# Court of Queen's Bench of Alberta

**Citation: D.W.H. v. D.J.R., 2011 ABQB 608**

**Date:** 20111012
**Docket:** FL01 11127
**Registry:** Calgary

Between:

**D.W.H.**

Applicant

- and -

**D.J.R. and D.D.**

Respondents

- and -

**The Minister of Justice and Attorney General of Alberta**

Intervener

**Restriction on Publication:** By Court Order, there is a ban on publishing information that may identify the children or guardians in this matter. See the *Family Law Act,* s. 100.

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**Reasons for Judgment**
**of the**
**Honourable Madam Justice S.M. Bensler**

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## Introduction

[1] The Applicant, Mr. H., is challenging certain sections of the *Family Law Act,* S.A. 2003, c. F-4.5 ("*FLA*") and the *Vital Statistics Act*, R.S.A. 2000, c. V-4 ("*VSA*") on the basis that both pieces of legislation discriminate against him on the grounds of gender and sexual orientation contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*. The Applicant filed a Notice of Motion seeking an Order declaring that ss. 8, 12 and 13 of the *FLA* violate his right to equality pursuant to s. 15 of the *Charter* and a reading in of any language necessary to recognize the parental rights of "intended parents" in a gay male relationship. Mr. H. further seeks an Order declaring that the *VSA* violates his s. 15 rights by failing to provide for recognition of a non-biological gay male "intended" parent on a birth certificate and seeks an amendment to the registration process under this *Act*. Mr. H.'s Notice of Motion was filed on October 28, 2010.

[2] In addition to the above, Mr. H. is also seeking damages against the Province as well as an award of costs on a retroactive basis.

**History**

[3] The Applicant Mr. H. and the Respondent Mr. R. were in a same-sex interdependent adult relationship when they determined that they wanted a child. They met with a lesbian couple, the Respondent Ms. D. and her partner Ms. C., and worked out an arrangement whereby Ms. D. would be impregnated using Mr. R.'s sperm in an assisted conception, and would give the child to Messrs. H. and R. Following this birth, Ms. D. would then be impregnated for a second time, again using Mr. R.'s sperm in an assisted conception, and the second child would be raised by Ms. D. and her partner.

[4] Baby S. was born in May of 2003 following a successful assisted conception using Mr. R.'s sperm. Mr. H. and Mr. R. were both present at her birth. Baby S. lived with and was cared for by Mr. H. and Mr. R. She grew up referring to these two men as "Papa" and "Daddy", respectively. Both Ms. D. and Ms. C. enjoyed regular access to the child S. In October of 2005, Ms. D. gave birth to the child N., again using Mr. R.'s sperm via assisted conception. Baby N. lived with and was raised by Ms. D. and Ms. C., with Mr. H. and Mr. R. (more so Mr. R.) exercising regular access. Biologically, the child S. and the child N. are sister and brother.

[5] A number of factual findings as to the nature of the relationship between Mr. H. and Mr. R., as well as the role played by Ms. D., are set out by Eidsvik, J. at 2009 ABQB 438, 478 A.R. 109. This judgment has not been appealed and I adopt the factual findings as set out therein. Specifically, I accept that Mr. H. and Mr. R. were living together in a loving and committed relationship. They each wore similar wedding bands, although they were never legally married. Both individuals were extremely excited about the birth of the child S. and lovingly welcomed her into their home. Both contributed to the care and upbringing of the child S. as dual primary caregivers. Mr. H. indicated that he was initially interested in adopting the child S. but did not pursue this option as he was unsure of the parental rights of Ms. D. and did not want to "rock the boat". Ms. D. lived with the couple for the first 2 ½ months following the child S.'s birth at which time all three parties participated in the baby's care. After Ms. D. moved back home, primary

responsibility for the child S.'s care moved to Messrs. H. and R. By all accounts, Mr. H. was a loving and involved *de facto* parent to Baby S.

[6] Messrs. H. and R. separated in June of 2006 when the child S. was approximately three years of age. Mr. H. moved out and the child S. continued to reside with Mr. R. Ms. D. had not relinquished her parental or guardianship status and she and Mr. R. subsequently entered into a parenting agreement which named each of them as guardians of both the child S. and the child N., with Mr. R. having primary responsibility of the child S. and Ms. D. having primary responsibility of the child N. Following the separation, relations between Mr. H. and Mr. R. and Mr. H. and Ms. D. soured. The Respondents claimed to be the sole legal parents of the child S. and initially denied any meaningful access to Mr. H., claiming that it was not in the child S.'s best interests.

[7] In October of 2006, Mr. H. brought an application for a contact order pursuant to s. 35 of the *FLA* granting him reasonable access on the basis that he acted as a parent to the child S. for the first three years following her birth. The chambers judge refused to grant the order and Mr. H. appealed to the Court of Appeal. The Court held that the trial judge erred by failing to determine Mr. H.'s legal status with respect to the child S., *in loco parentis*, before considering whether a contact order ought to be made: 2007 ABCA 57, 412 A.R. 34. The Court of Appeal found that "the uncontested evidence supports the conclusion that [Mr. H] stood in the place of a parent to the child": para. 18, and that Mr. H. had been "directly involved in her parenting since birth": para. 19. Accordingly, the Court awarded reasonable access pending trial or further court order.

[8] Of note to this application are the Court's comments at para. 7 that:

> The *FLA* is recent legislation. The definitions of father, mother, parent and guardian and whether it is possible to have more than one father or mother have yet to be judicially considered in this province and arguably arise on these facts. However, for the purpose of this interim application, we need not determine whether having more than one father and mother is possible under the *FLA*, or whether the respondents meet the definitions of parent or guardian under the *FLA* and what might flow as a result.

[9] Subsequent to the Court of Appeal's order, Mr. H. began exercising his access rights. The relationship between the parties further deteriorated and shortly thereafter a parenting assessment was performed. An order was granted in November of 2007 discontinuing contact between Mr. H. and the child S. Mr. H. submits that following this period, his relationship with the child S. has become virtually non-existent.

[10] Mr. H. sought a subsequent contact order giving him reasonable and generous access to the child S. under s. 35 of the *FLA*. The trial took place in the spring of 2009, when the child S. was six years old: see 2009 ABQB 438, *supra*. Mr. H. brought the application for access on the basis that he was a person standing in the place of a parent, or that he was a person who could be

considered a parent in law. Eidsvik, J. found that based upon the Court of Appeal's finding that Mr. H. stood in the place of a parent, he was able to bring the application without leave, pursuant to s. 35 of the *FLA*. She further noted that had Mr. H. been considered a legal parent, he would not have to satisfy the conditions enumerated under s. 35. Rather, there is a presumption that it is in the child's best interests to maintain maximum contact with his or her parents, absent evidence to the contrary. On the facts of the case before her, Eidsvik, J. applied the common law test for access as if both Messrs. H. and R. were legal fathers to the child S. On this basis she found that it was in the best interests of the child S. to have access visits with Mr. H. and ordered accordingly.

[11] Following the trial, Eidsvik, J. informed the parties that under the wording of the *FLA*, Mr. R. was not the legal father to the child S. Indeed, by operation of the *Act*, the child S.'s sole legal parent was Ms. D., who did not have primary custody of the child S. Following receipt of these reasons, Mr. R. applied to become - and was appointed - guardian of the child S. The order was granted in November of 2010. Mr. H. is also seeking an order for declaration of guardianship in relation to the child S. This application is opposed by Mr. R. and Ms. D.

[12] As a part of his application Mr. H. is challenging the validity of both the *FLA* and the *VSA*, as set out above. It is this constitutional challenge that is before me today. Following written and oral submissions by the parties it became clear that there has been some misapprehension on the behalf of the Applicant (who is self-represented) as to whether he was precluded from arguing in favour of a three-parent family model, based upon correspondence that he had received. In order to fully and finally resolve this issue, I requested that both the Applicant and the Intervener provide this Court with submissions as to whether the *FLA* discriminates against the Applicant's *Charter* rights utilizing a multiple-parent model.

[13] Submissions were received by both parties in this regard. The submissions received by the Applicant revealed that he continued to operate under the misapprehension that he was precluded from arguing in favour of an inclusive parenting model (although he clearly expressed his preference for a two parent model to the exclusion of the birth mother). This is best reflected in para. 6 of his supplementary submissions wherein he indicates that he has been told by lawyers and other government officials that the multiple parent model was not an arguable option. With respect to the Applicant, it is the courts, and not lawyers or government employees, who ultimately determine the interpretation of legislation. While the supplementary submissions of the Intervener confirmed that the Applicant was not arguing for a multiple parent model, it went on to address the issues surrounding the multiple parent model.

[14] In order to fully appreciate Mr. H.'s argument, I have reproduced the relevant sections of the legislation at issue.

**Legislation**

[15] The Applicant filed his originating notice of motion in this matter on October 28, 2010. He claims that his *Charter* rights were infringed by the *FLA* as worded at that time. This hearing took place on April 20, 2011. The *Family Law Statutes Amendment Act*, S.A. 2010, c. 16 received Royal Assent on December 2, 2010. Its relevant sections were proclaimed in force on August 1, 2011. This *Act* amends the presumptions of parentage originally created in the *FLA*. The sections of the *Act* that are pertinent to this Application have been appended to this decision ("*Amended Act*").

[16] While the Applicant made reference to the changes proposed in the *Amended Act* during argument, this *Act* had not yet been proclaimed in force and thus any *Charter* arguments concerning the amended legislation were not before this Court. While the recent proclamation of the *Amended Act* has, in part, rendered certain of my findings moot, the Applicant's claim that his *Charter* rights were infringed by the previous version of the legislation will be adjudicated on its merits. It is the previous version of the *FLA* which established parentage over Baby S. and it is this legislation which the Applicant claims negatively effected his relationship with the child and under which he seeks damages.

[17] The relevant sections of the *FLA* are as follows:

> **Definitions**
>
> 1 (f) "father" means
>
> > (i) unless subclause (ii) or (iii) applies, the biological father of a child, including a male person described in section 13(2)(a),
> >
> > (ii) in the case of an adopted child, a male person who adopts the child, or
> >
> > (iii) a male person described in section 13(2)(b);
>
> 1 (i) "mother" means
>
> > (i) unless subclause (ii) or (iii) applies, the person who gives birth to a child,
> >
> > (ii) in the case of an adopted child, a female person who adopts the child, or
> >
> > (iii) a female person described in section 12(6);
>
> 1 (j) "parent" means the father or mother of a child;

1 (n) "relationship of interdependence" means a relationship of interdependence as defined in the *Adult Interdependent Relationships Act*;

**Presumption of parentage**

8(1) For all purposes of the law of Alberta, unless the contrary is proven on a balance of probabilities, a male person is presumed to be the biological father of a child in any of the following circumstances:

(a) the male person was the spouse of the mother of the child at the time of the birth of the child;

(b) the male person was the spouse of the mother of the child and the marriage was terminated by

(i) a decree of nullity of marriage granted less than 300 days before the birth of the child, or

(ii) a judgment of divorce granted less than 300 days before the birth of the child;

(c) the male person became the spouse of the mother of the child after the birth of the child and has acknowledged that he is the father of the child;

(d) the male person cohabited with the mother of the child for 12 consecutive months during which time the child was born and has acknowledged that he is the father of the child;

(e) the male person cohabited with the mother of the child for at least 12 consecutive months and the period of cohabitation ended less than 300 days before the birth of the child;

(f) the male person is registered as the father of the child at the joint request of himself and the mother of the child under the *Vital Statistics Act* or under similar legislation in a province or territory other than Alberta;

(g) the male person has been found by a court of competent jurisdiction in Canada to be the father of the child for any purpose.

(2) Where circumstances exist that give rise to a presumption under subsection (1) that more than one male person might be the father of a child, no presumption as to parentage may be made.

**Declaration of parentage**

9(1) The following persons may apply to the court for a declaration that a female person named in the application is the mother of a child or a male person named in the application is the father of a child:

(a) a person claiming to be the mother or father of the child;

(b) the child;

(c) a parent of the child, if the child is under the age of 18 years;

(d) a guardian of the child;

(e) a person who has the care and control of the child.

(2) The court shall grant a declaration of parentage on being satisfied on a balance of probabilities that the alleged mother or alleged father is the mother or father of the child.

(3) In making a declaration of parentage, the court shall have regard to any subsisting presumption of parentage under section 8.

(4) The court has jurisdiction under this section if the child or an alleged parent against whom an application is brought resides in Alberta.

(5) A declaration under this section applies for all purposes of the law of Alberta.

**Surrogacy**

12(1) In this section,

(a) "genetic donor" means a female person who provides genetic material that is fertilized and implanted in the uterus of a gestational carrier;

(b) "gestational carrier" means a female person in whose uterus the genetic material of a genetic donor is implanted.

(2) A genetic donor may apply to the court for an order declaring the genetic donor to be the mother of a child who is born in Alberta to a gestational carrier.

(3) An application under subsection (2) may not be made more than 14 days after the date of the child's birth or such longer period as the court allows.

(4) The gestational carrier and any other guardian of the person claimed to be the child must, in accordance with the regulations, be served with notice of an application under subsection (2).

(5) If

(a) the court is satisfied that the child resulted from the fertilization of the genetic donor's genetic material, and

(b) the gestational carrier consents, in the form provided for by the regulations, to the application, the court shall make an order declaring the genetic donor to be the sole mother of the child.

(6) A genetic donor who is declared to be the sole mother of the child under subsection (5) is deemed to be the mother at and from the time of the birth of the child.

(7) Any agreement under which a gestational carrier agrees to give birth to a child for the purpose of relinquishing that child to a genetic donor

(a) is not enforceable, and

(b) may not be used as evidence of consent of the gestational carrier under subsection (5)(b).

**Assisted conception**

13(1) In this section, "assisted conception" means the fertilization by a male person's sperm of a female person's egg by means other than sexual intercourse and includes fertilization of a female person's egg outside of her uterus and subsequent implantation of the fertilized egg into her uterus.

(2) A male person is the father of the resulting child if at the time of an assisted conception he was the spouse of or in a relationship of interdependence of some permanence with the female person and

(a) his sperm was used in the assisted conception, even if it was mixed with the sperm of another male person, or

(b) his sperm was not used in the assisted conception, but he consented in advance of the conception to being a parent of the resulting child.

> (3) Subject to the exceptions in the regulations, a male person whose sperm is used in an assisted conception involving an egg of a female person who is neither his spouse nor a person with whom he is in a relationship of interdependence of some permanence is not the father of the resulting child and acquires no parental or guardianship rights or responsibilities of any kind as a result of the use of his sperm.

[18] The Applicant also alleges that the *Vital Statistics Act* discriminates against him on the basis of gender and sexual orientation. He did not specify any particular section as being offensive, other than to argue that the *VSA* demonstrated a breach of individual rights due to a lack of legislative services and that the *Act* should otherwise acknowledge him as a parent to the child S. As I understand the Applicant's argument, he is claiming discrimination based upon the fact that the *VSA* requires registration to reflect the parentage of Ms. D. as birth mother, and not an individual such as Mr. H., who stands as an intended parent. After hearing oral argument, it became clear that the majority of the discrimination alleged by Mr. H. stemmed from operation of the *FLA*. I note that s. 8(1)(f) of the *FLA* presumes parentage of the male person who is registered as the father of a child under the *VSA*.

**Issues**

[19] The primary issue before this Court is whether the impugned legislation offended the Applicant's s. 15 *Charter* rights by failing to grant status as a parent or guardian by operation of law based upon a prohibited enumerated or analogous ground. Section 15(1) of the *Charter* states that:

> 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.

[20] Laws which offend against this principle are considered unconstitutional, unless otherwise saved under a s. 1 analysis. If the legislation in question offends the Applicant's s. 15 *Charter* rights and cannot be saved under s. 1, I must determine an appropriate remedy.

**Analysis**

[21] At the outset of my decision, and prior to addressing the *Charter* issues, I wish to briefly discuss one of the grounds of relief requested by the Applicant; that is, his request to reopen the property and asset settlement previously reached between himself and Mr. R. The Applicant argues that this prior settlement was agreed to under duress and settled fraudulently. He seeks to have this settlement re-opened in order to introduce new evidence of duress. The Applicant further argues that the settlement was procured on the grounds of discriminatory legislation. The application before this Court is meant to deal specifically with whether the legislation in issue

discriminates against the Applicant's ability to be recognized as a parent. The Applicant did not argue that either *Act* discriminated against his ability to claim for property division or support. If the Applicant wishes to have his property and spousal support settlement reviewed he must proceed through the proper channels.

[22] Having briefly dealt with and dismissed this part of the Applicant's claim, I turn now to the crux of this application, namely whether the impugned provisions of the *FLA* and the *VSA* offend against the Applicant's s. 15 *Charter* rights. Although the Applicant's Notice of Motion alleged discrimination based upon gender and sexual orientation, during both written and oral argument he further alleged that he had been discriminated against on the basis of family status. As a preliminary point, I shall address his claim on this ground.

[23] At para. 11 of the Applicant's brief, he asserts that the above-mentioned sections of the *FLA* and the *VSA* violate s. 4 of the *Alberta Human Rights Act*. The Applicant filed a human rights complaint on August 13, 2009 pursuant to the [now] *Alberta Human Rights Act*, R.S.A. 2000, c. A -25.5 ("*AHRA*"). As I understand the Applicant's human rights claim, he has asserted that the *FLA* and the *VSA* demonstrate a lack of legislative services which in turn have breached his rights by failing to acknowledge his family status, gender and sexual orientation. Mr. H.'s human rights claim was investigated and was ultimately dismissed by the Director on February 9, 2011 pursuant to s. 22(1)(a) of the *AHRA* on the grounds that the Applicant had failed to prove discrimination in the provision of goods or services available to the public. In putting forth his human rights claim, the Applicant argued that he had been discriminated against, in part, on the basis of family status. The *AHRA* expressly protects against discrimination on the grounds of "family status." Family status is defined at s. 44(1)(f) as "the status of being related to another person by blood, marriage or adoption."

[24] On March 5, 2011 the Applicant wrote to the Chief Commissioner requesting a review of the Director's decision to dismiss his complaint and suggesting that the matter be referred to a human rights panel. This appeal was commenced within 30 days of the dismissal, as required by the *AHRA*. If the Applicant is not satisfied by the decision of the Chief Commissioner, he is able to apply for judicial review of that decision. To my knowledge, the appeal before the Chief Commissioner has not been determined, nor has the Applicant filed an application for the matter to be reviewed by this Court pursuant to s. 37 of the *AHRA*. As such, this Court lacks the jurisdiction to make any determination as to whether the *AHRA* has discriminated against the Applicant on the basis of family status, gender or sexual orientation.

[25] While "family status" is an enumerated ground under the *AHRA*, it is not an enumerated ground under the *Charter*. Gender, of course, is an enumerated ground and sexual orientation has since been accepted as an analogous ground: *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3. According to G. Beaudoin and E. Mendes, 4th ed., *Canadian Charter of Rights and Freedoms* (Markham, Ont., Butterworths, 2005) at p. 996, "family status" has not yet been recognized by the Supreme Court of Canada as an analogous ground. This Court has been unable to locate any Supreme Court authority

confirming family status as an analogous ground. However, I do refer to *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, where the majority confirmed the test for establishing an analogous ground, at para. 13:

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

[26] While there has not been a definitive Supreme Court ruling on this issue, I note that a number of lower courts have accepted distinction on the grounds of "family status" as an analogous ground. In *Pilette v. Canada*, 2009 FCA 367, 319 D.L.R. (4th) 369, the applicant claimed that a certain section of the *Income Tax Act* infringed upon her s. 15 *Charter* rights based on both age and family status. The respondent argued that a distinction based upon family status was not an analogous ground. While both the trial judge and the appellate Court seemingly accepted family status as a ground, they held that on the facts the applicant had failed to prove that single family parental incomes constituted a homogeneous economic situation involving a vulnerable group. In *Frégeau v. Canada*, 2004 TCC 293, the applicant claimed that the disallowance of a tax credit was discriminatory based on family status and violated his s. 15 *Charter* rights. The Court found that notwithstanding the fact that the applicant was treated differently based upon a personal characteristic - family status - the differential treatment under the *Income Tax Act* was not discriminatory in purpose or effect.

[27] In *Thibaudeau v. Canada*, [1994] 2 F.C. 189, the majority of Federal Court of Appeal held that the *Income Tax Act* discriminated against the applicant, a separated custodial parent, on the grounds of "family status". Of note, the majority opined at p. 211 that:

> The fact that family status or some similar expression figures as a prohibited ground of discrimination in most human rights statutes also serves to confirm its analogous nature to the grounds enumerated in the *Charter*.
>
> Finally, the group to which the applicant belongs and which claims discrimination on the ground of family status, separated custodial parents, can readily be seen as a discrete and insular minority which has historically suffered prejudice and has need of protection.

[28] On appeal, the majority of the Supreme Court allowed the appeal, deciding that the tax regime was not discriminatory, without focusing on the nature of marital or family status as such: [1995] 2 S.C.R. 627.

[29] More recently, the discrimination claim in *Fraess v. Alberta (Minister of Justice and Attorney General)*, 2005 ABQB 889, 390 A.R. 280 was decided on the basis of the applicant's gender and sexual orientation, as opposed to expressly establishing family status as a ground.

[30] I do not mean to state that there can never be overlapping grounds of discrimination; surely the grounds of "gender", "sexual orientation" and "family status" cannot be seen as being mutually exclusive. However, during the application before me, Mr. H. failed to demonstrate how he was discriminated against on the grounds of family status in a manner that differed from either sexual orientation or gender. In his Notice of Motion he claimed discrimination on two distinct grounds; sexual orientation and gender. These are the grounds that the Intervener, who filed their written submissions first, addressed in argument. As such, and given my findings that the Applicant has proven discrimination on the grounds as pled, I leave for another day the issue of whether family status is a properly recognized analogous ground.

[31] I turn now to the question of the whether the legislation in issue offended the Applicant's *Charter* rights.

[32] The facts are clear that the child S. was conceived via assisted human reproduction whereby Mr. R.'s sperm was inserted into Ms. D. The *FLA* defines "assisted conception" as the "...fertilization by a male person's sperm of a female person's egg by means other than sexual intercourse...".

[33] I accept the earlier findings of this Court that both during the planning for conception and after the birth of the child S., there was an understanding that Mr. R. and Mr. H. would have primary parenting responsibilities over the child S. and that Ms. D. would carry the baby for them, in return for the opportunity to have and raise baby N. using a subsequent assisted conception. During the trial before Eidsvik, J., it became apparent that the parties may have been operating under different assumptions. Mr. H. believed that following the birth of the child S., the child would be raised by himself and Mr. R., and that he would be one of two fathers with all of the rights and responsibilities that would come along with that role. Ms. D. testified that

although she understood that Messrs. H. and R. would be the primary caregivers, she expected to be involved to some degree in the child S.'s life and did not expect to give up any of her parental rights. Eidsvik, J. found that Mr. R. understood that Mr. H.'s role was going to be one of a co-parent (father).

[34] Mr. H. argues that because he was in the equivalent of a spousal relationship with Mr. R. prior to planning the conception and then following birth (up until separation) and that because throughout this process he fully intended to act as a father to the child S., he should be recognized as a parent by operation of law notwithstanding the fact that his genetic material was not used in the conception process. For the purposes of this judgment, I use the term "spouse" or "spousal" as indicating a couple that is married, living common law, or in relationship of interdependence.

[35] The *FLA* operates to regulate parentage of children born outside of the traditional method (being conception through sexual intercourse). Advances in reproductive technology have made it possible for couples - and individuals - who are otherwise unable to conceive a child to do so. However, the very nature of assisted conception can lead to difficulties with the legalities of determining "who is a parent". While the *FLA* has attempted to define parenthood through assisted conception, it is clear that the *Act* was modelled upon a traditional family structure (i.e. a heterosexual couple who is unable to conceive a child through sexual intercourse). However, this fact alone does not ground a claim for discrimination under s. 15 of the *Charter*.

[36] Both parties agree that the current test for discrimination has been recently restated by our Supreme Court in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 and *Withler v. Canada (Attorney General)*, 2011 SCC 12, 1 S.C.R. 396. These cases confirm a two-step analysis: the first step is determining whether the law, on its face or in its apparent effect, creates a distinction on an enumerated or analogous ground. The second step involves an examination of whether this distinction creates a disadvantage by perpetuating prejudice or stereotyping: *Kapp*, para. 17; *Withler*, para. 30. The legal burden is on the claimant to establish a violation of his or her rights on a balance of probabilities.

**Were the Applicant's s. 15 rights infringed?**

[37] The first step is determining whether the impugned law creates a distinction based upon one of the grounds protected under s. 15 of the *Charter*. That is, is the claimant being treated differently on the basis of one (or more) of the enumerated or analogous grounds. As the Court in *Withler* held, it is unnecessary to pinpoint a particular mirror group that precisely corresponds to the claimant group for the purposes of a comparison: para. 63. The focus of a s. 15 complaint must be on substantive, not formal equality: *Withler*, para. 2; *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, at p. 171; *Kapp*, para. 15.

[38] While the Intervener suggests that it is no longer necessary to identify a particular comparator group, comparison continues to play a role throughout the analysis. As such, the

Intervener suggests that, when compared to any couple where neither party can carry a child, the Applicant is treated no differently under the *FLA*. With respect, I do not think this is a proper comparison. Rather, the analysis should determine whether Mr. H. (in his relationship with Mr. R.) is treated differently from couples who require assistance in conceiving a child thus falling under ss. 12 or 13, and should not be limited to instances where neither couple is able to carry a child to term.

[39] In this instance Mr. H. is claiming discrimination on the grounds of gender and sexual orientation. He is arguing that the *FLA* fails to account for the realities of parentage in a homosexual male relationship. He claims discrimination based upon a commingling of these two grounds.

[40] As the Court in *Withler* held, at para. 58:

> ...An individual or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt...

[41] The above approach allows for the flexibility required to accommodate claims based on intersecting grounds of discrimination: *Withler*, para. 63.

[42] The Intervener argues that the fact that Mr. H. was not recognized as a parent and guardian by operation of law in circumstances where assisted conception was used - where he intended to be a parent and was in a spousal relationship with the genetic father of the child - has nothing to do with his gender or sexual orientation. Rather, the Intervener argues the *FLA* operates identically for all people where neither partner can carry the child, regardless of their gender or sexual orientation. It argues that under the *FLA* regime, adoption is the means for the non-biological partner to become a parent.

[43] The Intervener further argues that in relation to parentage in cases where assisted conception must be used, the *Act* is <u>not</u> about making parents by operation of law based solely on intent as opposed to biology. Rather, the Intervener submits there must be an appropriate biological connection coupled with an intention to parent.

[44] With respect, I disagree with the Intervener's interpretation of the *Act*. The *FLA* clearly provides for a mechanism whereby a non-biological partner can be considered a parent based upon intention. Section 13(2)(b) provides that a male who is in a spousal relationship (or its equivalent) with a female who becomes pregnant through assisted conception is the father of the resulting child, even if his sperm was not used in the fertilization process, as long as he consents in advance to being a parent. This is clearly an instance of an individual becoming a parent by operation of law based solely on intent as opposed to biology without having to resort to the

adoption process. It is also, given the wording of s. 13, applicable only to heterosexual couples using assisted conception.

[45] The *FLA* recognizes that in some instances, although each member of a couple has healthy genetic material, the couple nonetheless requires assistance in conceiving a child. The *Act* thus contemplates circumstances wherein each member of a heterosexual couple will be able to use their own genetic material to create a foetus, albeit where conception must take place through a means other than intercourse.

[46] For example, under s. 12 (surrogacy) a female person (genetic donor) can provide her own egg which has been fertilized using her male partner's sperm, with the foetus being carried to term by a gestational carrier. In this circumstance the male partner of the female genetic donor is recognized as the biological father of the child by operation of ss. 1(f)(i) and 13(1) and (2). The genetic donor can (with consent of the genetic carrier) apply for an order following the birth of the child to be declared the sole mother: s. 12(2)-(5). Likewise, under s. 13(2)(a) each member of a heterosexual couple is able to provide their own genetic material in order to create a foetus, although fertilization takes place outside of the uterus.

[47] By operation of biology, gay couples are unable to each provide the genetic material required to produce a baby. Unlike heterosexual couples (where if possible each member can donate genetic material), gay couples are forced to elect which partner will use his or her genetic material for the purposes of fertilization. The decision may be the result of discussion, an arbitrary election, or even of medical necessity (in this case Mr. H. is HIV positive and as such would not be a candidate to provide genetic material). Therefore, in all gay couples, at least one partner must rely solely on the "intended" parental provisions of the *Act*.

[48] Furthermore, the limited recognition of parenthood in the *FLA* is not restricted to "intended" gay parents, but to biological parents as well. As noted by Eidsvik, J., under the *FLA*, Mr. R. is not considered the child S.'s father. Notwithstanding the fact that his sperm was used in the fertilization process, he is not deemed a father in the same way that a heterosexual male in a spousal relationship with Ms. D. would have been. As such, the *FLA* fails to bestow parentage on a homosexual individual (Mr. R.) who is both a biological and intended father.

[49] Indeed, s. 13 of the *FLA* bases male parentage upon the existence of a spousal relationship with the birth mother; an occurrence which will never be realized in a gay male relationship. Under the historical version of the *FLA*, the spouses in a gay union could never be recognized as parents by operation of law. I recognize that the situation faced by gay parents has been alleviated by s. 8.1 of the *Amended Act*, assuming consent of the surrogate. This, of course, is not the situation before Messrs. H. and R.

[50] The *FLA*'s limited recognition of parenthood in this regard operates to an unfair disadvantage to gay couples where both partners in a gay union fully intend to act as parents to the child. As shall be seen, the forced election as to which individual in a gay couple is to donate

genetic material creates an additional disadvantage for the non-donor spouse. As a result, the *FLA* confers upon heterosexual spouses a benefit (parental presumption under s. 13(2)(a) and (b) or parental status under a relatively easy process under s. 12) that is denied to homosexual spouses. As is apparent upon reading *Fraess*, this distinction is even more pronounced in the case of a homosexual male couple, given the presumption of parentage that is linked to the existence of a spousal relationship with the birth mother. As such, I find that the Applicant has established an adverse distinction based upon an enumerated or analogous ground.

[51] The second stage of the s. 15 inquiry involves an examination as to whether the impugned legislation has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

[52] Discrimination was described by McIntyre, J. in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, at pp. 174 - 175:

> ...I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[53] In the case at bar Mr. H. argues that the *FLA* creates a substantive inequality by perpetuating disadvantage, prejudice or stereotyping in its treatment of gay couples using assisted conception technology. As the Court noted in *Withler*, the contextual factors relevant to this stage of the inquiry will vary with the nature of each case: para. 66.

[54] In turn the Intervener argues that the fact that a gay male couple will biologically require a donor egg and a gestational female carrier in order to become parents does not, in itself, establish a violation under s. 15. In so arguing the Intervener relies, in part, on *Doe v. Canada (Attorney General)*, 2007 ONCA 11, 276 D.L.R. (4th) 127. I agree with the Intervener in this regard. However, while the *FLA* obviously legislates within biological reproductive realities, its effect on gay parents and especially gay male parents must be scrutinized against the claim of discriminatory treatment.

[55] In the case at bar, there are two issues to examine in order to determine whether the law creates a distinction towards the claimant group. First, I must examine the Applicant's submission that the *FLA* recognizes the wrong person as a parent in a gay male family (Ms. D.) and that the *Act* should recognize only the intended gay male fathers as parents and guardians by operation of law.

[56] I agree fully with the Intervener that the *FLA* does not discriminate against gay intended parents by failing to automatically "force" a birth mother to relinquish a child to intended gay parents by operation of law. A review of the *FLA* makes it clear that where a woman carries a baby for another couple (or individual), the only way she can cease to be the legal mother of the child is through consenting to a declaration of parentage in a surrogacy application (s. 12) or through an adoption order made under the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12. While adoption orders may be made absent the consent of the birth mother, the circumstances surrounding such types of orders are not before the Court today.

[57] Although the surrogacy sections of the *FLA* are not applicable in the present case (in that they require a donor egg and a gestational carrier as opposed to a donor sperm and a gestational carrier) this section acts to highlight the similarity of treatment between all individuals utilizing a surrogate. If a heterosexual couple or a lesbian couple utilized this method, consent of the surrogate must be provided in order to declare the "intended" mother to be the sole mother of the child. This consent is required even though the "intended" mother's genetic material (egg) was utilized in the conception process. Under this section, any agreement whereby the birth mother had agreed to relinquish the child to the "intended" parents is not enforceable.

[58] Under s. 13 (assisted conception), the rights of the birth mother are similarly enshrined. Unlike the surrogacy section, this section does not provide a mechanism for relinquishment by consent. It also envisions the birth mother using her own egg in the conception process. As such, the only way a female giving birth under s. 13 can cease to be the legal mother of the child is through the adoptive process. The Applicant has failed to demonstrate discriminatory treatment: any individual falling under this section, regardless of gender or sexual orientation, would have to proceed through the adoption process in order to have a birth mother's rights so relinquished.

[59] Moreover, I accept the argument put forth by the Intervener that any legislated forced relinquishment of parental status by the birth mother would fly in the face of various laws enacted to ensure the best interests of the child, to say nothing of the negative effect upon women's autonomy.

[60] The Intervener relies on a publication entitled *Proceed with Care: Final Report of the Royal Commission of New Reproductive Technologies* (Canada: Minister of Government Services, 1993) where it was opined, at p. 666 that:

> There is certainly a body of legal opinion that states that legitimizing preconception arrangements would be inconsistent with existing family law principles. This is because a contract that provides in advance for handing over a child at birth would be at odds with fundamental principles of family law - that custody must be determined according to the best interests of the child and that parental authority and obligations cannot be legally "contracted away" in anticipation. Adults cannot simply transfer custody of a child at their whim: the

> child's best interests must guide decisions and actions in this respect. [emphasis added]

[61] The *FLA* operates in accordance with other provincial and federal legislation in providing that the best interests of the child remain paramount in determining a wide range of issues relating to the well-being of children; including parentage, guardianship, custody and access. I agree with the Intervener that the decision to legislatively recognize the initial rights and obligations of the birth mother is in keeping with the overall goal of ensuring the best interests of the child and that to force a capable birth mother to relinquish a child is contrary to family law policy in Canada. Our Supreme Court has stated that legislative policy goals may be relevant contextual factors in considering whether the impugned law perpetuates disadvantage or prejudice: *Withler,* para. 71. I find that the clear legislative policy goals of ensuring the best interests of the child do not act to perpetuate any disadvantage in this instance.

[62] The Applicant has failed to demonstrate how a failure to provide for automatic relinquishment of a birth mother's status as parent offended his s. 15 rights. He is treated no differently than other "intended" parent regardless of gender or sexual orientation, none of whom are entitled to force a birth mother to automatically relinquish a child by operation of law. The Applicant has failed to produce any argument as to why he should stand on a footing unequal to other intended parents utilizing a surrogate or otherwise utilizing assisted conception.

[63] I pause to note that the newly proclaimed *Amended Act* does not provide for the automatic relinquishment of a birth mother's parental status. The surrogacy provisions in the *Amended Act* provide for greater acknowledgment of an individual standing in a spousal relationship where their partner's genetic material was used in the assisted reproductive process. However, the *Amended Act* does not bestow parentage upon an "intended" (non-donor) individual in place of the birth mother. Moreover, s. 8.2(6)(b) is clear that consent of the surrogate is still required to relinquish her position as parent, and that any surrogacy agreement remains unenforceable: s. 8.2(8). Nor is there any automatic relinquishment under the assisted reproduction provisions: s. 8.1. This is so whether the intended parents are in a heterosexual, lesbian or gay male relationship.

[64] Given my finding that the automatic recognition of a child's birth mother does not violate s. 15, it is unnecessary to consider whether any infringement is justified under s. 1.

[65] I turn next to whether the *FLA* is discriminatory in failing to recognize the Applicant as a parent in addition to Ms. D. retaining her parental status; that is, an inclusive approach to parental recognition.

[66] The *FLA* does not envisage gay couples as parents by operation of law. While the *Act* does not draw any distinction in its provisions which operate to remove the birth mother as a parent by operation of law, I find that it fails to treat gay couples the same as heterosexual couples when it comes to inclusive provisions. In the case of a gay male couple, neither

individual is considered a parent under the *Act*, even if the genetic material of one of the male spouses is used in the assisted conception. Had Mr. R. been in a heterosexual relationship with Ms. D. at the time of conception, he would have been considered S.'s father under the *Act* by operation of s.13(2)(a). Had Mr. H. been in a heterosexual relationship with Ms. D. he would have been the child S.'s father under the *Act* by operation of s. 13(2)(b). The *FLA* simply does not contemplate situations of gay couples as co-parents.

[67] While not brought before the Court as a constitutional challenge, the decision in *A.A. v. B.B.*, 2007 ONCA 2, 287 D.L.R. (4th) 519 is of note in this Application. In *A.A.*, the Court held that a legislative gap under the *Child Law Reform Act* ("*CLRA*"), which did not allow for a child to have two mothers, was not a deliberate attempt by the legislation to prevent lesbian co-parents and invoked its *parens patriae* jurisdiction to declare the applicant a mother of the child. AA and CC were females in a same-sex spousal relationship. BB was a male friend of the couple who assisted them in having a child by enabling CC to conceive. The parties agreed that AA and CC would be the primary caregivers for the child, who referred to both of them as his mother. All parties wanted AA's status as the child's mother to be recognized. They also agreed that it would be in the best interests of the child for BB to remain involved in his life.

[68] The Court held that it would be contrary to the child's best interests to deny legal recognition of both of his mothers, as well as his father. The Court noted that the declaration of parentage was important in this instance as BB would lose his status as a parent if AA applied for an adoption order. The Court discussed a number of advantages to recognizing the parental status of AA under Ontario law, at paras. 14-15 including:

- 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 a provincial health 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;

- the declared parent may assert her rights under various laws such as the *Health Care Consent Act*; and

- upon death of one of the spouses the surviving mother would be able to continue to make decisions for the minor child.

[69] The Court of Appeal also noted the Victorian Law Reform Commission's position paper entitled *Assisted Reproductive Technology & Adoption: Position Paper Two: Parentage* at pp. 15 and 17, as referred to in *M.D.R. v. Ontario (Deputy Registrar General)* (2006), 270 D.L.R. (4th) 90 (Ont. Sup. Ct. Jus.) as follows:

> These submissions reported that the non-birth mother often encounters obstacles and ignorance, and at times hostility, in her dealings with government agencies and service providers where legal status is a relevant factor. Because the non-birth mother cannot be named as a parent on the child's birth certificate, she is unable to produce evidence of her relationship to the child unless she has taken steps to obtain a Family Court parenting order or some form of written authority from the birth mother.
>
> [W]e [Lesbian Parents Project Group] feel that legal recognition of our role as parents to our children is essential for their safety and social well being. It is critical to children that they have reflected back to them the value and integrity of their lives, including the legitimacy of their families ... Equal familial status sends a powerfully positive message to all social institutions that have an influence on our children's lives. It obliges them to acknowledge and respect the families our children live in.

[70] The Court agreed, at para. 32, that while Ontario's legislation contemplated only one mother and one father, and that while it favoured a biological preemption:

> ...the *Act* does not define parentage solely on the basis of biology. For example, s. 1(2) treats adopting parents as natural parents. Often one or both of the adopting parents will not be the biological parents of the child. Similarly, s. 8 enacts presumptions of paternity that do not all turn upon biology; the obvious example is the presumption of paternity flowing simply from the fact that the father was married to the child's mother at the time of birth. Further, as Ferrier J. pointed out in *T.D.L. v. L.R.L.*, [1994] O.J. No. 896 (S.C.J.) at para. 18, the declaration made under s. 4(1) is not that the applicant is a child's natural parent, but that he or she is recognized in law to be the father or mother of the child.

[71] The Court went on, at paras. 33 -35 to find that:

> ...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....
>
> 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....
>
> 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]

[72] Of note, the Court concluded that the Legislature simply did not foresee the possibility of declarations of parentage for two women at the time of drafting, and that to find a failure to do so was deliberate "requires assigning to the Legislature a discriminatory intent in a statute designed to treat all children equally." I note that the Attorney General of Ontario did not appeal the decision of the Ontario Court of Appeal: 2007 SCC 40, para. 6.

[73] The *FLA* was relatively new legislation, and the drafters have turned their minds to advances in science making assisted conception a reality. While concerns over same-sex relationships were known, they were not addressed in a concrete fashion. For example, the following concerns were raised during the Legislative Assembly debates, *Alberta Hansard*, No. 56 (December 3, 2003) at 2087-2088 (Laurie Blakeman):

> There are inequities that are being created with this bill that I was trying to correct.
>
> In particular, I think we have caused some people to have to go to additional expense and time and through court manoeuvers in order to achieve what they are seeking, particularly around the surrogacy and assisted-conception sections that are in the bill, where in effect we are now creating legal parents. Because of the

> technological advances in new reproductive technology, we can create parents where we couldn't before. I was seeking to be able to have many different people be able to seek these remedies, to be creating parents rather than to be creating specifically mothers and fathers. I felt that the concept of parent was more inclusive and more important, therefore, than segregating this into stereotypical gender-specific roles. The government was not supportive of that.
>
> I think these are the areas that were most likely to receive the challenges.

[74] See also the Legislature of Alberta Debates, *Alberta Hansard* (November 27, 2003), at p. 1950, where a proposal (unadopted) was made to revise s. 12 of the *FLA* using more gender-neutral language based upon the following concern:

> So this is getting around that problem where we're sending people off to court after the fact basically for them to adopt a child and go through the court process. I think we want it to be *Charter*-proof and we want to have this open to many different kinds of families. Specifically, I think we need to be alive to the possibilities of same sex parents here, so I brought forward this amendment hoping that we could get support for this and be able to do it right the first time and not have to come back with a *Charter* challenge and fix it later.

[75] In comparison to gay male couples, lesbian couples are placed in a slightly more advantageous position through the operation of biology in that the assisted conception provisions of the *FLA* recognize the birth mother as a legal parent. Presuming there is no surrogacy arrangement with a third party, lesbian couples have the assurance that at least one of the spouses will be recognized as a parent (being the spouse who carries the child to term). While this places lesbian couples in an advantageous position *vis-à-vis* gay male couples (where neither male is provided with parental recognition by operation of law) the *FLA* does not provide a mechanism for recognition of a female in a same-sex relationship who does not carry the child.

[76] This situation was addressed by our Court in *Fraess*, where the female spouse of the biological mother applied to have s. 13(2)(b) of the *FLA* declared unconstitutional. The applicant was in a spousal relationship with her female partner who had become impregnated through artificial insemination (the couple purchased sperm from an anonymous donor). Throughout the pregnancy and afterwards both women assumed the role of parent to the child. The applicant then learned that under the *FLA* she would be a legal stranger to the child unless she proceeded with a step-parent adoption. The applicant argued that if she had been in a heterosexual relationship with her spouse, she would have been deemed a parent by operation of s. 13(2)(b) of the *FLA* and that as a woman married to the biological mother, she was denied the benefit of this law.

[77] The applicant therefore argued that the *FLA* conferred a significant benefit to heterosexual spouses but denied her and other lesbian spouses the same benefit, thus forcing them to engage in a separate and protracted legal process in order to obtain the same parental

acknowledgment granted to opposite sex spouses by operation of law. The Court agreed, holding, at para. 6 that:

> The law is clear that where a law is creative of legislated consequences for opposite sex couples and excludes from its ambit same sex couples the law will violate s. 15(1) of the *Charter*. See *M v. H*, [1999] 2 S.C.R. 3. The effect of s. 13 of the *Family Law Act* is to confer upon opposite sex spouses a benefit denied same sex spouses. Men married or partnered to women can receive parental status immediately upon the birth of the child conceived through artificial insemination provided that they consented to being a parent in advance of the conception. Women married or partnered to women cannot. Such a provision clearly violates s. 15(1) of the *Charter of Rights and Freedoms*.

[78] The Court found that given such violation, the appropriate measure was to read in language that would include the applicant as a spouse to the biological mother of the child. The Court disagreed with the suggestion that the section be severed, which would have resulted in all non-biological "intended" parents having to proceed through adoption, regardless of sexual orientation. Rather, it held, at para. 13 that:

> ...It seems extraordinary that once the Legislature as a policy matter accepts a person can be a parent through intention that should be taken away from those persons because it is discrimination under the *Charter*. [emphasis added]

[79] In determining that a "reading in" was the proper approach, the Court stated as follows, at para. 9:

> This would be a sufficiently "distinct" provision for the purposes of the analysis giving rise to when "reading in" is appropriate. Furthermore the legislative objective of s. 13 of the *Family Law Act* is clear. Once the subsection confers parental status on the spouse or partner of the biological mother whether or not such person contributed genetic material provided that they consented to being a parent in advance of the procedure. The proposed provision would include a group of spouses or partners whose exclusion violates the *Charter* so that their inclusion could only further the goals of the legislation. [emphasis added]

[80] The Applicant argues that as per *Fraess*, he is discriminated against in that the *FLA* deems parentage in situation where a male was in a spousal relationship with the biological mother of the child and the male intended to act as a parent to child notwithstanding the fact that his biological material was not used in the assisted conception process.

[81] While *Fraess* can obviously be distinguished on the basis that the applicant was in a same-sex relationship with the mother of the child, I do not find this distinction fatal to Mr. H.'s claim. Section 13(2)(b) of the *FLA* allows for a heterosexual male to be deemed the parent of a

child born to the biological mother if he is in a spousal relationship with the mother and consented to be the parent of the resulting child conceived through assisted conception. *Fraess* concluded that the *FLA* discriminated against lesbian partners in a similar position. In so doing, the Court confirmed that the *FLA* "...as policy matter accepts a person can be a parent through intention."

[82] Section 13(2)(b) of the *FLA* permits individuals, both male and (post *Fraess*) female, to be deemed parents where they were in a spousal relationship with the biological mother of the child and intended/consented to act as the child's parent. By definition, a gay man will never be in a spousal relationship with the biological mother and thus will always be excluded from being deemed a parent under this provision. As such, gay males are denied an advantage (declaration of parentage by operation of law) that is bestowed upon all other individuals under s. 13(2)(b).

[83] The Intervener argues that the *FLA* treats all instances where a couple wants to be parents, but neither individual can carry a child, identically. While this is true in that such couples would of necessity fall under the surrogacy provisions in s. 12 (where the foetus is carried to term by a gestational carrier instead of the gestational donor) with respect, this argument fails to address the inherent inequities created under the *FLA*.

[84] Under the *FLA*, a gay male, regardless of whether he provided sperm for the purposes of the artificial conception, cannot be deemed a parent by operation of law. At the end of the day, the only individuals who can be recognized as parents based upon consent/intent (absent a surrogacy declaration or adoption) are those who are in a spousal relationship with the biological mother. Again, this will never be a gay male. The *FLA* legislates a benefit for individuals in a spousal relationship with the biological mother, which assumes the existence of a heterosexual relationship or (post *Fraess*) a lesbian relationship. By failing to provide a similar benefit for gay males (whether as genetic donor or intended/consensual father) the *FLA* creates a distinction that transcends the mere operation of biology.

[85] Consider the application of the *FLA* to the facts at bar: while the parties are not in full agreement as to the exact role Ms. D. was to play in the child S.'s life, Eidsvik, J. found that the arrangement entailed that S. was to be cared for and raised mainly by Messrs. R. and H., with Ms. D. having weekly access. Under the *FLA* the only legal parent to the child S. is Ms. D., notwithstanding the fact that she is not the child S.'s primary caregiver and that the child S. does not normally reside with her. On the other hand Mr. H. and Mr. R., the child S.'s papa and father, acquire no parental or guardianship rights or responsibilities (outside of those attached to *in loco parentis* status). It is difficult to see how this arrangement, whereby the *FLA* acknowledges the parentage of only the birth mother while excluding both the biological and intended/consensual father, can be seen as operating in the best interests of the child S.

[86] The Intervener argues that in limiting the number of parents that a child can have to two, the *FLA* creates a distinction based upon number as opposed to any ground under s. 15. With respect, I again disagree. While the particular circumstances surrounding the birth of S. may not

have been foreseen at the time of drafting, the *FLA* operates to create a distinction based upon gender and sexual orientation in that only same-sex spouses are excluded from deemed parentage under s. 13(2)(b).

[87] The Intervener further submits that the ability to make decisions in respect of a child is attached to guardianship status as opposed to parentage status and the *FLA* does not limit the number of guardians a child may have. While this is an accurate statement in law, it does not address the inequality suffered by gay male parents in the position of either Mr. R. or Mr. H. The Court acknowledges that Mr. R. has already successfully applied for status as the child S.'s guardian and that Mr. H.'s application is pending. However, it is the very fact that both individuals had to engage in an additional and protracted court process in order to receive such status that is in issue. Under s. 20 of the *FLA*, a male and female living together in a spousal relationship are both the mother and father of the child as well as the guardians of the child. Thus, in a traditional family, no further court process is required to receive guardianship status. In a gay male relationship the additional step of seeking guardianship status or an adoption order is always required.

[88] The Court in *Withler* summarized the fundamental analysis concerning equality rights at para. 54:

> In summary, the theme underlying virtually all of this Court's s. 15 decisions is that the Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group.

[89] Even though both Messrs. R. and H. are able to apply for guardianship status, this is not the same as being a legal parent. The majority in *Kapp* revisited the decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, where the Court had suggested that discrimination should be defined in terms of the impact that the impugned law has on the human dignity of the claimant, having regard to four factors. In *Kapp* the majority acknowledged that while several difficulties have arisen from the attempt to employ human dignity as a legal test, it remains an essential value underlying the s. 15 equality guarantee: para. 21.

[90] The effect of the *FLA* is that when gay males in a committed relationship decide to have a family assisted by a female (in this instance with the assistance of a friend who conceives for them) they should either be satisfied with guardianship status (which they must apply for to receive) or they must undertake the protracted adoption process. Denying a gay father (biological or intended) the status of legal parent has a negative effect on his human dignity. The significance of parental status has been recognized by our Supreme Court, as summarized in *Trociuk v. British Columbia*, 2003 SCC 34, [2003] 1 S.C.R. 835, at para. 15:

> Parents have a significant interest in meaningfully participating in the lives of their children. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 85, La Forest J. wrote that "individuals have a deep personal interest as parents in fostering the growth of their own children". In a similar vein, Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 319, wrote: "The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world."

[91] The ultimate operation of the *FLA* suggests that same-sex couples are somehow less able, or less worthy, of being parents. This reflects outdated assumptions or understandings about family in Canadian society.

[92] At the end of the day, I find that s. 13(2) discriminates against gay males in that it fails to confer a benefit (recognized paternity) and forces gay male parents to endure an extended and protracted legal process in order to have their guardianship and parentage recognized.

**Having found infringement, is the impugned law saved under a s. 1 analysis?**

[93] The Intervener submits that in the event that this Court finds that the impugned provisions of the *FLA* infringe upon the Applicant's s. 15 *Charter* rights, that any such infringement is demonstrably justified under s. 1 of the *Charter*, which reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[94] The test for justification was established in *R. v. Oakes*, [1986] 1 S.C.R. 103. The onus of showing that a law is saved by s. 1 rests on the party seeking to uphold the limitation. To satisfy this test the government must show that: (1) the legislation addresses a "pressing and substantial" objective; (2) a rational connection between the impugned legislative measure and the objective exists; (3) the legislation impairs rights and freedoms as little as possible; and (4) a proportionality exists between the importance of the objective and the injurious effects of the legislation. It is clear that the limitation in issue in this instance is "prescribed by law."

[95] As Dickson, J., writing for the majority in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 stated at p. 352:

> At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means

> chosen to achieve this interest are reasonable -- a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.

**(1) Pressing and Substantial Objective**

[96] I agree with the Intervener that one of the primary considerations of the *FLA* is assurance of the child's well-being. In order to ensure the safety and security of children, the *FLA* operates to identify an adult(s) to assume responsibility for the child, to protect the child and to make essential decisions on behalf of the child. Protection of the best interests of children is a pressing and substantial objective.

[97] Having found a pressing and substantial objective, I now move on the proportionality test as set out in *Oakes*.

**(2) Rational Connection**

[98] At this stage, the Intervener must show that the impugned provisions are rationally connected to the goal of ensuring the welfare of children. To establish a rational connection, the Intervener "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153 . The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at para. 48.

[99] The challenged provisions act to determine parentage in situations outside of the "normal" conception process. They provide consistency and predictability in establishing who, exactly, is charged with providing care for and protection over the child upon birth. While the Intervener has established a connection between establishing clear parental status and the objective of ensuring the well-being of the child, the *FLA* is underinclusive in this regard. As noted above, the operation of the *Act* has resulted in the following scenario: the child S. resided primarily with her Daddy and her Papa. While she maintained regular access with Ms. D., it was Messrs. R. and H. who acted as her primary caregivers. However, the child S.'s sole parent and legal guardian was Ms. D., an individual who did not exercise day-to-day care over the child S., who did not accept primary responsibility for her, and who was not contributing financially towards her expenses.

[100] As a result, while the *FLA* has as an objective the protection of children through the naming of a clearly identifiable parent and guardian, it arguably does not achieve this goal when same-sex male parents are involved (outside of recourse to the adoption process or guardianship order). If anything, the goals of the *FLA* are undermined by the impugned sections. Furthermore, the Intervener did not put forth a convincing argument as to why a three-parent model will fail to

achieve the goal of ensuring that an adult individual is named who will care for and protect a child upon birth.

[101] Even if I am incorrect in this regard, and a rational connection has been proven, I find that the Intervener has failed to satisfy the remaining steps in the *Oakes* test.

**(3) Minimal Impairment**

[102] The majority in *Hutterian Brethren of Wilson Colony* explained the minimal impairment analysis as follows, at para. 53:

> The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

[103] Regard may also be had to the oft-cited quote from *RJR-MacDonald*, at para.160, setting out the appropriate standard:

> The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

[104] The Intervener argues that it would not be possible to legislate in a fashion that would address all of the possible combinations of parents and guardians of a child arising by operation of law. While parents are generally also guardians, guardianship powers may be allocated according to the particular circumstances of each child, based upon what is in the child's best interests.

[105] The Intervener submits that because various rights and responsibilities flow from holding either parentage or guardianship status, laws that are too inclusive or too exclusive will have deleterious results. It argues that because it is difficult to know where to draw the line, some degree of deference should be given to the legislature in establishing the status of parents and guardians.

[106] I agree that some degree of deference should be afforded, especially given the wide ranging consequences involved once a legal familial relationship has been established. However,

while the Legislature is charged with balancing an individual's desire to be a parent while attempting to provide for the care and protection of children, it must do so in a fashion which impairs rights and freedoms as little as possible.

[107] The Intervener argues that the failure to make the Applicant a parent by operation of law is minimally impairing in that the Applicant could - and did - apply to the Court for a contact order and for status as the child's guardian. It submits that in cases where the *FLA* is unable to provide clear rules as to who is a parent or guardian, an application to the Court is available in order to determine such status. As such, it submits that recourse to the Court in these circumstances will satisfy the minimal impairment test.

[108] I disagree with the Intervener that the impugned provisions of the *FLA* minimally impairs the *Charter* protected equality rights of homosexuals - especially homosexual males - seeking to raise a family. The fact that a homosexual male has the option of applying for guardianship status (through the *FLA*) or for parentage status (through the adoption process) is not an adequate substitute for the recognition automatically given to other couples. Again, a heterosexual male who "intends" to have a child with his partner can be automatically named as a parent under s. 13(2) whether or not his genetic material is actually used in the conception process. I do not find that the reasoning in *Trociuk v. British Columbia*, 2003 SCC 34, [2003] 1 S.C.R. 835. assists the Intervener.

[109] In arguing minimal impairment the Intervener states in its brief that "[Mr. H.] had the right to apply to the Court for a contact order with respect to the child. He did so and the Order was granted." While the Intervener portrays this a relatively simple process, its submission fails to account for the fact that the Applicant was forced to go to the Court of Appeal to gain such an order. Because the legal status of the Applicant was unclear under the *FLA*, the Court of Appeal had to undergo the process of determining his status with respect to the child S. before considering whether to make a contact order under s. 35. This additional step would not have been required had the Applicant been deemed a legal parent by operation of law. Of note, in originally denying the order, the chambers judge determined that the wishes of the guardians were entitled to considerable weight (wherein only Mr. H. and Ms. D. were considered guardians). I find that the history of this case before the courts evidences that for an individual in the position of the Appellant, obtaining any rights with respect to S. may not be as straightforward as suggested by the Intervener, as his status under the *FLA* is non-defined.

[110] As discussed above, the act of becoming a parent and being recognized as such plays a major role in defining one's identity and sense of self. It is difficult to accept an argument that legislation which restricts one's status in this regard to that of guardian or which limits one's role and involvement in a child's life to an exercise of custody and access is minimally impairing.

[111] In determining whether an individual's rights have been minimally impaired, regard may be had to the fact that alternatives available to a complainant may not address the overall

implications arising from exclusion. As Cory and Iacobucci, J.J. wrote for the majority in *M. v. H.*, [1999] 2 S.C.R. 3 at para. 124:

> ...It must also be remembered that the exclusion of same-sex partners from this support regime does not simply deny them a certain benefit, but does so in a manner that violates their right to be given equal concern and respect by the government. The alternative regimes just outlined do not address the fact that exclusion from the statutory scheme has moral and societal implications beyond economic ones, as discussed by my colleague, Cory J., at paras. 71-72. Therefore the existence of these remedies fails to minimize sufficiently the denial of same-sex partners' constitutionally guaranteed equality rights.

[112] What is more, I cannot accept the Intervener's argument that it would not be possible to legislate in a fashion that would address all of the possible combinations of parents of a child arising by operation of law. The provisions of the *FLA* dealing with assisted conception will be utilized by three types of couples: heterosexual couples faced with fertility issues who make use of assisted conception; same-sex female partners, and same-sex male partners. By necessity these two latter groups will have to make use of assisted conception using a third party's genetic material in order to become parents (as will individuals using assisted conception). I do not accept the argument of the Intervener that it would be too difficult for the Legislature to determine the parental status of each member of these three groups in a clear and comprehensive fashion.

[113] In the present case, the government has failed to show that it had a reasonable basis for concluding that the rights of same-sex couples were impaired no more than was reasonably necessary to achieve its goals.

**(4) Proportionality Between the Importance of the Objective and the Injurious Effects of the *FLA***

[114] The proportionality test was aptly described by L'Heureux-Dubé, J. in *Egan* at para. 76:

> Finally, there must be a proportionality between the discriminatory effects of the impugned distinction and the salutary effects of the distinction: *Dagenais v. Canadian Broadcasting Corp.*, supra. Factors such as the importance of the state interest, the extent to which it is furthered by the impugned distinction, the constitutional and societal significance of the interests adversely affected, the severity of the rights deprivation suffered by the individual, and the potential for entrenching marginalization or stigmatization of particular groups will all be relevant considerations to this branch of the s. 1 examination.[...]

[115] The Intervener argues that the *FLA* adequately balances the interests of the child, the birth mother and any intended parents. Again, while the best interests of the child are of paramount

concern, I do not agree that the wording of the legislation proportionately balances these needs against the discriminatory effects created towards homosexuals wishing to raise a family. While s. 13(2) presumes that a male in a heterosexual relationship with a female who conceives through the use of assisted conception should be recognized as a parent by operation of law (whether or not his sperm is actually used in the procedure) it does not make the same presumption about gay parents. Rather, such individuals must proceed through additional court processes to prove their fitness as guardians (through application) or parents (through adoption) and that their relationship with the child will indeed be in the best interest of that child. The damaging effects engendered by the exclusion of same-sex couples using assisted conception from parental status by operation of law are numerous and severe. They re-enforce outdated concepts which do not accurately reflect the realities of today's family in Canada. As such, I find that the impugned legislation does not survive the final stage of the s. 1 analysis.

[116] Having found a violation of the Applicant's s. 15 *Charter* rights which is not saved under s. 1, I turn next to the question of appropriate remedy.

**Remedy**

[117] Section 52(1) of the *Charter* provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[118] Section 24(1) of the *Charter* provides that:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[119] The Applicant is seeking a declaration of parentage under the *FLA* without the need to proceed through a protracted court process, as well as changes to the *VSA* that would introduce an appropriate birth registration document recognizing both homosexual males as parents. In addition, the Applicant is seeking *Charter* damages commensurate with the loss of his relationship with the child S., which he submits was caused as a result of the denial of his status under the *FLA*.

[120] Section 52 is engaged when the law in issue is held to be unconstitutional, as opposed to when a particular action is taken which is found to violate a *Charter* right under an otherwise valid law. As the majority in *Schachter v. Canada*, [1992] 2 S.C.R. 679 instructs, at p. 717:

> Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way

> of severance or reading in, or are other parts of the legislation inextricably linked to it? This, should the declaration of invalidity be temporarily suspended?

[121] Having found that the impugned legislation demonstrated a pressing and substantial objective, but failed to meet the rational connection, minimal impairment and proportionality branches of the *Oakes* test, the extent of the inconsistency should be defined fairly flexibly. In addressing whether severance or reading is a preferable approach to a declaration of invalidity, the majority in *Schachter* continued on to state, at p. 718:

> Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:
>
> > A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;
> >
> > B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,
> > C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

[122] In his Notice of Motion, the Applicant requests, *inter alia*, a declaration that s. 13 of the *FLA* offended his s. 15 *Charter* rights by failing to recognize gay males as parents by law, as well as a declaration to read into the impugned sections of the *FLA* "the words necessary to bring the sections into conformity with the *Charter*." I interpret this as a request to read language in to the existing statute.

[123] In this instance, an attempt by the Court to read in language acknowledging the parental status of men in same-sex relationships who utilize assisted conception in order to start a family would be an unacceptable intrusion into the legislative domain. As Wilson, J. stated in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425, at p. 500:

> It is not for the courts, in effect, to amend legislation to make it constitutional. As Dickson J. stated in *Hunter*, at p. 169:
>
> > While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts

> to fill in the details that will render legislative lacunae constitutional. [...]

[124] In addition, sections of the *FLA* which bestow parentage are inextricably linked to the remainder of the *Act*. This further decreases the ability to deal with the impugned section as a stand alone provision. Having found s. 13 of the *FLA* to be inconsistent with the *Charter*, and having found that reading in is not a workable remedy in the circumstances (which given the wording of s. 13 is distinct from the situation in *Fraess*), this section of the *FLA* is thus declared to be of no force and effect. A declaration of invalidity in this instance would necessarily result in those persons who currently fall under the *Act* (i.e. individuals in a spousal relationship with the birth mother) being denied the benefit of parentage under the legislation. As noted by our Supreme Court in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 90:

> ...In such cases, the Court has temporarily suspended the declaration of invalidity of the unconstitutional legislation to avoid creating a "legal vacuum" or "legal chaos" before Parliament or the legislature has the opportunity to enact something in place of the unconstitutional legislation: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 ("*Manitoba Language Rights Reference*"), at p. 747; *Schachter*. [page 467] In *Schachter*, this Court held that the suspended declaration of invalidity was appropriate when giving immediate retroactive effect to the Court's declaration of invalidity would (a) "pose a danger to the public"; (b) "threaten the rule of law"; or (c) "result in the deprivation of benefits from deserving persons", such as when the legislation was "deemed unconstitutional because of underinclusiveness rather than overbreadth": *Schachter*, at p. 719.

[125] Given the overarching legislative goal of ensuring the best interests of the child, I do not think that removing parental status from either a genetic or intended parent (as provided for under the *FLA*) would further this legislative aim. As per *Schachter*, this would clearly "result in the deprivation of benefits from deserving persons" in instances where the *Charter* breach is based on underinclusiveness.

[126] While I would have declared s. 13 of the *FLA* invalid while suspending this declaration, such a remedy would be moot given the intervening proclamation of the *Amended Act*. As of August 1, 2011, both ss. 12 and 13 of the *FLA* have been repealed. Thus, the offending provision is no longer in existence, although the relationship between Mr. H. and the child S. was legally determined historically under the *FLA*. The *Charter* challenge before this Court does not pertain to the *Amended Act*.

[127] In addition to a declaration under s. 52, the Applicant is also seeking damages pursuant to s. 24 of the *Charter*. The Applicant submits that the lengthy and acrimonious legal dispute in which he was forced to become engaged may have been avoided if the presumption of parental status applied to him by operation of law. It is clear that the Applicant has been forced to pursue

additional steps through the courts in order to have his relationship with S. acknowledged, as compared to an individual whose parental status has been recognized by operation of law. However, it is an unfortunate reality of family law that proceedings are often drawn out and acrimonious. As the parties live in different cities, detailed custody and access arrangements would still need to be agreed upon or ordered, division of property settled, and so on. Given the level of acrimony between the parties, it is naive to think that the various court processes could have been altogether avoided had the parental status of Messrs. H. and R. been set by operation of the *FLA* (although the number of court appearances would no doubt have been reduced).

[128] The Applicant is not only seeking damages against the Intervener to compensate for his long journey through the courts, he is also seeking damages to compensate him for the loss of his relationship with S. While I acknowledge that the Applicant's relationship with S. has all but disappeared during his protracted journey through the justice system, I agree with the Intervener that an award of damages is inappropriate in the circumstances. I also note that the Applicant obtained a contact order giving him reasonable and generous access in 2009 but has not increased his access to S. since then.

[129] The following passage from *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405 is instructive in this regard:

> 78 According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, Administrative Law Treatise (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy *limited immunity* against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:
>
> > In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an

> individual following the enactment of legislation. [Footnotes omitted.]

79 However, as I stated in *Guimond v. Quebec (Attorney General)*, supra, since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

80 Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter*, supra, at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. [Emphasis added.]

81 In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.

82 Applying these principles to the situation before us, it is clear that the respondents are not entitled to damages merely because the enactment of Bill 7 was unconstitutional. On the other hand, I do not find any evidence that might suggest that the government of New Brunswick acted negligently, in bad faith or

> by abusing its powers. Its knowledge of the unconstitutionality of eliminating the office of supernumerary judge has never been established.[...]

See also *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; paras. 27, 32, 39-41; *Schachter v. Canada*, supra, para. 89.

[130] In the case at bar, the Applicant has failed to demonstrate any bad faith or negligence on the part of the Legislature. A declaration of invalidity would have been made absent the intervening proclamation of the *Amended Act*. This is not an appropriate case for an award of damages.

[131] I have already addressed the Applicant's request to have his property and asset settlement reopened, as above.

[132] I next turn to the Applicant's request for a declaration of parentage and guardianship. The Notice of Motion filed by the Applicant does not seek a declaration of guardianship, although the Applicant indicated that he was indeed seeking such a declaration in both written and oral argument. As I understand it, the Applicant has already commenced a guardianship application elsewhere before this Court (para. 5(e) of the Applicant's Brief). It is thus not properly before me.

[133] I have declined to read in language that will bestow parental status upon the Applicant by operation of law. As discussed, the offending provisions of the *FLA* have been repealed. The *Amended Act* clearly takes a more gender neutral/sexual orientation neutral approach to who may be considered a “spouse” and, correspondingly, an intended parent under ss. 8.1 and 8.2. Questions of whether the *Amended Act* adequately provides for parental status outside of the heterosexual norm must be left for another day. While the *Amended Act* governs on a go-forward basis, it is the former *FLA* which established parentage in the matter at bar.

[134] Both the Applicant and his former partner, Mr. R. are left in a gap created by the Legislature. The provisions of *FLA* establishing parentage by intent is not available to gay male couples under s. 13. While this section has been repealed, the *Amended Act* does not operate to retroactively establish parentage of a child who is now over eight years old.

[135] The Ontario Court of Appeal in *A.A. v. B.B.*, supra, confirmed the ability to utilize its *parens patriae* jurisdiction to bestow a declaration of parentage where it would be in the best interest of the child and where a legislative gap otherwise existed. In so doing, the Court held as follows: [emphasis added by underlining]

> 27 The court's inherent *parens patriae* jurisdiction may be applied to rescue a child in danger or to bridge a legislative gap. <u>This is not a case about a child being in danger. If the *parens patriae* authority were to be exercised it would have to be on the basis of a legislative gap</u>.

28 The application judge held that the court's *parens patriae* authority was not available to make the declaration in favour of A.A., although he appeared to accept that such an order would be in the best interests of the child. In his view, any gap was deliberate and the court was effectively being asked to legislate because of a perception that the legislation was under-inclusive. The application judge was also concerned about the potential impact on other children if other persons, such as stepparents or members of a child's extended family, came forward seeking declarations of parenthood.

29 I take a different view of the exercise of the *parens patriae* jurisdiction. The Supreme Court of Canada has considered this jurisdiction on several occasions, in particular in *Beson v. Director of Child Welfare for Newfoundland*, [1982] 2 S.C.R. 716 and *E. (Mrs) v. Eve*., [1986] 2 S.C.R. 388 (S.C.C.). La Forest J. reviewed the history of the *parens patriae* jurisdiction at length in *Eve*. He concluded at p. 426 with the following statement:

> As Lord MacDermott put it in *J. v. C*., [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, *but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion* ...." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X, supra*, [1975] 1 All E.R. 697 at p. 699, that the *jurisdiction is of a very broad nature*, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.[emphasis added]

30 The comments of La Forest J. about the broad nature of the *parens patriae* jurisdiction and the broader discretion under the impact of changing social conditions are particularly apt in this case. However, *Eve* concerned the court's jurisdiction to authorize a medical procedure. It was not principally concerned with the court's jurisdiction to fill a legislative gap. A case somewhat closer to the problem at hand is the Supreme Court's decision in *Beson*. In that case, the Director of Child Welfare for Newfoundland removed a child from an adoptive home shortly before the expiration of the probationary residence period required for an adoption. The legislation did not give the potential adoptive parents any right of appeal from the Director's action taken during the probationary period. Speaking for the court, Wilson J. found that there was accordingly a legislative gap that could be filled by the exercise of the *parens patriae* jurisdiction. She adopted the following statement from the reasons of Lord Wilberforce in *A. v. Liverpool City Council and another*, [1981] 2 All E.R. 385 (H.L.) at 388-89:

> But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court. Then the wardship may be continued with a view to action by the court. *The court's general inherent power is always available to fill gaps* or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority [Emphasis added].

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.

32 As discussed above, the application judge was of the view that the jurisdiction to make parentage declarations is not confined to biological or genetic relationships. The Alliance for Marriage and Family challenges that proposition. The Alliance points out that s. 1(1) of the *CLRA* refers to a person being the child of his or her "natural parents". I agree that the Act favours biological parents. For example, s. 10 gives a court power to order blood tests or DNA tests where it is called upon to determine a child's parentage. However, the Act does not define parentage solely on the basis of biology. For example, s. 1(2) treats adopting parents as natural parents. Often one or both of the adopting parents will not be the biological parents of the child. Similarly, s. 8 enacts presumptions of paternity that do not all turn upon biology; the obvious example is the presumption of paternity flowing simply from the fact that the father was married to the child's mother at the time of birth. Further, as Ferrier J. pointed out in *T.D.L. v. L.R.L.*, [1994] O.J. No. 896 (Ont. Gen. Div.) at para. 18, the declaration made under s. 4(1) is not that the applicant is a child's natural parent, but that he or she is recognized in law to be the father or mother of the child.

[136] In *A.A. v. B.B.*, the Court held that advances in both reproductive technology and societal attitudes created a parenting gap, whereby children of same-sex couples were deprived of the equality status that a declaration of full parentage provides.

[137] It is clear that in the case at bar a legislative gap exists. This is evidenced in the language used in s. 13(2)(b) where the *Act* expressly allows for parentage based upon intent. Again, establishing parentage by intent is not available to gay male couples under s. 13 of the *FLA*. I

agree with the Court in *A.A. v. B.B.* that to find such a legislative gap was deliberate requires assigning a discriminatory intent to the Legislature. I am not prepared to presume such an intent here.

[138] While the *Amended Act* goes some way in addressing parentage in the case of gay males, it does not operate to retroactively effect the established parentage of the child S. Again, a legislative gap continues to exist for an intended parent standing in the place of the Applicant.

[139] In the case at bar, Mr. H. acted as one of the primary caregivers to the child S. for the first three years of her life. Baby S. was dependant on Messrs. H. and R. to provide for all of her needs during this period. Both individuals acted as *de facto* parents towards the child and jointly provided for her necessities of life. It is contrary to the best interests of the child S. to be limited to the legal recognition of a sole parent, Ms. D. There is no other method of correcting for this deprivation outside of the exercise of the *parens patriae* jurisdiction. I thus declare Mr. H. to be a legal parent of S.

[140] In so declaring, I wish to emphasize that the child S. primarily resides with Mr. R. and has done for the last number of years and that Mr. R. has acted as her primary caregiver following separation. Mr. R. has been granted a declaration of guardianship and has all of the rights and responsibilities that accompany such status. Mr. H.'s application for guardianship remains pending before this Court and his rights and responsibilities pertaining to the child S. will be fully determined following that application. Mr. H.’s declaration of parentage does not automatically alter any of the parenting or guardianship arrangements currently in place for the child S.

[141] I note that the *Amended Act* expressly states under both the surrogacy provisions as well as s. 9 (declarations respecting parentage) that no application may be brought if it results in a child having more than two parents. Following this judgment, the child S. will have two legal parents; Ms. D and Mr. H. To date, Mr. R. is not a legal parent to S. Should Mr. R. wish to pursue parental status under the *Amended Act*, he will be required to challenge the constitutionality of this limitation. This question, however, is left for another day.

**The *VSA***

[142] The Applicant has also alleged that the *VSA* violates his s. 15 *Charter* rights by failing to provide for recognition of a non-biological gay male "intended" parent on a birth certificate and seeks an amendment to the registration process under this *Act*. It is the Applicant who must show that the impugned legislation has infringed his rights. As noted above, the Applicant focussed almost exclusively on the *FLA* and did not adequately address the provisions of the *VSA*. He failed to demonstrate any infringement based upon an enumerated or analogous ground before this Court, and as such has failed to demonstrate any violation of his s. 15 *Charter* rights.

**Costs**

[143] The Applicant is seeking costs of this application on a solicitor and client basis backdated to 2006.

[144] The Intervener submits that as an intervener, it is not seeking costs and requests that no costs be ordered against it. It further submits that this is not the proper case for an award of solicitor and client costs.

[145] I cannot accept the Intervener's submission that no costs award should be made in this instance. The law is clear that costs can be awarded against the Province acting as intervener on a constitutional matter: *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315. It is also clear that the Attorney General can be held liable for costs on matters dealing with constitutional claims: *Vriend v. Alberta*, supra.

[146] Although the Applicant has not been wholly successful, the fact remains that he has had success on the principal issue, namely the constitutional invalidity of the legislation in question. Following the general rule that costs follow the event, I would accordingly award the Applicant's costs for this application. I wish to make it clear that the costs awarded relate only to those costs connected to the current application regarding the *Charter* challenge and not to any historic actions or steps pursued by the Applicant.

[147] Such costs shall be awarded on a party-and-party basis only. This is not a case for costs on a solicitor and client basis. As our Supreme Court recently restated in *Mackin*, supra, at para. 86:

> ...It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport*), [1992] 1 S.C.R. 3, at p. 80).

[148] While I acknowledge that the issues brought forth in this application, which raise serious and important issues involving the definition of family which are of import to society as a whole and not just to the Applicant, I find that this alone does not justify a deviation from party-and-party costs. I agree with Osler, J. in *Canadian Newspapers Co. v. Canada (Attorney General)* (1986), 56 O.R. (2d) 240 (Ont. H.C.J.) at p. 242:

> The line is sometimes a fine one but in the present case there can be no doubt that a serious challenge has been made and ably supported and that each of the challengers had a bona fide interest on behalf of itself and on behalf of the public in ascertaining the validity of the legislation. On the other hand, the award of

> solicitor-and-client costs should not be made in such cases unless some form of misconduct on the part of the unsuccessful party can be found. The legislation herein questioned obviously represents an attempt to balance various interests and although its legislative history makes it apparent that a challenge was expected, there is nothing in the legislation or in the actions of Parliament or of the Government of Canada to invite such an award. While it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the Applicant to bear the entire burden, it is equally desirable that the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged.

[149] It is sufficient to say that the usual kinds of rare or exceptional occasions such as misconduct do not exist here. Nor is this a case where it would be an appropriate exercise of judicial discretion to award costs on a solicitor and client basis. However, while I decline to award indemnity costs, I do find that this is a proper case for an award of costs on an increased scale, having regard to the public interest in such litigation and the complexity of the issues involved.

[150] In so ordering I am mindful that the Applicant is a self-represented party who was provided assistance through his McKenzie friend. It is clear that this Court recognizes the granting of costs awards to self-represented litigants: *Collins v. Collins*, 1999 ABQB 707, 256 A.R. 311. Rule 10.31 (5) of the new *Alberta Rules of Court* provides that in appropriate circumstances, the Court may award costs payable to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.

[151] While not a case for solicitor and client costs, given the complex nature of this constitutional challenge, and the importance of the issues raised to the public at large, I find that this is the proper case for an award of increased costs. As such, I order costs to be calculated using Column 3 of the tariff, plus all reasonable disbursements. The Applicant shall provide his Bill of Costs to an assessment officer within 30 days of this judgment, unless otherwise agreed to by the parties.

Heard on the 20th day of April, 2011.
**Dated** at the City of Calgary, Alberta this 12th day of October, 2011.

**S.M. Bensler**
**J.C.Q.B.A.**

**Appearances:**

D.W.H.
not represented by counsel

Lillian Riczu, Alberta Department of Justice
Constitutional Law Branch
for the Intervener

Appendix A

**Definitions**

1 In this Act,

(a) "applicant" means a person who brings an application under this Act;

(b) "birth" means birth as defined in the *Vital Statistics Act* and includes a stillbirth as defined in that Act;

(b.1) "birth mother" means a person who gives birth to a child;

(c) "child", except in Part 1 and Part 3, means a person who is under the age of 18 years;

(c.1) "conjugal" means marriage-like;

(d) "contact order" means an order made under section 35;

(e) "court" means the Court of Queen's Bench or the Provincial Court, as the case may be;

(f) repealed 2010 c16 s1(2);

(g) "grandparent" means a parent of a person's parent;

(g.1) "marriage" includes a void marriage and a voidable marriage;

(h) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(i) repealed 2010 c16 s1(2);

(j) "parent" means a person determined under Part 1 to be a parent of a child;

(k) "parenting order" means an order made under section 32;

(l) "party" means a party as defined in the regulations;

(m) "person standing in the place of a parent" means a person described in section 48;

(n) "relationship of interdependence" means a relationship of interdependence as defined in the *Adult Interdependent Relationships Act*;

(o) "respondent" means a person against whom proceedings are brought under this Act.

2003 cF 4.5 s1;2005 c10 s2;2010 c16 s1(2)

## Part 1
## Establishing Parentage

### Interpretation

5.1(1) In this Part,

(a) "assisted reproduction" means a method of conceiving other than by sexual intercourse;

(b) "embryo" means an embryo as defined in the *Assisted Human Reproduction Act* (Canada);

(c) "human reproductive material" means human reproductive material as defined in the *Assisted Human Reproduction Act* (Canada);

(d) "surrogate" means a person who gives birth to a child as a result of assisted reproduction if, at the time of the child's conception, she intended to relinquish that child to

(i) the person whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo used in the assisted reproduction, or

(ii) the person referred to in subclause (i) and the person who is married to or in a conjugal relationship of interdependence of some permanence with that person.

(2) For the purposes of this Part, if a child is born as a result of assisted reproduction, the child's conception is deemed to have occurred at the time the procedure that resulted in the implantation of the human reproductive material or embryo was performed.

2010 c16 s1(6)

### Application of Part

6 This Part does not apply to an application under section 13 of the *Child, Youth and Family Enhancement Act*.

2003 cF-4.5 ss6,114;2003 c16 s117

**Rules of parentage**

7(1) For all purposes of the law of Alberta, a person is the child of his or her parents.

(2) The following persons are the parents of a child:

(a) unless clause (b) or (c) applies, his or her birth mother and biological father;

(b) if the child was born as a result of assisted reproduction, a person identified under section 8.1 to be a parent of the child;

(c) a person specified as a parent of the child in an adoption order made or recognized under the *Child, Youth and Family Enhancement Act*.

(3) The relationship of parent and child, and the kindred relationships flowing from that relationship, shall be determined in accordance with this Part.

(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.

(5) A person who was married to or in a conjugal relationship of interdependence of some permanence with a surrogate at the time of the child's conception is not a parent of the child born as a result of the assisted reproduction.

(6) All distinctions between the status of a child born inside marriage and a child born outside marriage are abolished.

2003 cF-4.5 s7;2010 c16 s1(7)

**Presumption of parentage - biological father**

8(1) For the purposes of section 7(2)(a), unless the contrary is proven on a balance of probabilities, a male person is presumed to be the biological father of a child and is recognized in law to be a parent of a child in any of the following circumstances:

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

(b) he was married to the birth mother by a marriage that within 300 days before the birth of the child ended by

(i) death,

(ii) decree of nullity, or

(iii) judgment of divorce;

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

(d) he cohabited with the birth mother for at least 12 consecutive months during which time the child was born and he has acknowledged that he is the father;

(e) he cohabited with the birth mother for at least 12 consecutive months and the period of cohabitation ended less than 300 days before the birth of the child;

(f) he is registered as the parent of the child at the joint request of himself and the birth mother under the *Vital Statistics Act* or under similar legislation in a province or territory other than Alberta;

(g) he has been found by a court of competent jurisdiction in Canada to be the father of the child for any purpose.

(2) Where circumstances exist that give rise to a presumption under subsection (1) that more than one male person might be the father of a child, no presumption as to parentage may be made.

(3) Subsection (1) does not apply in the case of a child born as a result of assisted reproduction.

2003 cF-4.5 s8;2010 c16 s1(8);2010 c16 s1(8)

**Assisted reproduction**

8.1(1) In this section and section 8.2,

(a) a reference to the provision of human reproductive material by a person means the provision of the person's own human reproductive material to be used for his or her own reproductive purposes;

(b) a reference to the provision of an embryo by a person means the provision of an embryo created using the person's own human reproductive material to be used for his or her own reproductive purposes.

(2) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a male person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person is declared to be a parent, the male person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the male person at the time of the child's conception, and

(ii) 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;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a female person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(ii) 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;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the female person is declared to be a parent, the female person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the female person at the time of the child's conception, and

(ii) 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;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(4) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person and a female person, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person and female person are each declared to be a parent, the male person and the female person;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(5) If a child is born as a result of assisted reproduction without the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(a) or (b), the parents of the child are the birth mother and a person who

(a) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(b) 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.

(6) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a conjugal relationship of interdependence of some permanence with,

(a) in the case of a child born in the circumstances referred to in subsection (2), the male person referred to in that subsection,

(b) in the case of a child born in the circumstances referred to in subsection (3), the female person referred to in that subsection, or

(c) in the case of a child born in the circumstances referred to in subsection (5), the birth mother.

2010 c16 s1(9)

**Surrogacy**

8.2(1) An application may be made to the court for a declaration that

(a) a surrogate is not a parent of a child born to the surrogate as a result of assisted reproduction, and

(b) a person whose human reproductive material or embryo was provided for use in the assisted reproduction is a parent of that child.

(2) Subject to subsection (3), the following persons may make an application under subsection (1):

(a) the surrogate;

(b) a person referred to in subsection (1)(b);

(c) a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b).

(3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person referred to in subsection (1)(b) and a female person referred to in subsection (1)(b), only the surrogate, the male person or the female person may make an application under subsection (1).

(4) An application under subsection (1) may not be commenced more than 30 days after the date of the child's birth unless the court allows a longer period.

(5) Unless the court directs otherwise, the following persons must, in accordance with the regulations, be served with notice of the application:

(a) if a surrogate brings an application under subsection (1),

(i) a person referred to in subsection (1)(b),

(ii) unless subsection (3) applies, a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b), and

(iii) any other person as the court considers appropriate;

(b) if a person referred to in subsection (1)(b) brings an application under subsection (1),

(i) the surrogate,

(ii) unless subsection (3) applies, a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b),

(iii) if subsection (3) applies, the other person referred to in subsection (1)(b), and

(iv) any other person as the court considers appropriate;

(c) if a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b) brings an application,

(i) the person referred to in subsection (1)(b),

(ii) the surrogate, and

(iii) any other person as the court considers appropriate.

(6) The court shall make the declaration applied for if the court is satisfied that

(a) the child was born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(b), and

(b) the surrogate consents, in the form provided for by the regulations, to the application.

(7) A person who is declared to be a parent of the child under subsection (6) and any person who, as a result of that declaration, is a parent of the child under section 8.1 are deemed to be the parents at and from the time of the birth of the child.

(8) Any agreement under which a surrogate agrees to give birth to a child for the purpose of relinquishing that child to a person

(a) is not enforceable,

(b) may not be used as evidence of consent of the surrogate under subsection (6)(b), and

(c) may be used as evidence of consent for the purposes of section 8.1(2)(b)(ii) or (3)(b)(ii).

(9) The court may waive the consent required under subsection (6)(b) if

(a) the surrogate is deceased, or

(b) the surrogate cannot be located after reasonable efforts have been made to locate her.

(10) If the court makes a declaration under subsection (6), the court shall identify in the declaration any person referred to in section 8.1(2)(b)(i) and (ii) or (3)(b)(i) and (ii), as the case may be, who is a parent as a result of that declaration.

(11) The court has jurisdiction under this section if the child is born in Alberta.

(12) An application may not be made under this section if

(a) the child has been adopted, or

(b) the declaration sought would result in the child having more than 2 parents.

2010 c16 s1(9)

**Declaration respecting parentage**

9(1) If there is a dispute or any uncertainty as to whether a person is or is not a parent of a child under section 7(2)(a) or (b), the following persons may apply to the court for a declaration that the person is or is not the parent of a child:

(a) a person claiming to be a parent of the child;

(b) a person claiming not to be a parent of the child;

(c) the child;

(d) a parent of the child, if the child is under the age of 18 years;

(e) a guardian of the child;

(f) a person who has the care and control of the child.

(2) This section does not apply where a child is born to a surrogate who has consented to an application under section 8.2.

(3) If the court finds that a living person is or is not a parent of a child, the court may make a declaration to that effect.

(4) If the court finds that a deceased person is or is not a parent of a child conceived before that person's death, the court may make a declaration to that effect.

(5) In making a declaration under this section, the court shall give effect to any applicable presumption set out in section 8 and any applicable provision of section 8.1.

(6) The court has jurisdiction under this section if

(a) the child is born in Alberta, or

(b) an alleged parent resides in Alberta.

(7) An application or declaration may not be made under this section if

(a) the child has been adopted, or

(b) the declaration sought would result in the child having more than 2 parents.

2003 cF-4.5 s9;2010 c16 s1(10)