BRITISH COLUMBIA LAW INSTITUTE

BACKGROUNDER

Report on Parentage: Review of Part 3 of the Family Act: Legislative Fact Sheet

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Introduction

BCLI's Parentage Law Reform Project Committee has published a report that makes recommendations to reform the law of parentage. This backgrounder summarizes the content and rationale of the committee's recommendations that call for changes to legislation.

Parentage if no assisted reproduction—more than two parents

What is the current law?

- If a child is conceived by sexual intercourse, the "birth mother" and "biological father" are automatically the legal parents. More than two parents is only provided for with assisted reproduction.

What reforms does the report recommend?

- The legislation should allow for more than two parents where a child is conceived through sexual intercourse.
- More than two parents in this case will require a pre-birth agreement (as opposed to pre-conception).
- Legislation should spell out who must be a party to a pre-birth agreement and who may be made a parent through the pre-birth agreement but should not limit the num-ber of parents.

Why should the BC legislature enact these reforms?

- This change decreases barriers to creating a family, by not requiring assisted reproduction for multi-parent families, and it allows part 3 of the *Family Law Act* to keep pace with recent BC court decisions, and legislative amendments in other provinces.
- The requirement for a pre-birth agreement provides contractual protections where parties may change their minds or attempt to avoid responsibilities post-birth. Unlike assisted reproduction, where pregnancy is planned and roles can be clarified be-fore conception, this change contemplates situations where parties' roles do not be-come clear until after conception (e.g., unexpected pregnancy in a multi-parent family).
- Setting no limit on the number of parents provides flexibility and inclusivity to differ-ent family models and avoids arbitrary limits.

Donors and parentage—sperm donation by sexual intercourse

What is the current law?

- 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.

What reforms does the report recommend?

- If—and only if—a pre-conception written agreement is made, then the sperm pro-vider can be a donor not a legal parent.
- More than two parents in this case will require a pre-birth agreement (as opposed to pre-conception).

Why should the BC legislature enact these reforms?

- This change decreases barriers to creating a family by not requiring assisted repro-duction. It also brings part 3 into line with the law in other provinces.
- A pre-conception agreement requires people involved in conception to clarify their intentions before conception. It also avoids coercion after conception (to avoid pa-rental responsibilities), as well as future disputes.

Donors and parentage—definition for embryos

What is the current law?

- 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.

What reforms does the report recommend?

- The law should not require a genetic connection to an embryo in order to preserve donor status.

Why should the BC legislature enact these reforms?

- Embryos created for people don't 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 don't require a genetic connection to an embryo for a person to be a donor.

Conception via assisted reproduction (other than surrogacy)—form

What is the current law?

- The *Family Law Act* currently states that the parents of 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 consent—or they withdrew their consent—to be a parent prior to conception. There is no standardized form or requirement for documenting non-consent.

What reforms does the report recommend?

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

Why should the BC legislature enact these reforms?

- A set form provides clarity where a party doesn't want to be a parent.
- Making the form optional means that people aren't penalized for not completing it, and they can make a customized document if they wish.

Donor-conceived children—access to information

What is the current law?

- The *Family Law Act* doesn't have any provisions on donor-conceived people's right to information about their genetic origins—nor does any other BC or federal legislation.

What reforms does the report recommend?

- As a policy statement, the committee believes that a law should be made to allow for donor-conceived people to obtain identifying information about their donor.

Why should the BC legislature enact these reforms?

- Many international jurisdictions have moved to allowing access to donor infor-mation.
- Adoption legislation in BC has moved to an open system, where the default is that adult adoptees have the right to access information about their birth parent or parents.
- Donor-conceived people may experience harms from the current anonymity regime.

Surrogacy—decision making after birth

What is the current law?

- 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.

What reforms does the report recommend?

- 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.

Why should the BC legislature enact these reforms?

- Medical emergencies don't allow for time to make court applications. It is important that the legislation is clear on who can make decisions.
- While this issue is often covered in surrogacy agreements, it may not always be.

Posthumous conception—genetic connection

What is the current law?

- When a person who provided human reproductive material for use in assisted human reproduction dies before the conception of the child, then the deceased person may only be a parent under part 3 of the *Family Law Act* if the deceased person is genet-ically related to the child. A parallel provision operates in the *Wills, Estates and Succession Act*.

What reforms does the report recommend?

- The *Family Law Act* and the *Wills, Estates and Succession 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.

Why should the BC legislature enact these reforms?

- This change aligns with the values of the *Family Law Act* for assisted reproduction.
- Several other provinces don't require a genetic connection in these cases.
- The *Family Law Act* and the *Wills, Estates and Succession Act* provisions work together and should be consistent.

Posthumous conception—spousal relationship

What is the current law?

- 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. A parallel provision operates in the *Wills, Estates and Succession Act*.

What reforms does the report recommend?

- The *Family Law Act* and the *Wills, Estates and Succession Act* should no longer require a spousal relationship for a deceased person to be named a parent.

Why should the BC legislature enact these reforms?

- The current law 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.
- The *Family Law Act* and the *Wills, Estates and Succession Act* provisions work together and should be consistent.

Posthumous conception—number of parents

What is the current law?

- 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.

What reforms does the report recommend?

- 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.

Why should the BC legislature enact these reforms?

- 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 the existing *Family Law Act* recognition of multi-parent families in assisted reproduction.

Parentage declarations by the court—simplified procedure

What is the current law?

- Applying for a parentage declaration involves a full court procedure, including an oral hearing by a court.

What reforms does the report recommend?

- 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.

Why should the BC legislature enact these reforms?

- 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 multiple 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 sec-tion 31.

Parentage declarations by the court—parens patriae (inherent) jurisdiction

What is the current law?

- 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. But 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 inter-preted some aspects of part 3 as a complete code.

What reforms does the report recommend?

- The committee recommends a specific section in part 3 to clarify that parens patriae applies to parentage declarations.

Why should the BC legislature enact these reforms?

- 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 over-looked.

Parentage declarations by the court—when declaration is available

What is the current law?

- Section 31 only applies if there is a dispute or uncertainty as to parentage.

What reforms does the report recommend?

- 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.

Why should the BC legislature enact these reforms?

- 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.

Parentage declarations by the court—vital statistics agency

What is the current law?

- 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 statis-tics agency, which is responsible for registering births in British Columbia.

What reforms does the report recommend?

- Section 31 should be changed to require that the vital statistics agency receive notice (be served) of a court application that may change birth registration.

Why should the BC legislature enact these reforms?

- 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.

Parentage declarations by the court—territorial jurisdiction

What is the current law?

- British Columbia has legislation dealing generally with its courts' territorial jurisdic-tion. This legislation is called the Court Jurisdiction and Proceedings Transfer Act. But section 31 of the Family Law Act is silent on the specific issue of a BC court's territorial jurisdiction to make an order declaring parentage.

What reforms does the report recommend?

- Section 31 should state that the court has territorial jurisdiction where the child is born in BC or an alleged parent resides in BC.

Why should the BC legislature enact these reforms?

- 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 applica-tion. This change would fix this issue and provide clarity for practitioners.

Legal advice and counselling—independent legal advice

What is the current law?

- Part 3 of the *Family Law Act* doesn't require independent legal advice.

What reforms does the report recommend?

- 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 should the BC legislature enact these reforms?

- Independent legal advice can protect vulnerable parties. A lawyer providing inde-pendent 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, independent legal advice's benefits outweigh the costs

Language, definitions, and interpretation—gender-neutral language

What is the current law?

- Part 3 of the *Family Law Act* contains gender-specific language, including "birth mother" and discussion of a male person as a "biological father."

What reforms does the report recommend?

- The *Family Law Act* should move to gender-neutral language in part 3 and should use terminology that describes a person's role in conception and birth.

Why should the BC legislature enact these reforms?

- The law as written appears to exclude transgender and non-binary individuals and makes assumptions about people's roles.
- This change is consistent with parentage law in other provinces and the government of BC's initiative to move to gender-inclusive language.