Assisted Human Reproduction - Working Group Report 2008

ASSISTED HUMAN REPRODUCTION

REPORT OF THE JOINT ULCC-CCSO WORKING GROUP

August 10-14, 2008 Quebec City, QB

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

Report of the Working Group

Background:

[1] The Conference was approached in 2007 by the CCSO-Family Justice Working Group to set up a joint working group to present uniform legislation to address advances in the area of assisted human reproduction. At last year's conference, a joint project was proposed and subsequently chosen as one of the new projects to be undertaken by the

ULCC. It was agreed that a joint working group would be formed consisting of members of the ULCC and members of the CCSO Family Law group.

ULCC-CCSO Joint Working Group

[2] In December 2007, the ULCC formed a joint working group with members of the CCSO Family Justice Working Group, at the request of CCSO. The ULCC-CCSO Working Group is co-chaired by Betty Ann Pottruff, Q.C. (SK-CCSO) and Elizabeth Strange (NB-ULCC). Members of the Working Group are: David Nurse (NS-ULCC), John Booth (AB-CCSO), Jill Dempster (BC-CCSO), Miranda Gass Donnelly (ON-CCSO), Lisa Hitch (CA-CCSO) and Hoori Hamboyan (CA-CCSO).

[3] Janis Cooper (NT-ULCC) had been a member of the Working Group and was responsible for drafting the English version of the legislation; however, she recently left her position in the Northwest Territories and, as a consequence, is no longer a member of the Working Group.

[4] Since the establishment of the Joint Working Group conference calls have been held on a monthly basis. These conference calls have focused on reviewing the mandate, reviewing the CCSO Family Report, discussing the policy, deciding on when and who to consult, deciding on how to proceed with drafting (i.e. whether to draft a stand alone Act or amend the existing *Uniform Child Status Act*) and reviewing drafts.

[5] The Working Group agreed that the preferred way to proceed would be to amend the existing *Uniform Child Status Act*. The main reason for this decision is that assisted human reproduction relates directly to issues dealt with in the *Uniform Child Status Act* and a new Act would create overlap and possibly confusion with the existing Act.

[6] To date, seven drafts of the amendments have been reviewed in English. A new English drafter and a French drafter have recently been assigned to continue the drafting process. In conjunction with the drafting, consultation is being held with both Assisted Human Reproduction Canada and Vital Statistics Registrars in order to gain their input on any issues that could affect the proposed amendments.

[7] The following report consists mainly of portions of a paper prepared by the CCSO Family Working Group that was presented to and adopted by Deputy Ministers of Justice in October 2007. It serves as the policy framework for the ULCC-CCSO Working Group.

Report of the CCSO Family Law Working Group

[8] Advances in AHR have made determining the legal parent-child relationship more complicated in certain cases. Most of the child status statutes across the country are based on a historical reality that pre-dates most AHR techniques, so they provide little guidance to a court when challenged. As a result, judges are being asked to make

decisions in a policy vacuum. If this situation is not remedied there is great potential for the law to develop in an ad hoc way from individual court decisions, within jurisdictions and with no consistency between provinces and territories. From the child's perspective, inconsistency in child status rights may arguably be inherently unconstitutional, since birth registration is a foundation document from which citizenship and the right to participate in society flows.

[9] Changes to the law in this area would respond to the realities of AHR by clarifying the relationship in such cases. Like many policy issues in family law, changes to clarify the law will have to address any remaining fundamental unfairness that exists for same-sex couples and their children. Although in Canada same-sex relationships are legally recognized, children born to same-sex couples may still experience different treatment in terms of the registration of their births. While these differences often reflect the historical purposes of the birth registration process, accommodation is needed to recognize equivalent parental and child rights in these situations.

[10] Because parentage laws and birth registration are the societal markers of legal parentage, same-sex couples have commenced numerous court challenges to ensure their inclusion in this fundamental element of family formation. Many Canadian jurisdictions have already experienced *Charter* challenges to these two legislative frameworks, and these challenges will only continue if legislatures are slow to respond.

[11] Opposite-sex couples who use AHR have not encountered the same difficulties in registering their children's births. However, since registration is not determinative of legal parentage, in the absence of specific legislation to resolve issues such as the legal status of the intended parents and third party donors of genetic material in relation to the child, they face the same legal uncertainty regarding the legal status of the parent-child relationship as same-sex couples do.

Defining the Policy Issues

[12] There are two related policy questions which must be resolved:

- who are the legal parents of a child at the moment of birth; and
- who is entitled to register as the child's parents.

[13] These issues may seem to be the same, but, in the legal construct of most provincial and territorial law, they are quite different. Typically, common law provinces and territories have child status legislation which defines who are the parents of a child and grounds legal responsibilities for support, custody and access and inheritance. In addition, they have birth registration provisions in their vital statistics legislation, which require and permit the administrative act of registration of parentage. There is substantial interplay between these two types of legislation. For example, a man who certifies the

birth registration is presumed to be the father in several child status statutes, and likewise, a person who receives a declaration of parentage under child status legislation is generally permitted to amend the birth registration.

[14] The period since 2001 has seen a high level of development in the law of birth registration, mostly through successful challenges to existing registration regimes. However, the issue of child status – who are the parents of a child at birth – has been less litigated, and is less understood by the public.[1]

[15] To accommodate same-sex parentage, and on occasion in response to court challenges, some jurisdictions have changed their registration process without changing their child status regime. Proceeding in this manner allows the administrative fact of registration to drive the legal child status policy development process, and has been questioned by some members of the AHRWG for that reason. Because child status is a legal status, and registration is to a great extent a reflection of that status, it is important that the policy work on determining parentage precede work to change vital statistics legislation.

Overview of Principles Adopted

[16] Canada's obligations under the *UN Convention On The Rights Of The Child* must be respected, including:

- protecting the child from discrimination,
- recognizing the best interests of the child is a primary consideration, and
- ensuring the status of the parent/child relationship is protected from birth.

[17] Commodification of children and reproductive abilities should be avoided.

[18] Equality of treatment of children regardless of the means of their conception should be promoted.

[19] The fact that women and men perform distinct roles in reproduction, which may merit distinct treatment for the woman who gives birth, should be recognized.

[20] The concept expressed in the Civil Code of Quebec and in the common law that a child has a maximum of two legal parents, but that other adults can take on parenting roles through their actions and relationship with the child or the child's parent should be accepted and maintained.[2]

The Recommended Approach

[21] The potential indicators for parentage are the act of birth, genetics and intention to parent. The current law of parentage in most common law jurisdictions is based on biological presumptions. Parentage begins with the act of birth – the birth mother is the

legal parent of the child, and a man who shares a conjugal relationship with the birth mother is presumed to be the father. This approach to parentage does not always work well in the AHR context. The result is to exclude some persons who have started families using AHR from acquiring automatic parental status by operation of law on the birth of a child.

[22] The challenge in developing a scheme for determining parentage that accommodates both natural conception and AHR is to balance the three potential indicators of parentage in a way that best reflects the principles set out above. The approaches are: to recognize the birth mother link; to equalize the natural and assisted conception models so that the two processes are treated the same as much as possible; and to look at an intention-based approach, where those who intend to parent, whether or not there is a genetic link, are recognized as parents. In all instances, court and/or administrative processes remain for persons who are left out of the determination of parentage at birth but who seek to be named as parents after birth.

[23] The AHRWG recommends a scheme for determining parentage that uses the model that equalizes, as far as possible, natural and assisted conception.

Parental status at birth:

[24] The birth mother is the child's legal mother at the time of birth. This applies whether or not the child is conceived using the birth mother's egg or a donor's egg. This provides stability for the child and treats natural and assisted conception the same.

[25] Unless a statutory provision (like a presumption) provides otherwise, the genetic father and the birth mother are the parents of a child.

[26] There are two means by which the birth mother can relinquish her parental status, and another person can gain parental status: adoption and surrogacy. The surrogacy approaches are outlined below.

Presumption of the "other" parent:

[27] In all cases except surrogacy, the parental status of the other parent will be presumed from that person's conjugal relationship with the birth mother at the time of conception or birth. This presumption applies whether or not there is a genetic link between the birth mother or the other parent and the child (i.e. it applies in cases where both egg and sperm are donated by third parties). This approach provides stability for the child and equal treatment of natural and assisted conception.

[28] The birth mother and a person with whom she shares a conjugal relationship, whether of the same or opposite sex, may jointly register the child's birth with a Vital Statistics registry showing themselves to be the child's parents. They do not have to go to

court to get declarations of parentage.

[29] In cases of natural conception, the current presumptions of parentage continue to be available for fathers. The presumptions can be rebutted by proving on the balance of probabilities that the presumed father is not the child's father. Currently, this is often done using DNA evidence to show that there is no genetic link between the presumed father and the child.

[30] In AHR cases (excluding surrogacy), presumptions of parentage are also available to the person in a conjugal relationship with the birth mother, whether of the same or opposite sex. However, since the child is not conceived through natural conception, proof of lack of a genetic link between the presumed parent and the child will not rebut the presumption of parentage. In order to rebut the presumption, the presumed parent will have to prove, on the balance of probabilities, that he or she did not consent, or prior to conception, withdrew consent to be the child's parent.

[31] When necessary, courts continue to be able to make declarations of parentage confirming or rebutting a presumption of parentage or in circumstances where a presumption does not operate or is challenged.

Rights of Third Parties:

[32] In all cases, third party donors of genetic material have no parental rights or responsibilities unless there is an express legislative provision otherwise. This is based on the fact that, as a general rule, third party donors do not intend to be the child's parents.

Surrogacy:

[33] Surrogacy arrangements are not enforceable.

[34] The AHRWG agrees that in all cases the surrogate will be recorded as the birth mother of the child and the surrogate's consent to relinquish her parentage will have to be obtained after the child's birth before the intended parents can be registered as the child's parents. If the surrogate consents to relinquish her parentage, no presumption would operate in favour of her spouse or conjugal partner because surrogacy is an exception to the presumptions rule

[35] Jurisdictions can choose whether or not to require intended parents in surrogacy arrangements to obtain court declarations of parentage before they are allowed to register themselves as the child's parents with a Vital Statistics registry. This decision will depend on how the jurisdiction views the role of the court and state in terms of considering the "best interests of the child" in these circumstances and whether to view these situations as similar to adoption or different.

[36] **2 options are being considered in determining the parentage of children born using surrogacy.**

1. The first option focuses on a genetic link with at least one of the intended parents and intention to parent. In this option, parentage in surrogacy situations would be determined based on the provision of genetic material for the child's conception by at least one of the intended parents. Legislation would allow the genetic parent and that parent's spouse or conjugal partner to apply for a declaration of parentage in a surrogacy situation. If the surrogate mother consents to the application, and the consent could only be given after the birth of the child, the court could make the declaration of parentage in favour of the genetic parent and the genetic parent's spouse or conjugal partner. Where the surrogate mother consents to the declaration, no presumption would operate in favour of her spouse or conjugal partner because surrogacy is an exception to the presumptions rule. (A jurisdiction could choose to allow the transfer of parentage to occur administratively through a registration process rather than require a court application.) In this option, where there is no genetic link between at least one of the intended parents and the child, the intended parents must apply to adopt the child.

2. The second option looks only at the intention to parent. It goes further than option 1 because it does not require the intended parents to apply to adopt the child where neither of them is genetically related to the child. It provides the same process in all surrogacy cases, regardless of whether or not there is a genetic link. This approach is based on distinguishing between adoption and surrogacy on the basis of when the intention to parent this particular child arises. In surrogacy situations both the intention of the intended parents to parent and the intention of the surrogate to relinquish her parentage arise before conception.

Conclusion

[37] CCSO Family recommends this scheme to common law jurisdictions as the best response to the principles adopted to guide our work. It responds to most of the issues currently before Canadian courts.

[38] This scheme does not change the law for determining the parentage of children born through natural conception. To the greatest extent possible, it treats children and parents in the same way, whether the children are born as a result of natural conception or AHR. It ensures that the legal parent/child relationship is clear from birth, so that legal rights and responsibilities can flow, and children are not discriminated against on the basis of means of their conception. Most of the same presumptions apply and so two parent status can generally be assumed or found. It recognizes AHR based on sperm donation and egg donation and treats them both in the same way.

[39] It avoids the commodification of children or reproductive abilities, for example, by not allowing surrogacy agreements to be enforced and leaving to jurisdictions the decision on the nature of review required to recognize such arrangements. The scheme includes two options for surrogacy cases. Option 1 provides an effective way of determining parentage in surrogacy arrangements where there is a genetic link between one of the intended parents and the child. This applies not only to opposite-sex couples for whom natural conception or other means of AHR are not viable but also to both male and female same-sex couples and single men and women. Option 2 provides a way to extend the scheme to determine parentage in surrogacy situations where neither intended parent is genetically related to the child, if a jurisdiction wishes to do so.

[40] The scheme protects the surrogate in two ways: as the birth mother, her consent is needed to permit parentage to be transferred to the intended parents, and since surrogacy arrangements are not enforceable, her rights are protected and balanced with the rights of the intended parents.

[41] In addition, it permits jurisdictions a choice in determining how to recognize parentage in surrogacy arrangements – either through registration at first instance or by requiring a court order before registration.

[42] The scheme also protects third party donors who do not wish to be parents by providing that they acquire no parental rights or obligations, unless legislation provides otherwise.

Next Steps

[43] It is the Working Group's expectation that drafting will continue and once the results of the consultations have been reviewed, a final report on the project and a draft Act and commentaries will be prepared for consideration at the 2009 Annual Meeting. In order to achieve these goals, the Working Group will continue to have regularly scheduled conference calls and meet as required.

[1] The exception is Alberta, which amended its child status legislation to accommodate the use of AHR. *Charter* litigation in Alberta has resulted in the extension of automatic parental status to same-sex spouses and partners in some circumstances. See *Fraess v. Alberta*, [2005] A.J. No. 1665 (Q.B.).

[2] This policy is being reviewed in light of an Ontario Court of Appeal finding that a child can have three legally recognized parents. See *A.A. v. B.B.,* (2007), 220 O.A.C. 115.

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