part 3. See *Proposals for a new Family Law Act*, *supra* note 3 at 31.

The committee tentatively recommends:

31. Part 3 of the Family Law Act should be amended to use gender-neutral terminology.

Should terms used in part 3 to identify people aim primarily to describe a person's role in conception and birth?

Brief description of the issue

This issue is largely a follow-up issue to the previous one. Part 3 currently uses a number of terms (such as "birth mother" and "biological father") that are both gender-specific and that identify people by social roles. The tentative recommendation for the previous issue for reform was to move part 3 away from gender-neutral terminology. In making this move, should part 3 also move toward identifying people by their functional roles in conception and birth?

Discussion of options for reform

This issue largely poses a yes-or-no question.

Some parentage legislation in Canada uses gender-neutral terminology but continues to identify people essentially by social convention (e.g., "birth parent"). The concern is that this terminology might not align with the legal rules being set out in the legislation (e.g., a "birth parent" might not legally be the child's parent in some circumstances). A clearer focus on the person's role in conception and birth (e.g., using "person who gives birth to the child")[861] would likely result in less potential confusion.

On the other hand, it could be argued this approach results in more clinical and wordy provisions, which go against the goal of drafting legislation in plain-language terminology.

The committee's tentative recommendations for reform

The committee favoured a functional approach to part 3's main terms, which would emphasize the person's role in conception and birth. In its view, such an approach is clearer and would result in less confusion.

861. See Alberta: *Family Law Act*, *supra* note 232, s 5.1 (1) (d).

The committee tentatively recommends:

32. Terms should be used which clearly describe a person's role in the conception and birth, such as "the person who gave birth to the child" and "the person whose sperm resulted in the conception."

Should the term "parent" be limited in part 3 to just descriptions of the parent-child relationship?

Brief description of the issue

This issue, like the previous one, examines a relatively narrow drafting issue. Part 3 deals with parentage, so one of the key terms used in that part is *parent*. Should the term be restricted just to describe the parent-child relationship?

Discussion of options for reform

There is only a fairly limited range of options for this issue. Conventions for drafting legislation in Canada emphasize the importance of using key statutory terms for a single purpose. It is undesirable for a key term in legislation to have multiple meanings.

The committee's tentative recommendations for reform

In the committee's view, *parent* is one of the key terms in part 3. It shouldn't be used in a casual way. Care should be taken to ensure that it just describes the parent-child relationship.

The committee tentatively recommends:

33. The term "parent" should only be used where a parent-child relationship is intended.

Should part 3 of the Family Law Act be amended by adding a new section setting out the part's purposes?

Background information on legislative purposes

Defined—statement declaring statute's purposes. A list of purposes is simply a statement in a statute that sets out the purposes that moved the legislature to enact the statute. The purposes are, broadly, the reasons for enacting the statute or the goals that the legislature hoped to achieve by enacting it.

A section as opposed to a preamble. A statutory list of purposes is a provision within the statute. That is, it's a section like all the other sections in the act. This quality stands in contrast to a preamble, which is a statement that sometimes appears before the start of a statute but that is considered not to form part of the statute itself.

Example from BC legislation. For an example of a list of purposes, consider this section from the *Local Government Act*:

> **Purposes of this Act**
>
> **1** The purposes of this Act are
>
> (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,
>
> (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and
>
> (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.[862]

Statements of purposes help courts to interpret legislation. Legislative statements of purposes are mainly intended to bridge a gap between two pillars of Canada's system of law and government. While legislatures (such as the Legislative Assembly of British Columbia) are responsible for enacting legislation, the interpretation of that legislation "is the domain of the courts."[863]

The purposive approach to statutory interpretation. Canadian courts have consistently said that, in interpreting legislation, "there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in

862. RSBC 2015, c 1, s 1.

863. British Columbia, Ministry of Justice, Office of Legislative Counsel, *A Guide to Legislation and the Legislative Process in British Columbia: Part 2: Principles of Legislative Drafting* (August 2013), online (pdf): *Crown Publications King's Printer for British Columbia* <crownpub.bc.ca/Content/documents/2-DraftingPrinciples_August2013.pdf> at 2. See also *ibid* ("To put this in a constitutional context, the role of our courts as the final authority on the meaning of legislation is one of the most important components of the rule of law. Because the courts, independent of the executive government, determine the meaning of the law, that meaning does not change simply because a different executive government is in power. That keeps the law sufficiently certain to enable the people who are subject to it to know their rights and obligations" at 1).

their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[864]

The references to the "object" of the legislation and the "intention" of the legislature point to purposes as a key component of the interpretation of legislation. Under this approach, the court is interested in more than just the plain meaning of the words on the page. The court must harmonize (1) the meaning of the passage at issue with (2) the design of the entire statute and (3) its purposes and the goals that the legislature intended to achieve by enacting the statute.

Evidence of intention. Courts can find evidence of a statute's intention from a variety of sources, such as reports that preceded the statute or speeches from members of the legislative assembly recorded in *Hansard*. Statutory lists of purposes are a particularly clear and obvious form of evidence of intention because they appear in the statute itself. As a result, they're considered to be "[t]he most authoritative statements of purpose."[865]

No list of purposes in part 3. Part 3 doesn't contain a provision listing its purposes.

List of principles guiding development of part 3. The enactment of the *Family Law Act* was preceded by a policy document,[866] in which the government discussed its intentions for family-law reform. According to the policy document, "[t]he principles guiding the policy development of the proposed scheme [i.e., part 3] are:"

- promoting family stability;
- providing certainty of parental status as soon as possible;
- treating children fairly, regardless of the circumstances of their birth;
- protecting vulnerable persons; and
- preferring out-of-court processes where possible.[867]

This list of principles could easily have been converted into a statutory list of purposes—but this wasn't done.

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864. *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC) at para 21, Iacobucci J (quoting Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87).

865. Sullivan, *supra* note 608 at 189.

866. See *Proposals for a new Family Law Act*, *supra* note 3.

867. *Ibid* at 31.

Two instances from the Family Law Act. The *Family Law Act* contains two provisions listing the purposes of, respectively, a part and a division under the act.

Resolution of family-law disputes. Section 4 sets out the purposes of part 2 of the act, which deals with the resolution of family-law disputes. These purposes are:

> **Purposes of Part**
>
> **4** The purposes of this Part are as follows:
>
> (a) to ensure that parties to a family law dispute are informed of the various methods available to resolve the dispute;
>
> (b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;
>
> (c) to encourage parents and guardians to
>
> (i) resolve conflict other than through court intervention, and
>
> (ii) create parenting arrangements and arrangements respecting contact with a child that is in the best interests of the child.[868]

Extraprovincial matters respecting parenting agreements. And section 73 contains a list of purposes for a division within part 4, which addresses care of and time with children. This division is division 7 (extraprovincial matters respecting parenting agreements), and its purposes are:

> **Purposes**
>
> **73** The purposes of this Division are as follows:
>
> (a) to ensure that court applications respecting guardianship, parenting arrangements or contact with a child are determined on the basis of the best interests of the child;
>
> (b) to avoid the making of orders respecting guardianship, parenting arrangements or contact with a child, respecting the same child, in more than one jurisdiction;
>
> (c) to discourage child abduction as an alternative to determining by due process the guardianship of, or parenting arrangements with respect to, a child;
>
> (d) to provide for effective enforcement of orders respecting guardianship, parenting arrangements or contact with a child, and for the recognition and enforcement of extraprovincial orders.[869]

868. *Supra* note 1, s 4.

869. *Ibid*, s 73.

No examples of a list of purposes in Canadian parentage legislation. No parentage legislation in Canada contains a section setting out the purposes of the legislation.

Brief description of the issue

Part 3 of the *Family Law Act* lacks a section that sets out the part's purposes. A list of purposes may help courts in interpreting part 3. Should part 3 be amended to add such a list?

Discussion of options for reform

A narrow threshold question. This issue poses the threshold question for reform, whether amending part 3 to add a new section with a list of the part's purposes is desirable. There are only two options for answering this threshold question: either (1) amend part 3 to add a list of purposes or (2) retain the status quo, in which part 3 doesn't contain a section setting out its purposes.

Arguments in favour of a statutory list of purposes. As one legal textbook said of preambles (in a comment that applies equally well to statutory lists of purposes), "[t]he role of a preamble might be to persuade readers as to the value of the statute, to explain why that statute was enacted, to establish its goals, or to provide a hint to judges about how that statute should be interpreted."[870] Among these roles, the last one (assisting courts in interpreting a statute) is commonly cited as the leading argument in favour of including a statutory list of purposes.

Assisting courts—clarifying language. As a commentator has put it, a list of purposes may assist a court by "clarify[ing] doubts about the scope of generally worded provisions or [establishing] limits on the exercise of statutory powers."[871] Such a provision may also be "relied on to resolve ambiguity: the meaning that better promotes the purpose is the one that is preferred."[872]

Assisting courts—best available evidence. Lists of purposes may also assist courts by providing authoritative, accessible evidence of legislative purposes. As was noted earlier,[873] considering the purposes of legislation is an important part of the prevailing method of statutory interpretation. If purposes aren't set out in the

870. Susan Barker & Erica Anderson, *Researching Legislative Intent: A Practical Guide* (Toronto: Irwin Law, 2019) at 74 [footnote omitted].

871. Sullivan, *supra* note 608 at 201.

872. *Ibid*.

873. See, above, at 224 (on "the purposive approach to statutory interpretation").

legislation, then parties to litigation and courts may have to craft or consider arguments about them or search for them in external sources. A statutory list may help to streamline the process of interpretation and may lead to better results.

Making the law more accessible to the public. In addition to helping courts interpret statutes and resolve disputes, statutory lists of purposes may help to make the law more accessible to the public. A declaration of the purposes of the statute may give readers necessary context to help them understand the rights and obligations set out in the statute. But there's probably some tension between this point and the one preceding it, as a provision that is helpful for the general public likely wouldn't provide much assistance to a court interpreting the statute and vice versa.

Arguments against a statutory list of purposes. There are arguments against including a list of purposes in a statute.

Canadian drafting conventions recommend not including a statutory list. Lists of purposes are quite rare in Canadian legislation. This is by design. There is a drafting convention that recommends avoiding lists of purposes.[874]

Superfluous. The rationale for this recommendation is that a section stating the statute's purposes is superfluous. "Explicit statements of purpose are rarely necessary," the authors of the drafting conventions explain, "since the object of a well-drafted Act should become clear to the person who reads it as a whole. In general, legislation should not contain statements of a non-legislative nature."[875]

Unhelpful effects on statutory interpretation. Other criticisms have focused on the effect of a statutory list of purposes on court decisions interpreting the statute. Interestingly, commentators have argued that these lists can be found wanting in three distinct (and nearly contradictory) ways: (1) by unduly narrowing the scope of statute; (2) by leading a court to extend the reach of a statute beyond what its operational provisions might allow; and (3) by not providing any significant assistance to courts in their interpretive task.

Using purposes to narrow down general language. Commentators have pointed out that listing a statute's purposes is often expressly done to narrow down the range of possible interpretations of the statute. "In practice," a textbook on statutory

874. See Uniform Law Conference of Canada, *Canadian Drafting Conventions* (last visited 26 January 2023), online: *Uniform Law Conference of Canada* <ulcc-chlc.ca/Civil-Section/Drafting/Drafting-Conventions>, principle 19.

875. *Ibid*.

interpretation notes, "a purposive approach [by a court to interpreting legislation] often leads to a narrower rather than a broader interpretation. . . . [T]o bring the scope of the legislative language in line with the purpose, the court must read it down. . . . [by], in effect, add[ing] words of limitation or qualification or exception to the provision."[876]

Example from part 3—court orders declaring parentage. Applying this criticism to part 3, it's worth noting that much of part 3 consists of declarative statements, setting out the legal result (in terms of parentage) of certain decisions and transactions in fact. Part 3 only really confers a broad discretionary power on a decision-maker in one provision: the section empowering the BC Supreme Court to make an order declaring parentage.[877] This section is fairly broad in its scope, as would be expected for a provision that would tend to be relied on in novel situations. But that scope is already limited on the face of the section: it only applies "if there is *a dispute* or *any uncertainty* as to whether a person is or is not a parent under this Part."[878] There is a possibility that list of purposes could be used by the court to limit the reach of this section even further.

Using purposes to inflate the meaning of a statute. Another critic has advanced an opposing criticism of statutory lists of purposes. This commentator has argued that "[t]he use of purpose in interpretation has a natural imprecision that could lead even the wiliest judge astray."[879] But this critic's concern is that highlighting the purposes of the legislation leads courts into an overly broad interpretation of the statute. The result is a "purpose error," which "arises when a court, tempted by an abstract purpose, bases an interpretation analysis on this purpose without adequately qualifying that purpose in the textual scheme that underlies it."[880]

Lists of purposes are too abstract and disconnected to really help courts. Finally, another criticism of statutory lists of purposes holds that these provisions actually end up having little impact on how courts interpret statutes. One textbook has said that these lists add little to that process because "they focus on primary aims and objects or general principles that tend to be formulated in abstract,

876. Sullivan, *supra* note 608 at 203.

877. See *supra* note 1, s 31.

878. *Ibid*, s 31 (1) [emphasis added].

879. Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alta L Rev 919 at 920.

880. *Ibid* at 921.

sometimes grandiose, language."[881] This criticism is clearly connected to the drafting convention that disdains statutory lists of purposes as superfluous additions to legislation. But the textbook also points out that "when more than one purpose is mentioned, they are almost never ranked. It is left to the courts to work out the relationship among the listed purposes and their connection to specific provisions and words."[882]

The committee's tentative recommendation for reform

The committee wrestled with this issue. It recognized that there might be some novel court cases that could benefit from being able to point to a list of purposes in part 3.

But, in the end, it was concerned that a list of purposes would have the effect of narrowing the scope of part 3. After all, this narrowing function is the role typically played by lists of purposes when they do appear in Canadian legislation.

The committee noted that most legislation in Canada doesn't contain a list of purposes. Legislative purpose is reflected in the design of the provisions as a whole. In the committee's view, its proposed amendments to part 3 have a clear, consistent design. Interpreting these amendments, if they were enacted, wouldn't be significantly aided by a list of purposes in part 3.

The committee tentatively recommends:

34. Part 3 of the Family Law Act should not be amended by adding a new section that lists the part's purposes.

881. Sullivan, *supra* note 608 at 191.

882. *Ibid*.

Chapter 11. Conclusion

Part 3 of the *Family Law Act* created the first legal framework for parentage in British Columbia. This part has been in force for 10 years, which is an appropriate time to take stock of what part 3 has done right and what might need improvement.

This consultation paper is the result of the Parentage Law Reform Project Committee's comprehensive review of part 3. While the committee doesn't believe that parentage law in BC needs to start over with a new model for legislation, it has decided that there are areas of the current legal framework in part 3 that do need reform.

Part 3 currently has a sharp division between rules to determine the parentage of children conceived by sexual intercourse (which are based on genetic connections) and rules to determine the parentage of children conceived by assisted reproduction (which are based on intention to be a parent). In the committee's view, parents and children in BC would benefit from adding some nuance to this division.

In particular, the committee proposes that part 3 be amended to allow a child conceived by sexual intercourse to have more than two parents. Parentage in these cases would be determined by intention, as evidenced by a written pre-birth agreement. This proposed reform would help to ensure that part 3 keeps pace with developments in family formation, such as the advent of polyamorous families.

The committee also proposes blurring the bright line by enabling sperm donation by sexual intercourse. Allowing sperm donation by sexual intercourse would enhance access to the donor process. To allay concerns about the potential misuse of the procedure, it would only be available to parties who have entered into a written pre-conception agreement.

Also concerning sperm, egg, and embryo donors, the committee tentatively recommends that BC end its system of donor anonymity and embrace the principle of donor-conceived people having access to identifying information about their donors. An open-access system would have considerable benefits for the health and well-being of donor-conceived people. It would also reflect the fact that conceiving children with the assistance of a donor no longer carries the shame and stigma it may have in the past. The committee acknowledges that considerable policy-development work will be needed to implement the open-access principle, and that work couldn't be carried out as part of this project.

The committee proposes a fine-tuning amendment for part 3's provision governing surrogacy arrangements. The amendment would address medical decision-making

for the child in the period between birth and the surrogate consenting to relinquish the child to the intended parents. This clarifies a potential grey area in the law.

The committee tentatively recommends a series of updates to part 3's provision on assisted reproduction after death. This provision, which deals with so-called posthumously conceived children, is more restrictive than the rest of part 3's provisions on assisted reproduction. The committee's tentative recommendations would align assisted reproduction after death with how part 3 approaches assisted reproduction generally by eliminating requirements for (1) a genetic connection between the posthumously conceived child and parent as a basis for parentage and (2) a spousal relationship between the posthumously conceived child's parents. The committee also tentatively recommends allowing a posthumously conceived child to have more than two parents. Finally, the committee tentatively recommended corresponding amendments to how the *Wills, Estates and Succession Act* deals with the inheritance rights of posthumously conceived children.

The committee thoroughly examined court orders declaring parentage. It tentatively recommends the creation of a new, streamlined process for orders declaring parentage when (1) all parties consent to the order and (2) all statutory requirements have been fulfilled. This simplified process will benefit parties and will help to conserve judicial resources.

The committee also proposes that part 3 recognize the continued availability of the court's protective *parens patriae* jurisdiction in parentage cases. This would clarify the current law.

The committee tentatively recommends that the current statutory conditions on when a court may make an order declaring parentage be removed. There have been some recent cases in which the court felt constrained to make an order because there wasn't a dispute over or any uncertainty about a child's parentage. In the committee's view, the court's jurisdiction should be broad, as it needs to be able to deal with novel cases and emerging issues.

The committee tentatively recommends adding a new provision that sets out the court's territorial jurisdiction to make an order declaring parentage. While there is existing general legislation on the territorial jurisdiction of BC's courts, it can be difficult to apply to parentage cases. As more and more of these cases have an interjurisdictional element, the law would benefit from a clear, distinct rule on territorial jurisdiction to make an order declaring parentage.

The committee made two tentative recommendations in relation to the agreements that are required under part 3. First, it proposes that if independent legal advice is

required by the legislation, there need not be a legislated requirement that signatures for those agreements be witnessed. Second, it proposes requiring that the parties receive independent legal advice on the agreement. There are always concerns in parentage arrangements that a party's vulnerabilities might be exploited. These proposed reforms would help to significantly mitigate those concerns.

The committee tentatively recommends that part 3 be redrafted to employ gender-neutral terminology. The part's current gender-specific terminology gives the (misleading) impression that it excludes trans and non-binary people. Adopting gender-neutral terminology would also be consistent with government policy for statutory language in general.

Finally, the committee considered and ultimately declined to endorse a number of proposed reforms, including denying parentage to a perpetrator of sexual assault for a child born as the result of that assault, requiring counselling as a part of all agreements under part 3, and creating a statutory list of the purposes of part 3.

Altogether, the committee has made 34 tentative recommendations for reform. The committee hopes to receive a wide range of responses to its tentative recommendations. Public comment is an integral part of the process of developing law-reform recommendations. Final recommendations are often shaped by input received at the consultation stage. To ensure that the committee is able to consider your response to this consultation paper, BCLI must receive it by **31 March 2024**.

APPENDIX A

List of Tentative Recommendations

Parentage if no assisted reproduction

1. Part 3 of the Family Law Act should be amended to create a provision allowing for more than two parents where a child is conceived by sexual intercourse. **(87–94)**

2. A provision allowing for more than two parents where a child is conceived by sexual intercourse should require a pre-birth agreement. **(94–99)**

3. A provision allowing for more than two parents where a child is conceived by sexual intercourse should require, at a minimum, that the following people must be parties to the pre-birth agreement:

(a) the intended birth parent, who is not a surrogate;

(b) the spouse of the intended birth parent;

(c) the person whose sperm is used to conceive the child, if that person is not a donor and is not the same as the party listed at (b);

(d) any other person who intends to be a parent to the child. **(99–101)**

4. A provision allowing for more than two parents where a child is conceived by sexual intercourse should provide that the child's parents are:

(a) the intended birth parent, who is not a surrogate;

(b) the person whose sperm is used to conceive the child, unless the parties made a pre-conception agreement under the section for sperm donation by sexual intercourse,

(c) the other parties to the pre-birth agreement who agree to be parents of the child. **(101–103)**

5. A provision allowing for more than two parents where a child is conceived by sexual intercourse should not limit the number of potential parents. **(103–105)**

6. Part 3 of the Family Law Act should not be amended to deny a perpetrator of sexual assault parentage to a child conceived through that sexual assault. **(105–113)**

Donors and parentage

7. Part 3 of the Family Law Act should be amended by adding a provision that permits sperm donation by sexual intercourse where a written pre-conception agreement is in place. **(117–124)**

8. Part 3 of the Family Law Act should not be amended to align the definition of "donor" with the Assisted Human Reproduction Act. **(124–127)**

9. The definition of "donor" in section 20 of the Family Law Act should be amended to eliminate the requirement that an embryo donor must have a genetic connection to the donated embryo by striking out "created through the use of his or her human reproductive material." **(127127–133)**

10. The Family Law Act should not be amended to allow for parents and a donor to draft an agreement for contact with a child. **(133–138)**

11. Part 3 of the Family Law Act should not be amended to require a pre-conception agreement as part of the donor process for children conceived through assisted reproduction. **(138–142)**

12. Part 3 of the Family Law Act should be amended to add an optional form which could be used for spouses of birth parents to demonstrate non-consent to parentage of a child conceived through assisted reproduction. **(142–150)**

13. British Columbia should enact legislation enabling donor-conceived people to have access to identifying information about their donors. **(151–166)**

Parentage if surrogacy arrangement

14. Part 3 of the Family Law Act should not be amended to allow for conception by sexual intercourse for traditional surrogacy. **(171–176)**

15. Part 3 of the Family Law Act should be amended to create a provision assigning full decision-making power for the child to the intended parents for the period between birth and the granting of consent by the surrogate to relinquish the child, unless otherwise provided for in the surrogacy agreement. **(177–184)**

Parentage if assisted reproduction after death

16. Section 28 of the Family Law Act should be amended to provide that, in order for a deceased person to be a parent of a child conceived after that person's death,
(a). The human reproductive material or embryo used in the child's conception must be either
i. the deceased person's own human reproductive material, which they provided for their own reproductive use either before their death or posthumously, or
ii. human reproductive material or an embryo which was obtained by the deceased for their own reproductive use prior to their death (e.g., donor sperm, eggs or embryo which had been obtained by the deceased during their lifetime for their own reproductive use);
and
(b). all other conditions of s. 28 must be met. **(190–195)**

17. Section 28 of the Family Law Act should be amended, removing the requirement that, for a posthumously conceived child, the parents be in a spousal relationship. **(195–198)**

18. Part 3 of the Family Law Act should be amended, allowing more than two people to be named as parents for a posthumously conceived child, provided the deceased person consents to be parent to a child conceived through assisted reproduction and lists the other intended parents. **(198–201)**

19. Section 8.1 of the Wills, Estates and Succession Act should be amended to remove the requirement that there be a genetic connection between the deceased person and the posthumously conceived child. **(201–203)**

20. Section 8.1 of the Wills, Estates and Succession Act should be amended to remove the requirement that there be a spousal relationship between the intended parents. **(204–205)**

Declarations of parentage by the court and parentage agreements

21. A simplified desk-order process should be available for an order declaring parentage if all the parties consent to the order and have complied with the legislation. **(209–210)**

22. Part 3 of the Family Law Act should be amended by adding a provision that declares that nothing in this part limits or restricts the inherent jurisdiction of the

supreme court to make an order declaring parentage in its parens patriae capacity. **(211–217)**

23. For cases that don't come within the scope of the proposed simplified process to obtain an order declaring parentage, section 31 of the Family Law Act should be amended as follows:

(a) by striking out the conditions that provide that an order declaring parentage is only available if there is a dispute or any uncertainty as to whether a person is or is not a parent; and

(b) by adding a provision that any person having, in the court's opinion, an interest may apply to the court for an order declaring parentage. **(217–223)**

24. Section 31 (2) of the Family Law Act, which lists the people who must be served with notice of an application to court for an order declaring parentage, should be amended by adding a new paragraph, which reads as follows: "the vital statistics agency, if the order will result in a change of the registration of parentage." **(224–225)**

25. Part 3 of the Family Law Act should not be amended to directly address how the best interests of the child is to be addressed by the court in making an order under the part. **(225–230)**

26. Section 31 of the Family Law Act should be amended to address the territorial jurisdiction of the court to make an order declaring parentage by providing that the court has jurisdiction, in addition to any other basis of jurisdiction under the Court Jurisdiction and Proceedings Transfer Act

(a) if the child is born in British Columbia or

(b) an alleged parent resides in British Columbia. **(231–242)**

27. Section 29 of the Family Law Act, which deals with surrogacy arrangements, should not be amended to address unwritten surrogacy agreements. **(242–247)**

28. If independent legal advice is required for agreements under Sections 29 and 30 of the Family Law Act, which deal with parentage in cases of surrogacy arrangements and other arrangements, these provisions should not be amended to add a requirement that the signatures to the written agreements referred to in those sections must be witnessed by at least one other person. **(247–250)**

Independent legal advice and counselling

29. Part 3 of the Family Law Act should be amended to require independent legal advice for all parties to legal agreements required under part 3. **(251–258)**

30. Part 3 of the Family Law Act should not be amended to require counselling. **(259–263)**

Language, definitions, and interpretation

31. Part 3 of the Family Law Act should be amended to use gender-neutral terminology. **(265–269)**

32. Terms should be used which clearly describe a person's role in the conception and birth, such as "the person who gave birth to the child" and "the person whose sperm resulted in the conception." **(270)**

33. The term "parent" should only be used where a parent-child relationship is intended. **(270)**

34. Part 3 of the Family Law Act should not be amended by adding a new section that lists the part's purposes. **(270–277)**

APPENDIX B

Research on Reforming Section 8.1 of the Wills, Estates and Succession Act

Memorandum no. 20:
Posthumous Conception & Wills
Time Limits for Notice and Birth

Date: 22 October 2022

Introduction and Purpose of this Memorandum

The purpose of this memorandum is to discuss issues for reform concerning posthumous conception and the *Wills, Estates and Succession Act*[883] [*WESA*]. This memorandum discusses how these issues may be addressed by reforming *WESA*.

The 4 issues related to posthumous conception and *WESA* are:

A. Are the time limits for giving notice of an intention to use the deceased's genetic material and for a resulting birth to occur still considered reasonable?
B. Are there any issues with *WESA* section 8.1 *Posthumous births if conception after death*, or any other related sections?
C. Is there an argument against denying an after-born child the ability to bring a claim for maintenance from a deceased parent's estate, in contrast to a child born before the parent's death?
D. Are there any issues relating to genetic material as property that can be distributed after the individual's death?

[883] *Wills, Estates and Succession Act,* SBC 2009, c 13 [*WESA*].

Issue (A) is on the agenda for the committee meeting scheduled for Monday 31 October 2022. This memorandum, which only addresses issue (A), will provide some background legal information, discuss options for reform, and set out some suggestions for tentative recommendations for further consideration at the meeting. Later memorandums will be provided to address issues (B) through (D).

This memorandum discusses whether the time limits for giving notice of an intention to use the deceased's genetic material and for a resulting birth to occur are still considered reasonable. This issue has three subparts:

1. Is the time limit for giving notice of an intention to use the deceased's genetic material still considered reasonable?
2. Is the time limit for a resulting birth to occur still considered reasonable?
3. Is the WESA provision allowing the court to extend the time limit in which a child can be born, but not extend the time limit for when notice must be provided, still considered reasonable?

Overview of the Posthumous Conception Framework

This section will outline the legal framework for posthumous conception. Posthumous conception occurs when a child is conceived using assisted reproduction after one of the parents has died. This can occur either through a person's sperm or eggs being removed from their body after death, or using sperm, eggs, or embryos which were previously banked prior to the individual's death.

This framework spans three pieces of legislation – the federal *Assisted Human Reproduction Act*[884] [*AHRA*], and BC's *Family Law Act*[885] [*FLA*] and *WESA*.

When a Person Can Engage in Posthumous Conception

The *AHRA* requires that a person must consent to:

- Use of their sperm or eggs to create embryos;[886]
- Use of their *in vitro* embryos;[887] and

[884] *Assisted Human Reproduction Act,* SC 2004, c 2 [*AHRA*].
[885] *Family Law Act,* SBC 2011, c 25 [*FLA*].
[886] *AHRA, supra* note 2, s 8(1).
[887] *Ibid,* s 8(3).

- Removing sperm or eggs from a person's body after death to create embryos.[888]

The *AHRA* only allows removal of sperm or eggs from a person under 18 years of age if it is for "creating a human being that the person reasonably believes will be raised by the donor."[889] Posthumous conception would not be available in the case that the deceased person was under 18 at the time of their death.

Parentage when Posthumous Conception has Occurred

If a child is born through posthumous conception, the *FLA* sets out who can be declared a parent. Section 28 sets out when the rules on parentage when there is posthumous conception applies:

- Assisted reproduction is used;[890]
- The deceased person provides their sperm or eggs in order to conceive a child they intend to be the parent for;
- The deceased person dies prior to conception;[891]
- The deceased person has written consent to let their spouse use their sperm, eggs, or embryos after their death to conceive a child;
- The deceased person did not withdraw their consent prior to their death; and
- There is proof of the deceased person's written consent.[892]

Section 28 states that if a child is born through posthumous conception, there are two people who can be named the child's parents – the person who has died, and the deceased person's spouse when they died.[893] The spouse can be married or in a marriage-like relationship with the deceased person. The spouse does not have to have contributed the sperm, egg, or embryos to be declared the parent.[894]

Section 28 does not allow for anyone else to be named a parent to a child born through posthumous conception.[895] Section 30, discussing parentage if other arrangements, states that an agreement is deemed revoked if one of the parties has died.[896] A parenting agreement is not relevant in the case of posthumous conception.

[888] *Ibid,* s 8(2).
[889] *Ibid,* s 9.
[890] *FLA, supra* note 3 s 28(1)(a).
[891] *Ibid,* s 28(1)(b).
[892] *Ibid,* s 28(1)(c).
[893] *Ibid,* s 28(2).
[894] *Ibid,* s 28(2)(b).
[895] *Ibid,* s 28(2).
[896] *Ibid,* s 30(3).

The committee has planned to take up issues for reform concerning section 28 at a future committee meeting.

Inheritance when Posthumous Conception has Occurred

A declaration of parentage has implications for inheritance and maintenance from a deceased parent or deceased relative's estate. *WESA* sets out rules for how and when a posthumously conceived child can inherit from an estate.

WESA differentiates between a child who was conceived prior to but born after a parent's death, and a child who was both conceived and born after a parent's death. Section 8 states that a child conceived before the deceased parent's death but born after their parent's death inherits from the estate like a child who was born prior to their parent's death.[897] The only requirement is that the child live for at least 5 days following their birth.[898]

If a child is conceived posthumously, several conditions need to be met in order for the child to be able to inherit from the estate:

- The deceased person must have a spouse to whom they were married to or in a marriage-like relationship at the time of their death;
- The spouse must provide written notice that they might use the sperm, eggs, or embryos of the deceased person to conceive a child;
- The notice must be given within 180 days (~ 6 months) of the court issuing a representation grant;
- The notice must be provided to the deceased person's personal representative, beneficiaries, and intestate successors;
- The spouse must conceive through assisted reproduction; [899]
- The deceased person must be named the child's parent, as per Part 3 of the *FLA*;[900]
- The child must be born within 2 years of the parent's death (which can be extended by the court);[901] and
- The child must live for at least 5 days following their birth.[902]

[897] *WESA, supra* note 1, s 8.
[898] *Ibid*.
[899] *Ibid,* s 8,1(1)(a).
[900] *Ibid,* s 8.1(1)(c).
[901] *Ibid,* s 8.1(1)(b), 8.1(3).
[902] *Ibid,* s 8.1(1)(b).

Under section 8.1, a posthumously conceived child gains their right to inherit from a relative at birth.[903]

Intestacy Inheritance Rules

In BC, if a person has not made a will, they are considered to have died intestate. *WESA* sets out the rules for how the deceased person's estate is distributed. The rules depend on whether the deceased person:

- only has a spouse;
- only has descendants;
- has both a spouse and descendants, and the parents of all the children are the deceased person and the surviving spouse; or
- has both a spouse and descendants, but the parents of some or all of the children are the deceased person and someone who is not the surviving spouse.

A descendant would include children, grandchildren, and any other lineal descendant.[904]

If the deceased person only has a spouse, having no descendants, then the entire estate would go to the spouse.[905]

If the deceased person does not have a spouse at the time of their death, but does have descendants, then the estate is distributed to the descendants.[906]

If the deceased person has a spouse and has descendants, the spouse gets a preferential share of the estate, and the spouse must receive the household furnishings.[907]

If, for all the children, the parents are both the deceased person and the surviving spouse, then the surviving spouse's preferential share of the estate is $300,000.[908] If some or all the children's parents are the deceased person and a person who is not their spouse, the surviving spouse's preferential share is $150,000.[909]

[903] *Ibid,* s 8.1(2).
[904] *Ibid,* s 1.
[905] *Ibid,* s 20.
[906] *Ibid,* s 23.
[907] *Ibid,* s 21(2).
[908] *Ibid,* s 21(3).
[909] *Ibid,* s 21(4).

If the value of the estate is less than the preferential share, then the spouse would receive the entire estate.[910] If the value of the estate is greater than the preferential share, any remaining property is distributed so half goes to the surviving spouse, and the other half goes to the descendants.[911]

When any part of the estate is being distributed to the descendants, the money is divided in equal shares to the nearest generation where there are surviving descendants. If the deceased person has living children, then the estate is distributed between all surviving children and any deceased children who have their own living descendants.[912]

Issues for Reform

Is the time limit for giving notice of an intention to use the deceased's genetic material still considered reasonable?

WESA requires that a spouse provide notice within 180 days (~ 6 months) of a representation grant being issued that they may use the deceased person's eggs, sperm, or embryos to conceive a child. Should BC change the length of time in which notice to be provided?

Current Legislation

Current law in British Columbia

For a child who was conceived posthumously, *WESA* sets out specific requirements for when that posthumously conceived child has a right to inherit from their deceased parent or other relative's estate.[913] Two of these requirements have time limits built in. The first requirement is that the spouse must provide notice that they intend to use the sperm, eggs, or embryos to conceive a child.[914]

For a posthumously conceived child to inherit, the spouse must provide notice of their intention to use the sperm, eggs, or embryos.[915] The spouse must provide the

[910] *Ibid,* s 21(5).
[911] *Ibid,* s 21(6).
[912] *Ibid,* s 24.
[913] *Ibid,* s 8.1.
[914] *Ibid*.
[915] *Ibid,* s 8.1(1)(a).

notice within 180 days (~ 6 months) of when the representation grant is issued.[916] The spouse must have been married to or in a marriage-like relationship with the deceased person at their death.[917] This notice must be provided to the personal representative, any beneficiaries, and any intestate successors.[918]

> **Posthumous births if conception after death**
> 8.1(1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:
>
> > (a)a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;[919]
> > ….

The time limit for providing notice of intention to use reproductive material begins when the representation grant is issued. Under *WESA,* a representation grant is:

- a grant of probate for a will;
- a grant of administration of the estate;
- a resealing of a grant of probate or grant of administration; or
- an ancillary grant of probate or administration.[920]

A grant of probate is a document given by the court when a person has died with a will, which gives the executor authority to deal with the estate and allows third parties to rely on this. A grant of administration is a document given by the court when a person has died without a will, or there is a will but there is no willing, capable, or appointed executor. The court will appoint an administrator for the estate, and the grant will give the administrator the authority to deal with the estate. A resealed grant is applicable when the deceased person has assets in other jurisdictions. A grant of probate or administration from one jurisdiction would be resealed in other jurisdictions to allow the personal representative to deal with assets in those other jurisdictions.[921]

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[916] *Ibid*.
[917] *Ibid*.
[918] *Ibid*.
[919] *Ibid.*
[920] *Ibid,* s 1.
[921] Greater Vancouver Law Students' Legal Advice Society, *Law Students' Legal Advice Manual,* 45th edition (2021) at Probate and Administration of the Estate (16:XI), online: *ClickLaw Wikibooks*

The time limit would not start running at the time of death, it would start later than this.

Relevant laws in other jurisdictions

In the rest of Canada, the only other jurisdiction to directly address the intestacy inheritance rights of posthumously conceived children is Ontario. The remainder of the provinces do not mention posthumous conception, only mention children conceived before death but born after death, or do not define posthumous conception but the issue of declaring parentage where there has been posthumous conception would seemingly exclude a posthumously conceived child from inheriting.[922]

In the United States, most of the case law has revolved around a posthumously conceived child's eligibility for social security benefits after their parent's death. The states are left to address posthumous conception in legislation. The states are split on whether they allow a posthumously conceived child to inherit from a deceased parent's estate. California is one of the jurisdictions where a posthumously conceived child is allowed to inherit and there are time limits for notice and having a child.[923]

This section will describe Ontario and California's time limits for a posthumously conceived child inheriting from their deceased parent's estate.

Ontario

<wiki.clicklaw.bc.ca/index.php?title=Probate_and_Administration_of_the_Estate_(16:XI)>.

[922] Christine E Doucet, "From *en Ventre Sa Mere* to Thawing an Heir: Posthumously Conceived Children and the Implications for Succession Law in Canada" (2013) 22 Dalhousie J Legal Studies 1 at 2, 5-6.

[923] *Ibid* at 8-10; Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief* , Report 118 (November 2008) [Manitoba LRC] at 4-11; Courtney Retter, "Introducing the Next Class of Bastards: An Assessment of the Definitional Implications of the Succession Law Reform Act for After-Born Children" (2011) 27 Can J Fam L 147 at para 55; Kristine S Knaplund, "Reimagining Postmortem Conception" (2021) 37:3 Ga St U L Rev 905 at 920-921, 930-931; Jeffrey Walters, "Thawing the Inheritance Rights of Maybe Babies: An Answer to Indiana's Statutory Silence on Posthumously Conceived Children" (2014) 48:4 Val U L Rev 1229 at 1231-1232; Patrick Grecu, "The New Ice Age: Addressing the Deficiencies in Arkansas's Posthumously Conceived Children Statute" (2019) 72:3 Ark L Rev 631 at 635-636.

In Ontario, the *Succession Law Reform Act*[924] states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met:[925]

- The deceased person must have had a spouse at the time of their death;
- The deceased person must have intended to become a parent;
- The spouse must provide written notice to the Estate Registrar in Ontario that they may use sperm, eggs, or embryos to conceive a child;
- The spouse must provide this notice within 6 months of the deceased person's death;
- The spouse must use assisted reproduction;[926]
- The child must be born within three years of the deceased person's death, or longer if the court grants an extension order;[927] and
- The deceased person must be declared the child's parent,[928] as per section 12 of the *Children's Law Reform Act*.[929]

For time limits to notify that a spouse intends to use sperm, eggs, or embryos for conceiving a child, Ontario and BC both use a 6-month timeline. The difference is that in BC, the time limit begins when the representation grant is issued, but in Ontario the time limit begins on the deceased person's death. BC's timeline is longer than Ontario.

California

In California, the *California Probate Code* states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met:[930]

- The deceased parent consented in writing to have their sperm, eggs, or embryos used for posthumous conception;
- The deceased parent chose a designated person to control their sperm, eggs, or embryos;
- The designated person provides written notice that material is available for conception;

[924] *Succession Law Reform Act,* RSO 1990, c S.26 [*Ont SLRA*].
[925] *Ibid,* s 47(10).
[926] *Ibid,* s 1.1(1).
[927] *Ibid,* s 1.1(1), (3).
[928] *Ibid,* s 1.1(1).
[929] *Children's Law Reform Act,* RSO 1990, c C.12, s 12.
[930] *Cal Prob Code* § 249.5.

- Notice must be provided within 4 months of when the death certificate was issued or there is a judgment determining the person's death; and
- The child is in utero within 2 years of the death certificate or judgment.[931]

For time limits to notify that material is available for conception, California has a shorter timeline than BC. California uses 4 months from the death certificate or judgment, and BC uses 180 days (~ 6 months) from the issuance of the representation grant.

Options for Reform

Brief statement of the issue

WESA requires that a spouse provide notice within 180 days (~ 6 months) of a representation grant being issued that they may use the deceased person's eggs, sperm, or embryos to conceive a child. Should BC change the length of time in which notice to be provided?

Options for reform

The options to consider in response to this issue for reform are below.

1. Amend *WESA* to remove the time limit for notice to be provided.
2. Amend *WESA* to increase the amount of time in which notice is to be provided.
3. Amend *WESA* to decrease the amount of time in which notice is to be provided.
4. Maintain the current rule for notice to be provided within 180 days (~ 6 months) of the representation grant being issued.

Arguments For and Against Reform

Introduction

This section will outline the arguments for and against reforming the time limits for providing notice and for a child to be born. Since most jurisdictions in Canada do not directly address posthumous conception, this section will focus on the arguments within academic and law reform literature.

[931] *Ibid*.

Most of the academic and law reform literature on posthumous conception focuses on balancing interests and rights. These four interests are:

- The rights of living beneficiaries;
- The best interests of posthumously conceived children;
- The procreative rights of the deceased; and
- Administering estates in an efficient and certain manner.[932]

In the literature, time limits are discussed in the context of whether a jurisdiction should or should not allow a posthumously conceived child to inherit from their deceased parent's estate. This section will briefly summarize the arguments for and against allowing posthumously conceived children to inherit from the estate to give a complete explanation of the arguments and debates. This section will outline arguments about:

- Allowing posthumously conceived children to inherit from the estate;
- Preventing posthumously conceived children to inherit from the estate;
- Allowing an unlimited time in which to inherit from the estate;
- Imposing time limits for notice and birth;
- Changing the time limits for notice and a birth; and
- Allowing a posthumously conceived child to inherit after the time limits have expired.

Posthumously conceived children should inherit from the estate

Much of the academic and law reform literature advocates for allowing posthumously conceived children to inherit from a parent's estate. There are 4 common arguments for allowing a posthumously conceived child to inherit from the estate.

First, it would be in the best interests of the child to inherit from the estate. The literature notes that posthumously conceived children are often in single parent or blended families, and these family structures can face barriers. Allowing a child to inherit from their deceased parent's estate and access death or inheritance-related benefits would support these children financially.[933]

[932] Manitoba LRC, *supra* note 47 at 9-10; Alberta Law Reform Institute, *Assisted Reproduction after Death: Parentage & Implications,* Report 106 (March 2015) [Alberta LRI] at 77, 86-87; Doucet, *supra* note 46 at 7, 16; Retter, *supra* note 47 at paras 95-96.

[933] Manitoba LRC, *ibid* at 8-10, 16; Retter, *ibid* at paras 22, 73, 91-95; Walters, *supra* note 47 at 1255-1256.

Second, allowing a posthumously conceived child to have their deceased parent declared their parent and allowing them to inherit from the estate promotes the interest of the deceased person to procreate. The deceased person, if they wanted to procreate after their death, may have wanted their child to inherit from their estate. This desire, usually written down due to consent requirements, should be respected.[934]

Third, it would be a benefit to society to allow a posthumously conceived child to inherit from the estate. If a child does not have access to inheritance or death related benefits, the child and their surviving parent may have to make use of income supports. If a child is able to inherit from the estate, this may reduce the need for income supports.[935]

Fourth, allowing a posthumously conceived child to inherit follows the intent of intestacy law, having the estate to pass onto the deceased person's family, which includes their spouse and children.[936]

Posthumously conceived children shouldn't inherit from the estate

Most jurisdictions have not addressed posthumously conceived children or have chosen not to let them inherit from the estate. The United Kingdom is one jurisdiction where the legislators directly excluded posthumously conceived children from inheriting.[937] The Alberta Law Reform Institute recommended excluding posthumously conceived children from inheriting.[938] There are 6 arguments for not allowing posthumously conceived children to inherit.

First, allowing posthumously conceived children to inherit from the estate would interfere with the orderly administration of the estate. The personal representative could not distribute the estate during the notice period. If notice were provided, the estate could not be distributed for the two to three years allowed for a child to be born. This would cause many delays for the named beneficiaries of the estate, usually the surviving spouse and children born during the deceased person's lifetime. Related to this, a personal representative may be uncertain of when they can administer the estate, and how to distribute the estate.[939]

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[934] Manitoba LRC, *ibid* at 9-10; Retter, *ibid* at paras 73, 91-93; Walters, *ibid* at 1259.
[935] Manitoba LRC, *ibid* at 16; Retter, *ibid* at paras 91-95.
[936] Manitoba LRC, *ibid* at 16; Retter, *ibid* at paras 91-93.
[937] Manitoba LRC, *ibid* at 11; Doucet, *supra* note 46 at 14-15.
[938] Alberta LRI, *supra* note 50 at 77, 86-87.
[939] *Ibid;* Manitoba LRC, *supra* note 47 at 7-9, 15, 17; Retter, *supra* note 47 at paras 73-74, 83-86; Knaplund, *supra* note 47 at 921; Walters, *supra* note 47 at 1253, 1257-1258.

Second, allowing a delay in administering the estate interferes with the rights of the living beneficiaries. This delay would be two to three years, or more. The beneficiaries could be waiting for an outcome which may never occur. The beneficiaries, especially minor children, may need access to the money, assets, or death-related benefits.[940]

Third, allowing a posthumously conceived child to inherit would be contrary to the traditional estate rules. Typically, a person's rights are not enforceable until they are born. Traditional estate rules require a descendant to be born before the deceased person's death or be conceived and in utero before the deceased person's death.[941] However, traditional rules were put into place before assisted reproduction and posthumous conception were possible.

Fourth, for people who die intestate, most of the estate usually goes to the spouse, and there is usually not enough to be distributed to any descendants. In BC, the priority share goes to the spouse. In the case of posthumous conception, the person who passes away would likely be younger, and their estates are usually not larger than the spouse's priority share, especially if the home is owned in joint tenancy with rights of survivorship.[942] However, this argument focuses on heteronormative nuclear family structures, ignoring the myriad of other family structures that exist.

Fifth, the problem of posthumously conceived children not being able to inherit can be solved with careful drafting of a will.[943] While it is true that a person can draft a will dividing the estate among all children, including posthumously conceived children, this does not account for a person who dies intestate. A younger person may die suddenly in an accident, and not have prepared a will. A will may also be deficient or out of date.

Sixth, some writers have argued that allowing posthumously conceived children to inherit would violate the rule against perpetuities.[944] However, this is no longer applicable in BC due to BC's *Perpetuity Act*.[945]

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[940] Manitoba LRC, *ibid*; Alberta LRI, *ibid*; Retter, *ibid* at paras 83-86; Walters, *ibid* at 1253, 1258-1259.
[941] British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (July 2010) [BC White Paper] at 33; Alberta LRI, *ibid*; Retter, *ibid* at para 88.
[942] Alberta LRI, *ibid*; Retter, *ibid* at paras 83-86.
[943] Alberta LRI, *supra* note 50 at 90.
[944] Alberta LRI, *ibid* at 92.
[945] *Perpetuity Act,* RSBC 1996, c 358, ss 6-8.

Posthumously conceived children should have unlimited time to inherit from the estate

If posthumously conceived children are allowed to inherit from the estate, there could be unlimited time for giving notice and a child to be born. However, this is not an option that is posed by any of the academic or law reform literature. This may be the case because it would appear that this option does not balance all of the interests very well.

The benefits to allow unlimited time are that this fully takes into account the child's best interests, and the rights of the deceased person to procreate. Having unlimited time would also give the surviving spouse as much time as they need to grieve and make the decision to have a posthumously conceived child.[946]

This option does not allow for an efficient administration of the estate, provide certainty for the personal representative, or respect the interest of the beneficiaries living at the time of the deceased's death. A personal representative would not know when they could administer the estate. If any of the estate was already distributed when a child was born this could create confusion or require re-distribution of the estate.[947]

There should be time limits for posthumously conceived children inheriting from the estate

If posthumously conceived children are allowed to inherit, the academic and law reform literature supports having time limits for notice of availability of sperm, eggs, or embryos, and for a child to be born. The literature argues that having time limits allows all the interests to be balanced better than any other option. There are several reasons for this.

Having time limits respects the rights of a deceased person to procreate. Having time limits allows for the posthumously conceived child to have the possibility of inheriting, which would be in their best interests. Allowing posthumously conceived children to inherit within a time limit is also in society's best interests to reduce the need for income supports. Giving the surviving spouse 180 days to provide notice gives the spouse time to grieve before considering if they might want posthumous conception.[948]

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[946] Manitoba LRC, *supra* note 47 at 9-10; Retter, *supra* note 47 at paras 99-100; Walters, *supra* note 47 at 1264-1265.

[947] Manitoba LRC, *ibid*; Retter, *ibid* at paras 74, 99-100; Walters, *ibid*.

[948] Manitoba LRC, *ibid* at 9-10, 18-19; Doucet, *supra* note 46 at 16-17; Retter, *ibid* at paras 95-96; Knaplund, *supra* note 47 at 921, 936; Walters, *ibid* at 1257-1258, 1261; Grecu, *supra* note 47 at

Having time limits supports the interests of the deceased and the child but does not let these interests completely overcome the interests of the other beneficiaries or the efficient administration of the estate. Having a time limit allows the personal representative certainty on when they are allowed to administer the estate and can do so without fear of liability for administering the estate after the time limits have expired.[949]

The other beneficiaries would only have their interests delayed by two or three years at most. The estate could be fully administered after a short time delay, and this would allow for efficient and certain administration of the estate. Some authors point out that estates often take years to administer anyway, so a two- or three-year delay would not be overly burdensome to the other beneficiaries.[950]

Having clear rules for posthumous conception when a person dies reduces the need for parties to go to court. This also would not discriminate against a child just because their parent died intestate.[951]

The time limit should be changed

BC's time limit for notice to be provided is 180 days (~ 6 months). This time limit is in line with most other jurisdictions, including Ontario, and consistent with recommendations in the academic and law reform literature. The only difference in BC is that BC starts the time running when the representation grant is issued, instead of at the death. BC's time limit would therefore be a little longer than other jurisdictions.

The surviving spouse is usually given time to allow them to grieve before making the decision to have a posthumously conceived child, which they may have to raise alone. The committee could consider whether 6 months for notice is enough time to grieve and make this decision.[952]

Posthumously conceived children should be able to inherit after the time limit has expired

641-642.

[949] Manitoba LRC, *ibid*; Doucet, *ibid*; Retter, *ibid*; Knaplund, *ibid* at 936; Walters, *ibid* at 1257-1258; Grecu, *ibid*.

[950] Manitoba LRC, *ibid*; Doucet, *ibid*; Retter, *ibid* at paras 83-86.

[951] Manitoba LRC, *ibid* at 17.

[952] Manitoba LRC, *ibid* at 9-10, 18-19; Doucet, *supra* note 46 at 16-17; Retter, *supra* note 47 at paras 99-100; Knaplund, *supra* note 47 at 936-937; Walters, *supra* note 47 at 1261; Grecu, *supra* note 47 at 642.

Currently in BC, if the surviving spouse fails to give notice within the 180 days, even if a posthumously conceived child is born, the child will not have the right to inherit from the estate. One author argued that, while the time limit was important to balance rights, if the child is born after the time limit has expired the child should still be eligible to inherit their share of any undistributed part of the estate.[953]

Potential tentative recommendations

option (1): *Section 8.1 of the Wills, Estates and Succession Act should be amended to remove the requirement for notice of the possible use of human reproductive material of a deceased parent to conceive a child through assisted reproduction to be provided within a certain time period.*

option (2): *Section 8.1 of the Wills, Estates and Succession Act should be amended, increasing the time in which notice of the possible use of human reproductive material of a deceased parent to conceive a child through assisted reproduction is to be provided to be….*

option (3): *Section 8.1 of the Wills, Estates and Succession Act should be amended, decreasing the time in which notice of the possible use of human reproductive material of a deceased parent to conceive a child through assisted reproduction is to be provided to be….*

option (4): *Section 8.1 of the Wills, Estates and Succession Act should not be amended, keeping the notice period of the possible use of human reproductive material of a deceased parent to conceive a child through assisted reproduction to within 180 days of the representation grant being issued.*

Issues for Reform

[953] Retter, *ibid* at paras 99-103.

Is the time limit for a resulting birth to occur still considered reasonable?

WESA requires a child to be born within 2 years of the deceased parent's death. Should BC change the length of time in which a child must be born?

Current Legislation

Current law in British Columbia

For a child who was conceived posthumously, *WESA* sets out specific requirements for when that posthumously conceived child has a right to inherit from their deceased parent or other relative's estate.[954] Two of these requirements have time limits built in. The second time limit requires that a child must be born within two years of their deceased parent's death.[955]

For a posthumously conceived child to inherit, the child must be born within two years of the deceased parent's death.[956] The court can extend the time during which the child must be born if the court feels it would be appropriate.[957]

> **Posthumous births if conception after death**
> 8.1 (1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:
> ….
> (b) the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;
> ….
> (3) Despite subsection (1) (b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.[958]

Relevant laws in other jurisdictions

This section will describe Ontario and California's time limits for a posthumously conceived child inheriting from their deceased parent's estate.

[954] *WESA, supra* note 1, s 8.1.
[955] *Ibid*.
[956] *Ibid,* s 8.1(1)(b).
[957] *Ibid,* s 8.1(3).
[958] *Ibid,* s 8,1.

Ontario

In Ontario, the *SLRA* states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met.[959] The child must be born within three years of the deceased person's death, or longer if the court grants an extension order.[960]

For time limits for birth of a child, Ontario's time limit is longer by 1 year. Ontario's time limit is 3 years, but BC's time limit is 2 years.

California

In California, the *California Probate Code* states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met.[961] The child must be in utero within 2 years of the death certificate or judgment.[962]

For time limits for the birth of the child, both jurisdictions use 2 years. However, BC uses two years for the child to be born, and California uses two years for the child to be in utero. California's time limit is longer.

Options for Reform

Brief statement of the issue

WESA also requires a child to be born within 2 years of the deceased parent's death. Should BC change the length of time in which a child must be born?

Options for reform

The options to consider in response to this issue for reform are below.

1. Amend *WESA* to remove the time limit for a child to be born.
2. Amend *WESA* to increase the time in which a child is to be born.
3. Amend *WESA* to decrease the time in which a child is to be born.

[959] *Ont SLRA, supra* note 48, s 47(10).
[960] *Ibid,* s 1.1(1), (3).
[961] *Cal Prob Code* § 249.5.
[962] *Ibid*.

4. Maintain the current rule for a child to be born within 2 years of the deceased person's death.

Arguments For and Against Reform

Introduction

This section will outline the arguments for and against reforming the time limits for providing notice and for a child to be born. Since most jurisdictions in Canada do not directly address posthumous conception, this section will focus on the arguments within academic and law reform literature.

See the previous issue for reform discussing time limits for giving notice for an introduction to the academic and law reform literature on posthumously conceived children inheriting from their deceased parents' estate.

Posthumously conceived children should inherit from the estate

Much of the academic and law reform literature advocates for allowing posthumously conceived children to inherit from a parent's estate. There are 4 common arguments for allowing a posthumously conceived child to inherit from the estate.

- First, it would be in the best interests of the child to inherit from the estate.[963]
- Second, allowing a posthumously conceived child to have their deceased parent declared their parent and allowing them to inherit from the estate promotes the interest of the deceased person to procreate.[964]
- Third, it would be a benefit to society to allow a posthumously conceived child to inherit from the estate, as it may reduce the need for income supports.[965]
- Fourth, allowing a posthumously conceived child to inherit follows the intent of intestacy law, having the estate to pass onto the deceased person's family.[966]

[963] Manitoba LRC, *supra* note 47 at 8-10, 16; Retter, *supra* note 47 at paras 22, 73, 91-95; Walters, *supra* note 47 at 1255-1256.
[964] Manitoba LRC, *ibid* at 9-10; Retter, *ibid* at paras 73, 91-93; Walters, *ibid* at 1259.
[965] Manitoba LRC, *ibid* at 16; Retter, *ibid* at paras 91-95.
[966] Manitoba LRC, *ibid*; Retter, *ibid* at paras 91-93.

For more details on these arguments, see the previous issue for reform on time limits for giving notice.

Posthumously conceived children shouldn't inherit from the estate

Most jurisdictions have not addressed posthumously conceived children or have chosen not to let them inherit from the estate. There are 6 arguments for not allowing posthumously conceived children to inherit.

- First, allowing posthumously conceived children to inherit from the estate would interfere with the orderly administration of the estate.[967]
- Second, allowing a delay in administering the estate interferes with the rights of the living beneficiaries.[968]
- Third, allowing a posthumously conceived child to inherit would be contrary to the traditional estate rules.[969]
- Fourth, for people who die intestate, most of the estate usually goes to the spouse, and there is usually not enough to be distributed to any descendants.[970]
- Fifth, the problem of posthumously conceived children not being able to inherit can be solved with careful drafting of a will.[971]
- Sixth, some writers have argued that allowing posthumously conceived children to inherit would violate the rule against perpetuities.[972]

For more details on these arguments, see the previous issue for reform on time limits for giving notice.

Posthumously conceived children should have unlimited time to inherit from the estate

If posthumously conceived children are allowed to inherit from the estate, there could be unlimited time for a child to be born. However, this is not an option that is posed by any of the academic or law reform literature. This may be the case because it would appear that this option does not balance all of the interests very well.

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[967] Manitoba LRC, *ibid* at 7-9, 15, 17; Alberta LRI, *supra* note 50 at 77, 86-87; Retter, *ibid* at paras 73-74, 83-86; Knaplund, *supra* note 47 at 921; Walters, *supra* note 47 at 1253, 1257-1258.

[968] Manitoba LRC, *ibid* at 7-9; Alberta LRI, *ibid*; Retter, *ibid* at paras 83-86; Walters, *ibid* at 1253, 1258-1259.

[969] BC White Paper, *supra* note 69 at 33; Alberta LRI, *ibid*; Retter, *ibid* at para 88.

[970] Alberta LRI, *ibid* at 86-87; Retter, *ibid* at paras 83-86.

[971] Alberta LRI, *ibid* at 90.

[972] *Ibid* at 92.

The benefits to allow unlimited time for a child to be born or to give notice are that this fully takes into account the child's best interests, and the rights of the deceased person to procreate. Having unlimited time would also give the surviving spouse as much time as they need to grieve, and then conceive. The spouse could potentially conceive multiple children.[973]

This option does not allow for an efficient administration of the estate, certainty for the personal representative, or respect the interest of the beneficiaries living at the time of the deceased's death. A personal representative would not know when they could administer the estate. If any of the estate was already distributed when a child was born this could create confusion or require re-distribution of the estate.[974]

There should be time limits for posthumously conceived children inheriting from the estate

If posthumously conceived children are allowed to inherit, the academic and law reform literature supports having a time limit for a child to be born. The literature argues that having time limits allows all the interests to be balanced better than any other option. There are several reasons for this.

Having time limits respects the rights of a deceased person to procreate. Having time limits allows for the posthumously conceived child to have the possibility of inheriting, which would be in their best interests. Allowing posthumously conceived children to inherit within a time limit is also in society's best interests to reduce the need for income supports. Giving the surviving spouse two or three years to have a child gives the spouse time to grieve, and some time to conceive a child through assisted reproduction.[975]

Having time limits supports the interests of the deceased and the child but does not let these interests completely overcome the interests of the other beneficiaries or the efficient administration of the estate. Having a time limit allows the personal representative certainty on when they are allowed to administer the estate and can do so without fear of liability for administering the estate after the time limits have expired.[976]

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[973] Manitoba LRC, *supra* note 47 at 9-10; Retter, *supra* note 47 at paras 99-100; Walters, *supra* note 47 at 1264-1265.

[974] Manitoba LRC, *ibid*; Retter, *ibid* at paras 74, 99-100; Walters, *ibid*.

[975] Manitoba LRC, *ibid* at 9-10, 18-19; Doucet, *supra* note 46 at 16-17; Retter, *ibid* at paras 95-96; Knaplund, *supra* note 47 at 921, 936; Walters, *ibid* at 1257-1258, 1261; Grecu, *supra* note 47 at 641-642.

[976] Manitoba LRC, *ibid*; Doucet, *ibid*; Retter, *ibid*; Knaplund, *ibid* at 936; Walters, *ibid* at 1257-1258; Grecu, *ibid*.

The other beneficiaries would only have their interests delayed by two or three years at most. The estate could be fully administered after a short time delay, and this would allow for efficient and certain administration of the estate. Some authors point out that estates often take years to administer anyway, so a two- or three-year delay would not be overly burdensome to the other beneficiaries.[977]

Having clear rules for posthumous conception when a person dies reduces the need for parties to go to court. This also would not discriminate against a child just because their parent died intestate.[978]

The time limit should be changed

BC's time limit for the child to be born is 2 years from the time of the deceased parent's death. Most jurisdictions have a time limit of 2 or 3 years. Some jurisdictions state that the child must be in utero by the end of the 2 or 3 years, instead of having to be born.

There are some factors to consider in whether BC's time limits are sufficient or reasonable.

First, the surviving spouse is usually given time to allow them to grieve before making the decision to have a posthumously conceived child, which they may have to raise alone. The committee could consider whether 2 years to have a child is enough time to grieve, make the decision to have a posthumously conceived child, successfully conceive, and have the child be born.[979]

Second, assisted reproduction can take some time to be successful. Given the average length of a pregnancy, the surviving spouse would have to successfully conceive within 14 months of their spouse's death. Given assisted reproduction is complex and often needs many attempts to be successful, two years may be a short window to successfully conceive and carry a child to term.[980]

[977] Manitoba LRC, *ibid*; Doucet, *ibid*; Retter, *ibid* at paras 83-86.
[978] Manitoba LRC, *ibid* at 17.
[979] Manitoba LRC, *ibid* at 9-10, 18-19; Doucet, *supra* note 46 at 16-17; Retter, *supra* note 47 at paras 99-100; Knaplund, *supra* note 47 at 936-937; Walters, *supra* note 47 at 1261; Grecu, *supra* note 47 at 642.
[980] Manitoba LRC, *ibid* at 18-19; Doucet, *ibid*; Knaplund, *ibid* at 937-938.

The 2-year rule likely does not give the surviving spouse enough time to have more than one posthumously conceived child.[981] The committee could consider whether the time limit should be increased to allow time to have more than one child.

Posthumously conceived children should be able to inherit after the time limit has expired

Currently in BC, if the surviving spouse has a child after the 2-year time limit has expired the child will not have the right to inherit from the estate. One author argued that, while the time limit was important to balance rights, if the child is born after the time limit has expired the child should still be eligible to inherit their share of any undistributed part of the estate.[982]

Potential tentative recommendations

option (1): *Section 8.1 of the Wills, Estates and Succession Act should be amended to remove the requirement that a child conceived and born after a deceased parent's death must be born within a certain time period in order to inherit from the deceased parent's estate.*

option (2): *Section 8.1 of the Wills, Estates and Succession Act should be amended, increasing the time in which (in order to inherit from a deceased parent's estate) a child, who was conceived and born after the deceased parent's death, is to be born to be ….*

option (3): *Section 8.1 of the Wills, Estates and Succession Act should be amended, decreasing the time in which (in order to inherit from a deceased parent's estate) a child, who was conceived and born after the deceased parent's death, is to be born to be….*

option (4): *Section 8.1 of the Wills, Estates and Succession Act should not be amended, keeping the time in which (in order to inherit from a deceased parent's estate) the birth of a child who was conceived and born after the deceased parent's death must occur within two years of the parent's death.*

[981] Manitoba LRC, *ibid*.
[982] Retter, *supra* note 47 at paras 99-103.

Issues for Reform

Is the *WESA* provision allowing the court to extend the time limit in which a child can be born, but not extend the time limit for when notice must be provided, still considered reasonable?

WESA allows the court to extend the time in which a child must be born. Should BC change this provision?

Current Legislation

Current law in British Columbia

For a child who was conceived posthumously, *WESA* sets out specific requirements for when that posthumously conceived child has a right to inherit from their deceased parent or other relative's estate.[983] Two of these requirements have time limits built in – for giving notice, and for the birth of the child. *WESA* allows the court to extend the time limit in which a child can be born, but not extend the limit for when notice must be provided.[984]

For a posthumously conceived child to inherit, the child must be born within two years of the deceased parent's death.[985] The court can extend the time during which the child must be born if the court feels it would be appropriate.[986]

> **Posthumous births if conception after death**
> 8.1 (1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:
> ….
> (b) the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;
> ….

[983] *WESA, supra* note 1, s 8.1.
[984] *Ibid*.
[985] *Ibid,* s 8.1(1)(b).
[986] *Ibid,* s 8.1(3).

> (3) Despite subsection (1) (b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.[987]

Relevant laws in other jurisdictions

In Ontario, the *SLRA* states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met.[988] The child must be born within three years of the deceased person's death, but the court can grant an extension order. The court cannot grant an extension of the notice period.[989]

In both BC and Ontario, the court can extend the time limit for a child to be born, but not for the period in which the surviving spouse must give notice.

Options for Reform

Brief statement of the issue

WESA allows the court to extend the time in which a child must be born. Should BC change this provision?

Options for reform

The options to consider in response to this issue for reform are below.

1. Amend *WESA* to allow the court to modify the time limit for notice to be provided.
2. Amend *WESA* to prevent the court from extending the time limit for a child to be born.
3. Maintain the current rule that a court can extend the time limit for the birth of a child, but not for notice to be provided.

Arguments For and Against Reform

[987] *Ibid,* s 8,1.
[988] *Ont SLRA, supra* note 48, s 47(10).
[989] *Ibid,* s 1.1(1), (3).

WESA allows the court to extend the time limit for a child to be born if it is appropriate. This section is not applicable to the time limit for notice. The academic and law reform literature does not discuss this matter.

The committee could consider if it is still reasonable to not allow the court to extend the time limit for notice to be provided. Notice must be provided that sperm, eggs, or embryos are available for conception, but the surviving spouse does not have to have commenced the assisted reproduction process.

Currently, the court can extend the time in which a child must be born. This may allow for adding extra time if the spouse is experiencing challenges conceiving. But the committee could consider if *WESA* should be relying on a court application to extend the time, instead of providing a longer window for a child to be born.

Potential tentative recommendations

option (1): *Section 8.1 of the Wills, Estates and Succession Act should be amended to allow the court to modify the time limit for notice of the possible use of human reproductive material of a deceased parent to conceive a child through assisted reproduction to be provided.*

option (2): *Section 8.1 of the Wills, Estates and Succession Act should be amended to prevent the court from extending the time in which (in order to inherit from a deceased parent's estate) a child, who was conceived and born after the deceased parent's death, must be born.*

option (3): *Section 8.1 of the Wills, Estates and Succession Act should not be amended, retaining the current rule that a court can extend the time in which (in order to inherit from a deceased parent's estate) a child, who was conceived and born after the deceased parent's death, must be born, but not the period for notice of the possible use of human reproductive material of a deceased parent to conceive a child through assisted reproduction to be provided.*

Issues for Reform

Should s 8.1 of *Wills, Estates and Succession Act* continue to require that notice be given to the deceased person's personal representative, beneficiaries, and intestate successors that the deceased person's genetic material may be used to create a child?

Potential tentative recommendations

option (1): *Section 8.1 of the Wills, Estates and Succession Act should be amended*

option (2): *Section 8.1 of the Wills, Estates and Succession Act should be amended*

option (3): *Section 8.1 of the Wills, Estates and Succession Act should not be amended, retaining*

Memorandum no. 23:
Posthumous Conception & Wills
Who Should Be Given Notice

Date: 12 December 2022

Introduction and Purpose of this Memorandum

The purpose of this memorandum is to discuss issues for reform concerning posthumous conception and the *Wills, Estates and Succession Act*[990] [*WESA*]. For an overview of BC's posthumous conception legal framework, see memorandum 20 pages 2 to 5.

Previous memorandums have discussed other aspects of posthumous conception:

[990] SBC 2009, c 13.

- Memorandum 20, discussing time limits for notice and a resulting birth for a posthumously conceived child to inherit under *WESA* section 8.1;
- Memorandum 21, discussing who can be listed as a parent for a posthumously conceived child under section 28 of the *Family Law Act*[991] [*FLA*]; and
- Memorandum 22, discussing posthumous conception and parentage under *WESA* section 8.1.

This memorandum discusses whether section 8.1 of *WESA* should continue to require that notice be given to the deceased person's personal representative, beneficiaries, and intestate successors that the deceased person's genetic material may be used to conceive a child.

Under *WESA,* for a child who is conceived posthumously, several conditions need to be met in order for the child to be able to inherit from the estate:

- The deceased person must have a spouse to whom they were married to or in a marriage-like relationship at the time of their death;
- The spouse must provide written notice that they might use the sperm, eggs, or embryos of the deceased person to conceive a child;
- The notice must be given within 180 days (~ 6 months) of the court issuing a representation grant;
- The notice must be provided to the deceased person's personal representative, beneficiaries, and intestate successors;
- The spouse must conceive through assisted reproduction;[992]
- The deceased person must be named the child's parent, as per Part 3 of the *FLA*;[993]
- The child must be born within 2 years of the parent's death (which can be extended by the court);[994] and
- The child must live for at least 5 days following their birth.[995]

Issues for Reform

[991] SBC 2011, c 25.
[992] *WESA, supra* note 1, s 8,1(1)(a).
[993] *Ibid,* s 8.1(1)(c).
[994] *Ibid,* s 8.1(1)(b), 8.1(3).
[995] *Ibid,* s 8.1(1)(b).

Should section 8.1 of *Wills, Estates and Succession Act* continue to require that notice be given to the deceased person's personal representative, beneficiaries, and intestate successors if the deceased person could be a parent to a posthumously conceived child?

Current Legislation

Current law in British Columbia

For a child who was conceived posthumously, *WESA* sets out specific requirements for when that posthumously conceived child has a right to inherit from their deceased parent or other relative's estate.[996] For a posthumously conceived child to inherit, the spouse must provide notice of their intention to use the sperm, eggs, or embryos within 180 days of when the representation grant is issued.[997]

This notice must be provided to three categories of people:

1. The personal representative;
2. Any beneficiaries; and
3. Any intestate successors.[998]

> **Posthumous births if conception after death**
> 8.1(1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:
>
> > (a)a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;[999]
> > ....

A personal representative is the executor of a will if the person died testate, or the administrator of the estate if the person died intestate. A beneficiary is "(a) a person

[996] *Ibid,* s 8.1.
[997] *Ibid,* s 8.1(1)(a).
[998] *Ibid*.
[999] *Ibid.*

named in a will to receive all or part of an estate, or (b)a person having a beneficial interest in a trust created by a will".[1000] An intestate successor is "a person who is entitled to receive all or part of an intestate estate".[1001]

Relevant laws in other jurisdictions

Canada

In the rest of Canada, the only other jurisdiction to directly address the inheritance rights of posthumously conceived children is Ontario.[1002] In Ontario, the *Succession Law Reform Act*[1003] states that a posthumously conceived child can inherit from the estate as if they were born before their parent died if some conditions are met.[1004] Ontario requires the spouse provide written notice to the Estate Registrar in Ontario that they may use sperm, eggs, or embryos to conceive a child.[1005]

USA

In California, the *Probate Code* states that a posthumously conceived child can inherit from the estate as if they were born before their parent died, if some conditions are met.[1006] California requires the spouse to provide written notice to a person who is distributing the estate or responsible for paying death benefits that the spouse may use the genetic material for posthumous conception.[1007]

Like California, the other states in the USA that require notice also only require notice be given to the personal representative.[1008]

Options for Reform

Brief statement of the issue

[1000] *Ibid,* s 1.
[1001] *Ibid.*
[1002] Christine E Doucet, "From *en Ventre Sa Mere* to Thawing an Heir: Posthumously Conceived Children and the Implications for Succession Law in Canada" (2013) 22 Dalhousie J Legal Studies 1 at 2, 5-6.
[1003] *Succession Law Reform Act,* RSO 1990, c S.26, ss 1.1(1), 47(10).
[1004] *Ibid*.
[1005] *Ibid,* s 1.1(1).
[1006] *Cal Prob Code* § 249.5.
[1007] *Ibid.*
[1008] Kristine S Knaplund, "Reimagining Postmortem Conception" (2021) 37:3 Ga St U L Rev 905 at 921-922.

BC requires that notice be given to the deceased person's personal representative, beneficiaries, and intestate successors that the deceased person could be a parent to a child conceived after the person's death using assisted reproduction. Should BC change who should be given notice?

Options for reform

The options to consider in response to this issue for reform are below.

1. Amend *WESA* to require that notice only needs to be provided to the personal representative.
2. Maintain the current rule that notice must be provided to the personal representative, beneficiaries, and intestate successors.

Arguments For and Against Reform

The academic and law reform literature does not discuss the topic of to whom notice should be provided in a substantive manner. Some of the literature briefly discusses notice within discussions about whether a posthumously conceived child should be allowed to inherit, and how limits can be put into place to balance interests of all the parties.

The committee could consider keeping the current rule that notice be provided to the personal representative, beneficiaries, and intestate successors. The Manitoba Law Reform Commission Reform's report suggests requiring the personal representative to be notified, and if the personal representative is the person using the genetic material, then any interested parties should be notified.[1009] Notifying any person who possibly may inherit from the estate would allow the potential beneficiaries to know that their interests may be impacted. However, it could be difficult for the person giving notice to know who the beneficiaries or intestate successors are, especially if the person is not the personal representative. Now that the committee has recommended to remove the spousal requirement for posthumous conception, it may be more likely that the person giving notice is not the personal representative and would have difficulty identifying all the people they would need to notify.

Going down to just notifying the personal representative could help alleviate some of the hurdles for engaging in posthumous conception, and it would be in line with other jurisdictions. The jurisdictions in the USA where there must be notice only

[1009] Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief*, Report 118 (November 2008) at 19.

require the spouse to notify the personal representative.[1010] Any academic research that mentions notice only refers to notice being provided to the personal representative.[1011] The personal representative would still receive notice, and they would know who the potential beneficiaries or intestate successors are so these individuals can be told of the delay in administering the estate.

Ontario only requires the spouse to notify the court's Estate Registrar that genetic material may be used to conceive a child. Ontario's approach to posthumous conception is very different than BC's approach. Ontario requires a spouse to apply to the court to determine parentage when there is posthumous conception,[1012] but BC uses out of court options. The BC *White Paper on Family Relations Act Reform* principles include preferring out of court options,[1013] with which this committee has concurred . It would be a significant departure from BC's parentage scheme and principles to require notification to the court.

Potential tentative recommendations

option (1): *Section 8.1 of the Wills, Estates and Succession Act should be amended to require that notice be given to the deceased person's personal representative that the deceased person could be a parent to a posthumously conceived child, but not require the beneficiaries or intestate successors to be notified.*

option (2): *Section 8.1 of the Wills, Estates and Succession Act should not be amended, retaining the current rule that notice be given to the personal representative, beneficiaries, and intestate successors that the deceased person could be a parent to a posthumously conceived child.*

[1010] Knaplund, *supra* note 19, at 921-922.

[1011] Patrick Grecu, "The New Ice Age: Addressing the Deficiencies in Arkansas's Posthumously Conceived Children Statute" (2019) 72:3 Ark L Rev 631 at 656-657; Courtney Retter, "Introducing the Next Class of Bastards: An Assessment of the Definitional Implications of the Succession Law Reform Act for After-Born Children" (2011) 27 Can J Fam L 147 at para101; Doucet, *supra* note 13 at 16.

[1012] *Children's Law Reform Act,* RSO 1990, c C.12, s 12.

[1013] British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (July 2010) at 5.

APPENDIX C

Biographies of Project-Committee Members

Zara Suleman, KC (committee chair) practises family law and fertility law at her law firm Suleman Family Law. She is a certified family law mediator and collaborative law practitioner. Zara has also been actively involved in presenting, training, writing, and editing materials on family law and fertility law issues. She is a former front-line anti-violence advocate and immigrant/refugee support worker and has done extensive professional development and academic research in the areas of family violence, specifically violence against women and children.

Zara has provided trainings to nurses, doctors, fertility centre teams, midwives, lawyers, and counsellors on various issues related to and on Assisted Reproductive Technology (ART) and Legal Parentage. Zara was one of the faculty members and co-organizers of the Continuing Legal Education (CLEBC) Course—Baby Making: Fertility Law and Assisted Reproductive Technologies (April 2016). Zara has also provided training and public education on assisted reproduction and donor agreements specifically for LGBTQ2S+ communities. She presented her paper, "We Are Family: Family Law Services for Queer and Transgender Couples and Families" at the National Family Law Program Conference (2014). Zara presented, "Family Conceptions: Family Making under Part 3 of the *Family Law Act*" (September 2017) at the Pacific Business and Law Institute (PBLI) Family Law Conference.

Zara is a LexisNexis—Practice Advisor and author of online materials on Family Law, Family Violence, Legal Practice, and Assisted Reproduction.

Zara co-authored one of the first comprehensive papers on ART conceived children and legal parentage in BC with barbara findlay, KC. The paper is titled Baby Steps: Assisted Reproductive Technology and the B.C. Family Law Act (January 2013). Zara was also a faculty member for the Continuing Legal Education (CLEBC) training—The *Family Law Act*: Everything You Always Wanted to Know where she presented on the co-authored paper in Kelowna, B.C. (February 2013).

Zara is a member of Fertility Law BC.

More information about Zara Suleman can be found at www.sulemanfamilylaw.com.

Tracey Anderson (committee member Oct. 2020 to Sept. 2021) is a Registered Nurse currently working as the Third-Party Coordinator and Medical Management Lead at Pacific Centre for Reproductive Medicine (PCRM) in Burnaby, B.C.

Prior to coming to work at PCRM, Tracey was a Peri-Operative Nurse at Burnaby Hospital's Operating room. Tracey has worked at PCRM for 14 years. During that time, she worked as the Nursing Director for 10 years and was closely involved with the opening of PCRM's Edmonton office. Tracey is involved with the Non-Hospital Medical and Surgical Facilities Accreditation Program (NHMSFAP) at PCRM and in the past was involved with the Non-Hospital Surgical Facility (NHSF) for PCRM Edmonton.

Since PCRM's inception Tracey has been the Third-Party Coordinator for Donor Egg, Surrogacy, Donor Sperm, and Embryo Donation. Working closely with the Medical Director, she has helped to implement and ensure all requirements are met for Health Canada Regulations.

Tracey is committed to Third Party Reproduction and understanding each patient's unique circumstance for creating a family with the assistance of fertility treatments.

Jeannette Aucoin practises family law and fertility/reproductive technology law at Clark Wilson LLP. She has experience with parentage matters including cases involving post-humous conception, surrogacy, and sperm/ova donor agreements, as well as compliance with the *Assisted Human Reproduction Act*. Jeannette also represents clients with respect to all aspects of family law including divorce, property division, child support, and spousal support. She is passionate about new developments in family and fertility law, as well as access to justice. Jeannette has also been a volunteer with Access Pro Bono since 2017.

Lynda J. Cassels is a family and wills and estates lawyer with Cassels Murray Family & Estates Law in Victoria. Trained in mediation and collaborative law, Lynda enjoys assisting clients with the legal issues that arise during major life transitions, including separation and divorce, planning for marriage or cohabitation, deciding to have children, or dealing with the death or diminishing mental capacity of a loved one. She has a particular interest in fertility law, adoption, and elder law. Lynda has presented at continuing legal education seminars on fertility and family law topics and formerly served on the executive the Elder Law and Family Law (Victoria) sections of the Canadian Bar Association (B.C. Branch).

barbara findlay, KC, has been practising queer law for more than thirty years. Her practice has included the formation, recognition, and protection of same sex, trans, polyamorous, and other family forms, including ART law. findlay's work is

embedded in an intersectional analysis of the ways that the law impacts marginalized communities.

findlay was the cofounder of Fertility Law BC, a working group of lawyers doing ART law, and a co-author of the first paper on Part 3 of the *Family Law Act*, "Baby Steps."

Mathew P. Good (committee member Sept. 2021 to Apr. 2023) practised class actions and complex commercial litigation with Good Barrister in Vancouver, until his untimely death in 2023. In his practice, he had particular experience with plaintiff-side actions in the areas of consumer protection, tort law, antitrust, and competition law. He was also the co-author of *Class Actions in Canada*, 2d ed. He had clerked for the BC Court of Appeal and the Chief Justice of Canada, and he had formerly taught statutory interpretation at the law schools at the Universities of British Columbia and Victoria.

Dr. Ruth M. Habte is an Obstetrics and Gynaecology Resident Physician at the University of British Columbia. She has a special interest in reproductive justice, reproductive endocrinology, and global health. As National Officer of Global Health Education during medical school, Dr. Habte directed global health curricula and was co-editor-in-chief of *Selected Cases in Global Health*. She has lived experience as a first generation Ethiopian-Canadian and black woman. She holds a Bachelor of Science in both Pharmacy and Medicine, as well as a Doctor of Medicine from the University of Manitoba.

Dr. Jon Havelock is a reproductive endocrinologist and infertility specialist at the Pacific Centre for Reproductive Medicine. Dr. Havelock's area of focus is infertility, recurrent miscarriage, polycystic ovary syndrome, infertility surgery, and reproductive endocrine disorders.

Dr. Havelock completed his residency in Obstetrics and Gynecology at the University of Alberta. He subsequently went on to complete a three-year, American Board Certified fellowship in Reproductive Endocrinology and Infertility at the University of Texas Southwestern Medical Center in Dallas, Texas.

He is currently a Clinical Assistant Professor at the University of British Columbia (UBC) and former Subspecialty Residency Program Director of the Gynecologic Reproductive Endocrinology and Infertility program at UBC. Dr. Havelock is a co-director at the Pacific Centre for Reproductive Medicine.

Shannan Knutson is a Legal Counsel within the Family Policy, Legislation and Transformation Office (FPLT), Justice Services Branch, Ministry of Attorney General. FPLT has responsibility for the policy underlying most private family-law legislation

in British Columbia including the *Family Law Act*. Shannan began with FPLT as a Legal Counsel in 2014. Prior to joining FPLT, Shannan worked for six years as a Senior Policy Analyst with Family Justice Services Division, the division responsible for operation of the family justice centres and justice access centres across the province. Shannan began her career in public service in 2004, as a policy analyst with what was then called the Ministry of Employment and Income Assistance. Interested in legal policy and a career in public service, Shannan left private legal practice, where she had been helping clients primarily with family-law matters, and completed a Masters degree in Public Administration with a concentration in Dispute Resolution at the University of Victoria. Shannan also spent a number of years working with various non-governmental organizations, including working with young offenders through the John Howard Society in Saskatchewan and developing youth justice policy and legislation with UNICEF in Central Asia. Shannan is a practising member of the Law Society of British Columbia and holds a Bachelor of Laws degree from the University of Saskatchewan obtained in 1999. She was called to the Saskatchewan Bar in 2001 and the British Columbia Bar in 2003.

Dr. A.J. Lowik (they/them) is a Postdoctoral Research Fellow and Researcher with the Centre for Gender and Sexual Health Equity, part of UBC's Faculty of Medicine. Their work is primarily focused on trans people's health, and experiences accessing health care, including reproductive and sexual health. They lead the Gender & Sex in Methods and Measurement Research Equity Toolkit project, creating tools for researchers who are interested in the precise, accurate and inclusive mobilization of gender and sex concepts. Dr. Lowik is the Vice-President of the Abortion Rights Coalition of Canada and a member of the B.C. Period Poverty Task Force. Dr. Lowik is a renowned expert in trans-inclusion, having worked with researchers, healthcare and social service organizations, lawyers and policymakers who are interested in trans- and gender-inclusive research and praxis, policy and practice, and legal reform.

Lindsay C. Morphy received her Bachelor of Laws from the University of Alberta in 2003 following which she articled at a national firm in Calgary. Upon relocating to Vancouver in 2004, Lindsay practiced at a boutique litigation firm until 2007, when she joined the Department of Justice in the Business & Regulatory Law Department until 2015, appearing in all levels of the courts in BC as well as the Federal Court and the Federal Court of Appeal.

In 2016, following her passion, she opened her solo practice and began working exclusively in the area of Fertility & Assisted Reproductive Technologies Law. Lindsay has guest lectured at the Peter A. Allard School of Law at UBC on the topic of Fertility Law and is passionate about helping intended parents, donors, and surrogates through the fertility process. In her practice, Lindsay prepares Surrogacy

Agreements, Egg Donation Agreements, Sperm Donation Agreements, Embryo Donation Agreements, provides independent legal advice to donors and surrogates, and appears in court on Declaration of Parentage Applications.

Melissa Salfi practices Family and Fertility Law at Crossroads Law in Vancouver, BC. She is an accredited Family Law Mediator and certified Collaborative Divorce practitioner. Melissa developed her Fertility Law practice when she moved to Vancouver in 2019. Prior to that she practiced family law in Ontario (where she was called in 2011) and worked as a policy advisor for the Royal Australasian College of Physicians in Sydney, Australia and later as a lawyer for the Australian Press Council. In her Fertility Law practice, Melissa regularly advises intended parents, donors, and surrogates. She prepares surrogacy and donor agreements for intended parents and provides independent legal advice to donors and surrogates. Melissa is passionate about helping individuals and couples build their families through third-party reproduction and has an interest in international family and fertility law matters.

Elise Schopper-Brigel is a pioneer in the collaborative family law movement, as in 2002 she introduced collaborative family law to Austria and soon after other European countries joined the movement, where it is currently thriving. She has published articles on the subject and was past co-chair of the Victoria Collaborative Family Law Group and chair of the Training Committee. Elise's practice also includes dispute resolution in family law matters including mediation. Her keen interest in mediating family disputes resulted in co-founding a local Mediation Study Group that has grown to become a very robust group. She is a co-founder (with the same co-founder, curiously!) of a local book club for women lawyers in Victoria that has also become a regular meeting of the minds. In addition, she is passionate about her practice in the area of fertility law, representing Intended Parents, Surrogates and Donors as well as obtaining parental declarations for international intended parents. She has used her natural connector skills in the development of a model for establishing parentage for births by surrogacy in BC. As a stalwart Orca activist, she started the Southern Resident Killer Whale group to bring attention to the plight of these iconic creatures. Her abiding passion, other than Prada, is her family consisting of her life partner, two children, and Chloe and Clyde.

Monique N. Shebbeare is a Tax and Estate Planner at TD Wealth, Wealth Advisory Services. As a Tax and Estate Planner, Monique applies her experience in estate, trust, and tax planning to assist TD Wealth clients in developing an estate plan that reflects their personal choices for the future. Prior to joining TD Wealth, Monique ran a solo law practice in Vancouver in fertility law and wills and estates. In her fertility law practice, she assisted clients with donor agreements, surrogacy agreements, multi-parent agreements, posthumous use of embryos, and legal

parentage. She has presented many times on the overlap of fertility and estate law. Monique Shebbeare received her BSc (Hon) in psychology from McGill University in 1995, and her LL.B. from the University of Toronto in 1999. She was called to the Ontario Bar in 2001 and the BC Bar in 2006. Monique is a contributor to the Continuing Legal Education of BC publication *Wills and Personal Planning Precedents: An Annotated Guide and is an author of Annotated Family Practice, 2023–2024*.

Dr. Beth Taylor is a Reproductive Endocrinologist and Infertility Specialist at the Olive Fertility Centre.

She completed her medical degree at Dalhousie University and residency in Obstetrics and Gynecology at the University of British Columbia (UBC). She completed a fellowship in Reproductive Endocrinology and Infertility in 2007 and joined Genesis Fertility Centre. Dr. Taylor worked at Genesis Fertility Centre until 2013, when she helped establish the Olive Fertility Centre.

She is a Clinical Associate Professor at UBC and coordinates the UBC Obstetrics & Gynecology residency program "Reproductive Endocrinology & Infertility" rotation. She is also a staff member at BC Women's Hospital and Vancouver General Hospital. Dr. Taylor has also published several papers in peer-reviewed journals and has written three book chapters.

Jasmeet K. Wahid is a lawyer at Aaron Gordon Daykin Nordlinger LLP. Her family law practice is diverse and interesting. It often includes complex financial and parenting issues. Her practice also includes unique issues in the areas of adoption, re-productive technology, child protection, and First Nations concerns. Jasmeet appears in all levels of court.

In 2019, she was involved in a significant family law appeal (*A.B. v C.D.*, 2020 BCCA 11 & *A.B. v C.D.*, 2019 BCCA 297) concerning a child's consent to gender affirming care, family violence and remedies under the *Family Law Act*. In 2017, she was successful in an important case concerning the adoption of a First Nations child and the statutory scheme of the *Adoption Act* (*M.M. v T.B.*, 2017 BCCA 296), with application for leave to the Supreme Court of Canada being dismissed. In 2015, she was successful in an important appeal concerning the issue of variation of spousal support and whether re-partnering is a material change of circumstances.

Jasmeet enjoys collaborating with colleagues in other practice areas involving challenging family law and related issues. In her spare time, Jasmeet has managed to climb Mt. Kilimanjaro, ride a camel in the Indian desert, and complete a marathon in Hawaii. She is searching for her next adventure.

Catherine J. Wong is a founding partner of Saltwater Law, a boutique family law firm located in downtown Vancouver. She offers specialized family law legal services relating to marriage and cohabitation, guardianship and parenting, fertility law, separation and divorce, and property division and support. She is a certified family law mediator and is also a collaborative divorce practitioner. Catherine's practice has a particular focus on fertility law, working with 2SLGBTQIA+ communities, and on working with polyamorous families. In addition to presenting on matters related to fertility law, Catherine is also asked to consult on fertility law matters by other family law lawyers in the context of cohabitation and separation. Catherine is a member of Fertility Law BC, the Canadian Bar Association, and the Trial Lawyers of British Columbia. She serves on the executive of the CBABC branch of the Sexual Orientation and Gender Identity Conference.

In addition to her law practice, Catherine is an active member of her communities and has served on a number of boards and organizations including the City of Vancouver 2SLGBTQIA+ Advisory Committee and the Just Society Committee of EGALE. Currently, she serves as the Past-Chair of Out on Screen, which produces the Vancouver Queer Film Festival and operates Out in Schools.

Holly Yager, M.Ed., RCC, CCC, is a Registered Clinical Counsellor with the BC Association of Clinical Counsellors and a Canadian Certified Counsellor with the Canadian Counselling & Psychotherapy Association with a primary focus on fertility, reproductive mental health, and sexual health. Holly has a Master's degree in Counselling Psychology from the University of British Columbia, and is an active member of the Canadian Fertility & Andrology Society's Counselling Special Interest Group and the American Society for Reproductive Medicine's Mental Health Professionals Group. Holly has co-authored several peer-reviewed publications related to pelvic pain and reproductive health, presented research at conferences, and facilitated workshops. In her private practice, she supports clients with concerns related to infertility, assisted conception, third-party reproduction, pregnancy loss, perinatal mood & anxiety disorders, and sexual/chronic pelvic pain. In addition, Holly has a long history working at BC Women's Hospital + Health Centre in the Specialized Women's Health, Reproductive Endocrinology & Infertility, Birthing, Recurrent & Early Pregnancy Loss, and Chronic Pelvic Pain/Endometriosis clinics.

Margot Young (committee member Nov. 2020 to Aug. 2021) is Professor in the Allard School of Law. She teaches and works in the areas of constitutional law, human rights, feminist theory, and social justice law. She is also on the board of Justice for Girls and chair of the board of the David Suzuki Foundation.

BCLI would also like to acknowledge:

Bruce Klette (liaison to the project) is a Director with BC Vital Statistics and subject-matter adviser to the Parentage Law Reform Project.

Dr. Rachel Olson.

APPENDIX D

Glossary

Assisted reproduction	Assisted human reproduction refers to a wide range of procedures which result in conception without sexual intercourse. For example, with the assistance of a sperm, egg, or embryo donor, or a surrogate. These may take place in a clinical or private setting.
Biology-based parentage	Historically, a person's parents were the individuals who were genetically related to them (or presumed to be so). This method of using genetics to determine who is a parent is the so-called 'genetics' or 'biology' based model of parentage. However, with assisted reproduction the law required a different way to think about parentage. See intention-based parentage.
Desk-Order	Desk-orders involve a simplified and paper-based application to the court. Rather than appearing before a judge in person, a desk order procedure allows people to complete the necessary paperwork and simply submit it to the court to obtain an order.
Donor	A donor under the *Family Law Act* is usually understood to be a person who provides human reproductive material, or an embryo created through their reproductive material- without the intention of becoming a parent. There are two types of donors. Unknown donors are strangers to the person using the reproductive materials and

	are often anonymous. Known donors are individuals known to the person using the reproductive materials. For example, they may be a friend, family member, or former romantic partner.
Embryo	Under the *Family Law Act*, this means "a human organism during the first 56 days of its development following fertilization or creation, excluding any time during which its development has been suspended, and includes any cell derived from such an organism that is used for the purpose of creating a human being."
Human reproductive material	Under the *Family Law Act*, this means "a sperm, an ovum or another human cell or human gene, and includes a part of any of them."
Intended parents	The *Family Law Act* deals with situations where the individuals who plan to act as parents to a child may or may not be genetically related to that child. Such people are often referred to as 'intended parents' because their connection to the child is their intention to become a parent (as opposed to genetics).
Intention-based parentage	With the introduction of assisted reproduction, a person's parents may or may not be genetically related to them. These individuals (often called 'intended parents') are parents by virtue of their intention to be a parent (as opposed to their genetics). See also biology-based parentage and intended parents.
Multi-parent family	Under section 30 of the *Family Law Act*, more than two people may be parents to a child. The act envisions certain groupings of people using this section. For example, a same sex couple and a

	donor. Multiparent families may or may not be polyamorous.
Parens patriae	A term meaning the parent of the nation. This is the idea that the court has the duty to protect vulnerable parties. For example, in a parentage context, the court can use parens patriae to provide solutions to parties where the written law is not able to provide a just result.
Parentage	This term refers to the laws that govern who may or may not become a parent. In British Columbia, parentage is determined by rules set out in part 3 of the *Family Law Act*. 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.
Polyamory	Polyamory is a consensual relationship of multiple adults based on an ethic of equality, consent, and mutual decision-making.
Polygamy	Polygamy may be understood as "an umbrella term that refers to the state of having more than one spouse at the same time." It is commonly linked to bigamy, which is a *Criminal Code* offence that frequently has elements of "fraud" and "deception."
Posthumous conception	Where a child is conceived after the death of one of the parents, using assisted reproduction.
Pre-birth agreement	This is an agreement which is completed before a child is born.
Pre-conception agreement	This is an agreement which is completed before a child is conceived.

Surrogate	A surrogate is an individual who carries and births a child without the intention of becoming a parent. There are two types of surrogacy. The first is gestational surrogacy, so named because the person is carrying the child but does not have a genetic connection. This usually involves implantation of an embryo containing the genetic material of the intended parents (although this is not always the case). The second is traditional surrogacy, in which the surrogate not only carries the child, but is also biologically related (and therefore an egg donor). This usually involves insemination of the surrogate by the sperm of one of the intended parents.

PRINCIPAL FUNDERS IN 2023

The British Columbia Law Institute expresses its thanks to its funders in 2023:

- Law Foundation of British Columbia
- Ministry of Attorney General
- Alzheimer Society of Canada
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- The Council to Reduce Elder Abuse (CREA)
- Department of Justice Canada
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- Simon Fraser University
- Vancouver Foundation
- McLachlin Fund

The Institute also reiterates its thanks to all those individuals and firms who have provided financial support for its present and past activities.