***All Families Are Equal*: The New Legislation Regarding Parentage in Ontario, Canada**[1]

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Introduction

On January 1, 2017, the *All Families Are Equal Act* came into force in Ontario, Canada.[2] This legislation amended legislative provisions governing parentage to respond to the diverse needs of Ontario families to foster equality and inclusion. The legislation implements a shift from conceiving of parenthood as derived from biology to derived from intention. Ontario's government was forced to enact this reform after years of litigation initiated by parents from the LGBTQ community who rightly demanded that their parent-child relationships be recognized in a non-discriminatory manner. Ontario's new parentage law has a much broader societal impact as it respects the autonomy of all parents in choosing how to form their families.

How the *All Families Are Equal Act* came into existence

In Ontario, who is considered a parent is governed by the *Children's Law Reform Act* ("CLRA").[3] The registration of births and of parentage is governed by the *Vital Statistics Act* ("VSA").[4] Until the recent reforms, the CLRA and the VSA did not address the situation of children who had more than two parents, those whose parents were of the same sex, or those who were born from modern reproductive technologies or surrogacy arrangements. This posed a particular challenge for LGBTQ parents prompting a number of test cases.

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[1] This paper is based on a 2017 paper prepared by Sarah Boulby of Boulby Weinberg LLP, "All Families are Equal: Ontario Parentage".

[2] *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016*, 2nd Sess, 41st Leg, Ontario 2016 (assented to 5 December 2016), S.O. 2016 C. 23.

[3] *Children's Law Reform* Act, R.S.O. 1990, c. C.12, as am. (Canada is a federation. Parentage falls under provincial jurisdiction.)

[4] *Vital Statistics Act*, R.S.O. 1990, c. V.4, as am.

In 2006, Justice Rivard of the Ontario Superior Court (the trial division) declared the birth registry provisions of the VSA invalid because they infringed the constitutional equality rights of four sets of same-sex parents, protected by s. 15 of the *Canadian Charter of Rights and Freedoms*. The court delayed implementation of the declaration of invalidity to permit the Ontario legislature an opportunity to amend the legislation to bring it into compliance with the constitution.[5] In 2007, three self-identified parents of a child, (the biological father, the biological mother and her same sex partner) sought a declaration of legal parentage for the partner. In this case the Ontario Court of Appeal held that although the CLRA did not permit a declaration of parentage for a second mother, under the *parens patriae* power a court could grant such a declaration. In so doing, the Court of Appeal acknowledged the importance of a declaration of parentage as follows:

1. The declaration of parentage is a lifelong immutable declaration of status;
2. It allows the parent to fully participate in the children's life;
3. The declared parent has to consent to any future adoption;
4. The declaration determines lineage;
5. The declaration ensures that the child will inherit on an intestacy;
6. The declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for a child;[6]
7. The child of a Canadian citizen is a Canadian citizen, even if born outside Canada;
8. The declared parent may register the child in school; and
9. The declared parent may assert her rights under various laws including health consent legislation.[7]

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[5] *Rutherford v. Ontario (Deputy Registrar General)* 2006 CarswellOnt 3463 (Ont.S.C.). Section 15 of the *Canadian Charter of Rights and Freedoms* provides:

> S.15(1) Equality before and under law and equal protection and benefit of law
> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 15(2) Affirmative action programs
> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration or conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[6] OHIP is the Ontario Health Insurance Plan, which is Ontario's free public health care. Social Insurance Numbers are issued by the Canadian government and are necessary for many purposes including filing tax returns, taking employment or opening bank accounts.

[7] *A.A. v. B.B. and C.C.* 2007 CarswellOnt 2 (Ont.C.A) at para. 14.

The Court of Appeal refused to consider the parties' s. 15 equality rights constitutional challenge on technical grounds because they did not make that claim at first instance but only in the Court of Appeal.[8]

Following the 2007 Court of Appeal decision, those seeking legal confirmation of their status as parents could and did apply to courts for a declaration of parentage. This involved considerable legal expense, and a barrier to the legally unsophisticated. Although the unconstitutionality of the CLRA provisions seemed evident after the 2006 *Rutherford* decision, the provincial government did not move forward with legislative reforms. To force the issue, in 2016, nine families commenced a constitutional challenge against both the CLRA and the VSA. This application, *Grand v. Ontario (Attorney General),* was settled on the basis that the Attorney General of Ontario acknowledged the unconstitutionality of the legislation and agreed to introduce legislative amendments to rectify the law.[9] The Attorney General agreed to ensure that the new legislation would contain the following guiding principles:

1. 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.
2. Pre-conception intention to parent will be recognized as a basis of parentage in the context of same-sex relationships and assisted reproduction.
3. Presumption 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.
4. 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 a dispute.
5. A donor of human reproductive material or an embryo should not be declared a parent by reason only of the donation.
6. 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 the fetus.
7. 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 and judicial declarations of parentage will still be

[8] *A.A. v. BB and C.C.* 2007 CarswellOnt 2 (Ont.C.A.) at para. 12
[9] *Grand v. Ontario (Attorney General)* 2016 CarswellOnt 8390 (Ont.S.C.) Joanna Radbord was counsel in this action and instrumental in its settlement and implementation in the new legislation

available in circumstances for more than four parents, having regard to a child's best interests.

8. Pre-conception intention to parent will be recognized as a factor in determining best interests of a child.
9. The definition of "birth" in the VSA will be changed to be inclusive of trans parents who give birth to a baby.
10. 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.[10]

The provincial government introduced the *All Families Are Equal Act* some months after the settlement of the *Grand* case.

How the *All Families Are Equal Act* works to define "parent"

The amended CLRA now recognizes many different ways to determine that a person is or is not a parent of a child. They are as follows:[11]

1. The birth parent, who is defined as "the person who gives birth to a child", is a parent of the child unless that person is a surrogate, in which case special provisions apply.

2. A person who provides reproductive material or an embryo for use in conception of a child through assisted reproduction is not a parent unless he or she is otherwise a parent under the Act. "Reproductive material" is defined as all or any part of a sperm, ovum or other human cell or human gene.

3. The person whose sperm resulted in the conception of the child conceived through sexual intercourse is a parent unless that person and the birth parent agreed in writing to the contrary before the child is conceived.

4. The spouse of the birth parent at the time of conception of a child conceived through assisted reproduction or insemination by a sperm donor is a parent, unless (a) before conception the spouse did not consent to be a parent or withdrew such

[10] Cited in *M.R.R. v. J.M.* 2017 CarswellOnt 6290 (Ont.S.C.) at para. 49
[11] *CLRA*, *supra* note 3, ss. 6-13.

consent, (b) the birth parent is a surrogate, or (c) the child is conceived after the death of the person subject to an application by a surviving spouse for a declaration of parentage by the deceased. “Spouse” means either married spouses or those living in a conjugal relationship outside marriage. “Surrogate” means a person who agrees to carry a child conceived through artificial reproduction if, at the time of conception, the person intends to relinquish entitlement to parentage of the child to one or more persons.

5. Up to four persons who are parties to a “pre-conception parentage agreement” are parents.

6. If a child is conceived by sexual intercourse, there is a presumption that the following persons are a parent:

    a. The birth parent’s spouse at the time of the child’s birth;
    b. The person was married to the child’s birth parent by a marriage that terminated by death, nullity, or divorce within 300 days before the child’s birth;

    c. The person was living in a conjugal relationship with the child’s birth parent before the child’s birth and the child is born within 300 days after they cease to live together;

    d. The person has certified the child’s birth under the VSA or a similar act in another jurisdiction in Canada;

    e. The person has been found or recognized by a court of competent jurisdiction outside Ontario to be a parent of the child.

7. If a court declares that the person is a parent.

The legislative scheme prioritizes intention over biology in defining who is a parent and attempts to meet prospective parents’ expectations as to their status. The legislation preserves a role for declarations that a person is, or is not, a parent where there is a dispute or where there are more than four prospective parents. Most parents will be able to register their parentage without any court intervention.

Pre-conception Agreements

Prospective parents may now enter pre-conception agreements. These are written agreements entered into by two or more parties before a child is conceived. They are restricted to the following situations:

a. There or no more than four parties;

b. The intended birth parent is not a surrogate and is a party to the agreement;

c. If the child is to be conceived through sexual intercourse, the person whose sperm is used is a party to the agreement;

d. It the child is to be conceived through assisted reproduction or through insemination by a sperm donor, the spouse or the person who intends to be a birth parent is a party to the agreement, unless he or she provides written confirmation that he or she does not consent to be a parent and does not withdraw that confirmation before the conception.

There is no legislative requirement that the parties obtain independent legal advice on the pre-conception agreements, which is a requirement for all other types of domestic contracts in Ontario.

Surrogacy Arrangements

There are special provisions that apply to surrogacy arrangements. A surrogate and one or more persons may enter a surrogacy agreement as long as: there are only four parties to the agreement, the child is conceived by assisted reproduction and the parties to the agreement all receive independent legal advice. Even where surrogacy agreements comply with these legislative provisions, they are legally unenforceable and may only be used as evidence of intention. A surrogate must still provide consent in writing giving up entitlement to parentage after the child is seven days old. During those first seven days of the child's life, the surrogate and intended parents under the surrogacy agreement share the rights and responsibilities of a parent with respect to that child, subject to the agreement providing otherwise. If the surrogate does not give consent to relinquish parentage rights, any party to a surrogacy agreement may apply to a court for a declaration of parentage.

Conclusion

The *All Families are Equal Act* addresses many possible permutations and combinations, which makes it seem more complicated than it is. The definitions of who is a parent will generally fit into the majority of Ontarians' expectations of when a parent and child relationship is formed. The one exception, however, is the introduction of pre-conception consent as a means to displace parental rights and responsibilities from biological parents, even those who conceive a child through sexual intercourse.[12] The questions of what constitutes intention and what constitutes an enforceable pre-conception agreement under the new legislation are likely to generate litigation. The provisions that narrow the scope of legal parentage, rather than those that broaden it, may prove to be the most revolutionary elements to this legislation.

[12] See for example *M.R.R. v. J.M.* 2017 CarswellOnt 6290 (Ont.S.C.), which involved two parties, a man and a woman, who conceived a child through sexual intercourse. Before this legislation, the "father" would have been found to be a parent, ordered to pay child support and permitted rights of custody and/or access. In the light of this new legislation, the fact that the two parties had agreed before the child was born, although not in writing, that only the mother would be a parent was sufficient for the court to grant a declaration that the other party is not a parent. The mother was denied child support.