



Consultation on Parentage and Assisted Reproduction

Submitted to: Justice Policy Development, Policy Division, Ministry of the Attorney General

Submitted by: Ontario Bar Association



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



Introduction

The Ontario Bar Association (the “OBA”) appreciates the opportunity to provide a submission to the Ministry of the Attorney General on issues raised in its consultation on legislation that will address parentage when assisted reproduction has been used. The OBA supports the Ministry’s efforts to address the determination of parentage in cases involving Assisted Reproductive Technology (“ART”).

In light of the short consultation period in which the ministry is working, we are not able to provide a comprehensive opinion on this nuanced area of developing law. We have, however, in the following pages, aimed to provide the ministry with input on several elements of the ministry’s background materials and to indicate principles that should help guide the development of this legislation. In that regard we have benefitted from input from several OBA sections including the OBA Sexual Orientation and Gender Identity Conference and the OBA Trusts and Estates section. As the legislation progresses, other interested and impacted OBA sections may develop additional input which we hope you will be interested to receive.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors and law students in Ontario. OBA members are on the frontlines of our justice system in every area of law and in every type of practice, and provide legal services to a broad range of clients in every region of the province.

In addition to providing legal education for its members, the OBA is pleased to assist government with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice. OBA members in our 39 sections include amongst their clients a broad array of parties potentially impacted by legislative amendments on parentage.

Comments

The OBA recognizes the important rights and responsibilities at issue, and supports the government’s acknowledgement of a need for law reform, along with the ministry’s efforts to address these reforms in an inclusive and pragmatic manner. Indeed, through a resolution related to parental recognition at the Canadian Bar Association (“CBA”) national council meeting in August, the CBA has called for legislation permitting the appropriate determination of legal



relationship of parents to children without unnecessary court proceedings and associated delay and cost when assisted reproduction has been used.

As stated in the ministry's consultation materials, we agree that it is of significant concern that in many cases, intended parents, including LGBT and multi-parent families, and those who use ART, must go to court to obtain a declaration of parentage, which leads to potential custodial gaps and does not respect these children's right to have all their intended parents recognized from birth. We therefore welcome the government's work to remedy Ontario's legislation so that children's rights are protected through the provision of clear, consistent and accessible means to recognize their parents, regardless of their parent's sexual orientation or gender identity, the composition of their families or their parents' use of reproductive technology. This area of law poses serious concerns of equality and equity that impact in particular single persons, LGBT couples, and individuals with fertility issues.

As was the case in the development of the *Uniform Child Status Act, 2010* ("Uniform Act"), we urge the government to consider amending existing legislation in a manner that accords with Canada's obligations under the *UN Convention On the Rights of the Child*, including protecting the child from discrimination, recognizing the best interest of the child as a primary consideration, and ensuring the status of the parent/child relationship is protected from birth.

We understand that the Uniform Act issued by the Uniform Law Conference of Canada and the Federal/Provincial/Territorial Coordinating Committee of Senior Officials on Family Justice was developed through consultation with a number of stakeholders. We support the stated intention of the Uniform Act to equalize the natural and assisted reproduction models so that the two processes are treated the same as much as possible. However, we recognize that the approach undertaken in the Uniform Act to achieve that objective is based on policy determinations about scope, which are not the product of universal consensus, including the degree to which intention or genetics should govern entitlement to parentage. In the time permitted, we have not identified a consensus on the policy underpinnings of the Act, but sought to identify considerations that should be addressed under any legislation the government introduces.

First, our members have reiterated that the proposed legislation should use inclusive nomenclature that, in particular, accommodates trans or gender non-conforming parents. We therefore suggest that Ontario's legislation replace the term "birth mother" with the more inclusive term "birth parent."

Second, we support a model that, as a matter of process, swiftly and conclusively establishes parentage and eliminates the potential for custodial gaps. We recognize that the model contemplated in the Uniform Act seems to necessitate, in some circumstances, a period in which



intended parents are not afforded full parental recognition and decision making capacity for the child until a declaratory order is made.

Third, we support a model that appropriately considers the need for consequential amendments to related statutes. For instance, our members have indicated that related areas of law including wills and estates, family law and child protection will require consideration in light of proposals unique to the Uniform Act and that are not addressed in current Ontario legislation. In particular, the Trusts and Estates section has advised that, in light of the significant implications for the administration of estates, inheritance rights and dependant's relief claims for children conceived after death should be carefully considered through the development of any proposed legislation.

Conclusion

Once again, we appreciate the invitation to provide input at this stage of the ministry's work to develop legislative amendments addressing the determination of parentage in cases involving ART that provides certainty about the legal relationship of parents to children without unnecessary court proceedings and associated delay and cost to those families. We will continue to consider the implications of using the Uniform Act as a model for legislative reform, and look forward to the opportunity to comment further as the ministry progresses with this work.