IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
FAMILY DIVISION

Citation: *C.C. (Re)*, 2018 NLSC 71
Date: April 4, 2018
Docket: 201702F0427

IN THE MATTER OF an Application for a Declaratory Order of Parentage pursuant to section 7 of the *Children's Law Act*, R.S.N.L. 1990, Chapter C-13.

Before: Justice Robert A. Fowler

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: January 18, 2018

Summary:

The Application was granted.

Appearances:

Tracy L. Bannier	Appearing on behalf of the Applicants
Jessica R. Pynn	Appearing on behalf of the Attorney General for Newfoundland and Labrador and the Registrar of Vital Statistics for Newfoundland and Labrador

Filed Apr. 4 18

Authorities Cited:

CASES CONSIDERED: *B. (D.) v. Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716, 39 Nfld. & P.E.I.R. 246; *A. (A.) v. B. (B.)*, 2007 ONCA 2.

STATUTES CONSIDERED: *Children's Law Act*, R.S.N.L. 1990, Chapter C-13; *Vital Statistics Act, 2009*, S.N.L. 2009 Chapter V-6.01; *Family Law Act*, R.S.N.L. 1990, Chapter F-2.

REASONS FOR JUDGMENT

FOWLER, J.:

BACKGROUND

[1] The Applicants are J.M. and J.E., the two male partners, along with C.C., the mother of a child, A., born of this polyamorous relationship, and who are now seeking a declaratory order pursuant to section 7 of the *Children's Law Act*, R.S.N.L. 1990, Chapter C-13 (the "*CLA*").

[2] The matter first came before Justice LeBlanc of this Court who, on June 23, 2017, ordered that the Attorney General for Newfoundland and Labrador, as well as the Registrar of Vital Statistics, be given notice of the Application.

[3] Having been served on June 28, 2017, counsel for the Attorney General and for the Registrar of Vital Statistics appeared on August 1, 2017 and requested a postponement of the matter to enable her to obtain further instructions. The postponement was granted and the matter set over to September 26, 2017 at which time counsel for the Attorney General and Registrar of Vital Statistics stated that the current legislation does not permit a child to have more than two parents.

[4] Justice LeBlanc then set the matter down for a hearing and, on January 18, 2018, the matter was heard by Justice Fowler.

[5] At the hearing before Fowler, J., counsel for the Applicants filed her Memorandum of Fact and Law as well as her Book of Authorities. Counsel for the Attorney General and Registrar of Vital Statistics as well filed her Memorandum of Fact and Law. In addition, counsel for the Applicants and for the Attorney General and Registrar of Vital Statistics made oral submissions to the Court.

[6] There were no further requests for additional postponement or for the presentation of any further evidence.

[7] The hearing was concluded and reserved by the Court pending its decision.

INTRODUCTION

[8] J.M. and J.E. are the two male partners in a polyamorous relationship with C.C., the mother of A., a child born of the three-way relationship in 2017. The relationship has been a stable one and has been ongoing since June 2015. None of the partners in this relationship is married and, while the identity of the mother is clear, the biological father of the child is unknown.

[9] J.M. and J.E., along with C.C., have sought to be legally recognized as the parents of A. However, Vital Statistics Division of the Ministry of Service NL refused to grant that designation on the basis that under the *Vital Statistics Act, 2009*, S.N.L. 2009 Chapter V-6.01 (the "*VSA*"), they were unable to name more than two parents on the child's birth certificate.

[10] By way of Application to this Court, J.M., J.E. and C.C. are seeking a declaration of parentage for all three of the Applicants pursuant to section 7 of the *CLA*.

ISSUE

[11] Whether or not the Supreme Court of Newfoundland and Labrador, Family Division, has the jurisdiction to make a declaratory order of parentage for more than two parents.

RELEVANT LAW

[12] Part II, and in particular sections 6 and 7, of the *CLA*, refers to the establishment of parentage and states:

> **6.** (1) A person having an interest may apply to the court for a declaratory order that a woman is or is not in law the mother of a child.
>
> (2) Where the court finds on the balance of probabilities that a woman is or is not the mother of a child, the court may make a declaratory order to that effect.
> 1988 c61 s6; 1989 c11 s3
>
> **7.** (1) A person having an interest may apply to the court for a declaratory order that a man is or is not in law the father of a child.
>
> (2) Where the court finds on the balance of probabilities that a man is or is not the father of a child, the court may make a declaratory order to that effect.
>
> (3) Where the court finds that a presumption of paternity under section 10 applies, the court shall make a declaratory order confirming that the paternity is recognized in law unless it is established on the balance of probabilities that the presumed father is not the father of the child.
>
> (4) Where circumstances exist that give rise under section 10 to conflicting resumptions as to the paternity of a child and the court finds on the balance of probabilities that a man is the father of a child, the court may make a declaratory order to that effect.
>
> (5) [Rep. by 2009 c11 s1]
>
> (6) [Rep. by 2009 c11 s1]

(7) Nothing in this section prevents an application under this section before the birth of the child.

[13] Section 10 of the *CLA* addresses the presumption of paternity and states:

10. (1) Unless the contrary is proved on the balance of probabilities, a man is presumed to be the father of a child in 1 or more of the following circumstances:

(a) he was married to the mother at the time of the child's birth;

(b) he was married to the mother by a marriage that was terminated by

(i) death or judgment of nullity that occurred, or

(ii) divorce where the judgment of divorce or *decree nisi* was granted within 300 days, or a longer period the court may allow, before the birth of the child;

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

(d) he and the mother have acknowledged in writing that he is the father of the child;

(e) he was cohabiting with the mother in a relationship of some permanence at the time of the child's birth or the child was born within 300 days, or a longer period the court may allow, after the cohabitation stopped; and

(f) he has been found or recognized by a court in Canada to be the father of the child.

(2) Where circumstances exist that give rise to a presumption that more than 1 man may be the father, no presumption shall be made as to paternity and no one is recognized in law to be the father unless the court so finds under subsection 7(2).

(3) A written acknowledgment of parentage that is admitted in evidence in a civil proceeding against the interest of the person making the acknowledgment is, in the absence of evidence to the contrary, proof of the fact.

[14] In relation to a declaratory order of the Court and the effect on the registry of birth under the *VSA*, section 11 of the *CLA* states:

11. (1) A statement respecting each order or judgment of the court which makes a finding of parentage or that is based on a recognition of parentage, shall be filed by the court in the office of the registrar.

(2) A written acknowledgement of paternity referred to in section 10 may be filed in the office of the registrar.

(3) On application and on satisfying the registrar that the information is not to be used for an unlawful or improper purpose, a person may inspect and obtain from the registrar a certified copy of

(a) a statement or acknowledgment filed under this section; or
(b) a certificate of registry of birth made under the *Vital Statistics Act, 2009.*

(4) The registrar is not required to amend the register of births in relation to a statement or acknowledgment filed under this section.

(5) Notwithstanding subsection (4), on receipt of a statement under subsection (1) in relation to a declaratory order made under section 6 or 7, the registrar shall, in accordance with the *Vital Statistics Act, 2009* amend the register of births accordingly.

[15] And further, in addressing the circumstances of artificial insemination and the recognition of parentage, section 12 of the *CLA* states:

12. (1) In this section, "artificial insemination" includes the fertilization by a man's semen of a woman's ovum outside of her uterus and subsequent implantation of the fertilized ovum in her.

(2) 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 even if his semen was mixed with the semen of another man.

(3) A man who is married to 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.

(4) A man who is not married to a woman with whom he is cohabiting 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, unless it is proved that he refused to consent to assume the responsibilities of parenthood.

(5) Notwithstanding a married or cohabiting man's failure to consent to the insemination or consent to assume the responsibilities of parenthood under subsection (3) or (4), 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.

(6) 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.

[16] The *Family Law Act*, R.S.N.L. 1990, Chapter F-2 (the "*FLA*"), at section 2, defines a "child" and a "parent" at (a) and (d) respectively as:

(a) "child" means a child born within or outside marriage and includes

(i) a child adopted under the *Adoption of Children Act* , and
(ii) a child whom a person has demonstrated a settled intention to treat as a child of his or her family, but does not include a child placed in a foster home for consideration by a person having lawful custody;

(d) "parent" means the father or mother of a child by birth, whether within or outside marriage, or by virtue of the *Adoption of Children Act,* and includes a person who has demonstrated a settled intention to treat a child as a child of his or her family other than under an arrangement where the child is placed in a foster home for consideration by a person having lawful custody;

[17] It has been well-established that in dealing with the matters of children, the best interests of a child or children shall always be the determining factors for the courts.

[18] Part III of the *CLA* states at section 31 that:

31. (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.

(2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including

(a) the love, affection and emotional ties between the child and,

(i) each person entitled to or claiming custody of or access to the child,
(ii) other members of the child's family who live with the child, and
(iii) persons involved in the care and upbringing of the child;

(b) the views and preferences of the child, where the views and preferences can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and the special needs of the child;

(e) the ability of each parent seeking the custody or access to act as a parent;

(f) plans proposed for the care and upbringing of the child;

(g) the permanence and stability of the family unit with which it is proposed that the child will live; and

(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

ANALYSIS

[19] There is little doubt that the legislation in this Province has not addressed the circumstance of a polyamorous family relationship as is before this Court and that what is contemplated by the *CLA* is that there be one male and one female person acting in the role of parents to a child.

[20] Throughout the above references, the sections speak to a "man" in the singular and at no time is there a reference which would lead one to believe that the legislation in this Province considered a polyamorous relationship where more than one man is seeking to be recognized in law as the father (parent) of the child born of that relationship.

[21] In this regard, I agree with the position of counsel for the Attorney General and Registrar of Vital Statistics who stated her position on parentage at paragraph 9 of her Memorandum of Fact and Law as being:

> **9.** The *Children's Law Act*, RSNL 1990 c C-13, does not allow for more than two people to be named as the legal parents of a child. Read comprehensively, it is evident that the Act contemplates only two parents, particularly in the *Act's* use of the word "both":
>
> 26(3) Where more than 1 person is entitled to custody of a child, 1 of them may exercise the rights and **accept the responsibilities of a parent on behalf of both** in respect of the child.
>
> ...
>
> 28(2) A child is habitually resident in the place where he or she lived
>
> (a) **with both parents**;
>
> ***Children's Law Act*, RSNL 1990 c C-13**
> **Memorandum of Act and Law of the AG of NL, Tab 1**

[22] And further at paragraph 11:

> 11. The *Children's Law Act* was introduced to the House of Assembly in 1988. Hansard from that time shows that of primary concern was the elimination of the distinction between children born inside and outside of marriage as well as the codification of the best interests of the child. Polyamory was not discussed.
>
> **Newfoundland and Labrador, House of Assembly, *Hansard*, No. 71**
> **(July 8, 1988) at 4217 (Hon. Lynn Verge)**
> **Memorandum of Fact and Law of the AG of NL, Tab 3**

[23] And at paragraphs 14, 15 and 16:

> **14.** While the Applicants have stated that there is no explicit provision in either act that limits parentage to two people, the consistent use of the phrase "both

parents" in both acts indicates that the acts only contemplate a child having two parents.

15. The Applicants have also noted the decision of *Lynch v. St. John's (City)*, 2016 NLCA 35, in which this province's Court of Appeal confirmed the adoption of the "modern rule" of statutory interpretation as stated in Driedger, *The Construction of Statutes*:

> [31] As noted by the majority of this Court in *Archean Resources Ltd. V. Newfoundland (Minister of Finance)*, 2002 NFCA 43 (CanLII), 2002 NFCA 43, 2015 Nfld. & P.E.I.R. 124, at para. 15, the Supreme Court of Canada has adopted as its "modern rule" of statutory interpretation the statement in Driedger, *The Construction of Statutes* (2nd ed., 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.
>
> ***Lynch v. St. John's (City)*, 2016 NLCA 35**
> **Memorandum of Fact and Law of the Co-Applicants, Tab 1**

16. As discussed above, reading the words of both the *Children's Law Act* and the *Vital Statistics Act*, 2009 in their entire context and in their grammatical and ordinary sense, it is evident that the acts contemplate a child having only two parents.

[24] Having found that the provincial legislation does not offer much comfort to the Applicants in this matter, I will now consider whether or not there is a gap in the legislation and, if so, does it trigger a remedy under the Court's inherent *parens patriae* jurisdiction.

[25] In *B. (D.) v. Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716, 39 Nfld. & P.E.I.R. 246, Wilson, J. of the Supreme Court of Canada found that there was a gap in the Newfoundland *Adoption of Children Act* (at that time) in that it offered no appeal from the Director's decision to remove a child from the home of prospective adoptive parents in which the child was prospering. Wilson, J. stated at paragraph 14 that:

> **14.** If the B.'s had indeed no right of appeal under the statute from the director's removal of C. from their home, then I believe there is a gap in the legislative scheme which the Newfoundland courts could have filled by an exercise of their parens patriae jurisdiction. Noel J., in other words, could have done more than recommend that the director give C. the chance of the good home available with the B.'s. He could have so ordered. It was not a matter of substituting his views for those of the director. It was a matter of exercising his parens patriae jurisdiction in light of a deficiency in the statute. If it was not in C.'s best interests that he be removed from the appellants' home, then in the absence of any statutory right of appeal through which his interests might be protected, Noel J. had an obligation to intervene.

[26] It would seem from Wilson, J.'s comments that the crucial factor in using the Courts *parens patriae* power was to protect the best interests of the child in that case.

[27] In *A. (A.) v. B. (B.)*, 2007 ONCA 2, a case in which a lesbian couple sought to have both women legally recognized as the mothers of a child, the Ontario Court of Appeal found that there was indeed a gap in that province's *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*"). M.R. Rosenberg, J.A., writing for that court, recognized and accepted that the scheme of the *CLRA* contemplates only one mother and one father (reference paragraph 22), and if that was the deliberate intention of the legislature then it would be difficult to overcome. He stated at paragraph 31 that:

> **31.** The determination of whether a legislative gap exists in this case requires a consideration of whether the *CLRA* was intended to be a complete code and, in particular, whether it was intended to confine declarations of parentage to biological or genetic relationships. If the *CLRA* was intended to be confined to declarations of parentage based on biology or genetics, it would be difficult to find that there is a legislative gap, at least as concerns persons with no genetic or biological link to the child.

[28] However, in his further analysis, Rosenberg, J.A. found that it was not simply a matter of accepting the social norms at the time of the introduction of the *CLRA* but that the realities of a changing society must not be ignored to the detriment of children who no longer fit the traditional family model. He stated at paragraphs 33 and 34 that:

> **33.** Further, even if the *CLRA* was intended to limit declarations of paternity and maternity to biological parents, that would not answer the question of whether there is a gap. Advances in reproductive technology require re-examination of the most basic questions of who is a biological mother. For example, consider the facts of *M.D.R. M.D.R.* involved a case where one lesbian partner was the gestational or birth mother and the other partner was the biological mother, having been the donor of the egg.
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> **34.** I return to the earlier discussion of the intention of the *CLRA*. The legislation was not about the status of natural parents but the status of children. The purpose of the legislation was to declare that all children should have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The Legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day. As MacKinnon A.C.J.O. said in *Bagaric v. Juric* (1984), 44 O.R. (2d) 638 (Ont. C.A.) at: "The Legislature recognized by this legislation present social conditions and attitudes as well as recognizing that such declarations have significance beyond material ones."

[29] I agree with the reasoning of Rosenberg, J.A. and find it persuasive in relation to the matter presently before me.

[30] In relation to the *CLA*, it is safe to say that at the time of its introduction approximately 30 years ago, there was no contemplation of the now complex family relationships that are common and accepted in our society. Counsel for the Attorney General and Registrar of Vital Statistics has referred me to *Hansard* of July 8, 1988 where the Honourable Minister Lynn Verge introduced a bill on family law reform. She stated:

> The fourth bill is 'An Act Respecting The Law of Children,' and that contains very substantial reforms in our Family Law, reforms, I should say, that are long overdue. The Act, for a start, eliminates the distinction between children born and outside of marriage and within marriage. Of course, that would be required now by The Charter of Rights, and it is something that our government would want to do in any case. The Act further provides for enhancement of the status of children in other ways by codifying the concept that the interests of children are paramount in court actions involving them. An innovation is setting out proper procedures for a court adjudication of access and custody matters. Our Province has long suffered without

> appropriate legislative provision for resolving custody and access disputes, and we have had to resort to other inappropriate remedies which were never conceived for children. There are a number of other innovations in the area of the law respecting children. So I am pleased that members opposite agree with the principles of the bills.

[31] It is clear from *Hansard* that the main concern was to bring about equal status for children born inside and outside of marriage. This was the same as found by Rosenberg, J.A. in his analysis at paragraph 34 above. He further stated at paragraph 35 that:

> **35.** Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The *CLRA*, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide. [Emphasis Added]

[32] And further at paragraph 38:

> **38.** I disagree with the application judge that the legislative gap in this case is deliberate. There is no doubt that the Legislature did not foresee for the possibility of declarations of parentage for two women, but that is a product of the social conditions and medical knowledge at the time. The Legislature did not turn its mind to that possibility, so that over thirty years later the gap in the legislation has been revealed. In the result, the statute does not provide for the best interests of D.D. Moreover, a finding that the legislative gap is deliberate requires assigning to the Legislature a discriminatory intent in a statute designed to treat all children equally. I am not prepared to do so. See the comments of Rivard J. in *M.D.R.* at paras. 93 - 103. There is nothing in the legislative history of the *CLRA* to suggest that the Legislature made a deliberate policy choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the Act.

[33] I am of the opinion that when the *CLA* was enacted in this Province it was never the intention of the legislature to discriminate against any child but clearly to bring about equal status for all children notwithstanding their parentage.

[34] In the present case, the child, A., has been born into what is believed to be a stable and loving family relationship which, although outside the traditional family model, provides a safe and nurturing environment. The fact that the biological certainty of parentage is unknown seems to be the adhesive force which blends the paternal identity of both men as the fathers of A. I can find nothing to disparage that relationship from the best interests of the child's point of view.

[35] As to the best interests of the child in this case, all of the factors under section 31(2) of the *CLA* come into play with the exception of the views of the child. I have no reason to believe that this relationship detracts from the best interests of the child. On the contrary, to deny the recognition of fatherhood (parentage) by the Applicants would deprive the child of having a legal paternal heritage with all the rights and privileges associated with that designation. Society is continuously changing and family structures are changing along with it. This must be recognized as a reality and not as a detriment to the best interests of the child.

[36] Under the *CLA*, at paragraph 10(2) where a presumption that more than one man may be the father of a child, I am required to consider paragraph 7(2) in that regard.

[37] I have considered paragraph 7(2) and find that since both J.M. and J.E. each share an equal probability of paternity in this case, neither of them tilts the balance of probabilities in his individual favour and either of them is likely to be the child's father.

[38] I find on the evidence before me that there is in fact a gap in the *CLA* which was not intentional but which acts against the best interests of a child born into such a polyamorous relationship as is before the Court. To deny this child the dual

paternal parentage would not be in his best interests. It must be remembered that this is about the best interests of the child and not the best interests of the parents.

[39] As to my *parens patriae* jurisdiction, it is well established that as a Superior Court I have an inherent *parens patriae* jurisdiction. Counsel for the Attorney General and Registrar of Vital Statistics, at paragraph 17 of her Memorandum of Fact and Law, acknowledges the *parens patriae* jurisdiction of this Court when she states with reference to Wilson, J.'s analysis in the case of *B. (D.) v. Newfoundland (Director of Child Welfare)* and referenced previously in this decision:

> **17.** The Supreme Court of Canada has found that a court may use its *parens patriae* jurisdiction (a facet of its inherent jurisdiction) to fill a gap in legislation. There is no limitation in either the *Children's Law Act* or the *Vital Statistics Act, 2009* on the inherent jurisdiction of the Court. Therefore, if this Honourable Court finds a gap in the legislation at issue, there is no statutory limitation on the Court's use of its *parens patriae* jurisdiction remedy the gap.
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> ***B.(D.) v. Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716**
> **Memorandum of Fact and Law of the AG of NL, Tab 5**

[40] In consideration of the best interests of the child and in the exercise of my *parens patriae* jurisdiction, I find that there is an unintentional gap in the *Children's Law Act*, R.S.N.L. 1990, C-13, preventing a recognition of J.M. and J.E. as the fathers of A. To remedy the gap I am issuing a declaration that both J.M. and J.E. are the fathers (parents) of the child, A., born of the polyamorous relationship with C.C., the mother of the child. The amendments to the *Vital Statistics Act, 2009*, shall follow accordingly.

[41] There will be no order as to costs.

ROBERT A. FOWLER
Justice