

The Top Five 2008

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



A.A. v. B.B., 2007 ONCA 2

<http://www.canlii.org/en/on/onca/doc/2007/2007onca2/2007onca2.html>

The Ontario Court of Appeal declared that both partners in a lesbian relationship were mothers of a child. This resulted in the child having three parents.

Date released: January 2, 2007

The Facts

A.A. and C.C. were two women who had been in a stable same-sex union since 1990. In 1999, they decided to start a family with the assistance of their friend B.B. B.B. impregnated C.C. The two women were to be the primary caregivers of the child, but they believed it would be in the child's best interests that B.B. remain involved in the child's life. D.D. was born in 2001. He refers to A.A. and C.C. as his mothers. In 2003, A.A. applied for a declaration that, like B.B. and C.C., she was D.D.'s parent, specifically his mother. The application judge found that he did not have jurisdiction to make the declaration sought, either under the *Children's Law Reform Act*, or through exercise of a court's inherent *parens patriae* jurisdiction. He therefore dismissed the application. A.A. appealed the decision, arguing that the court did have jurisdiction and as well alleging a violation of her rights to equality and fundamental justice under ss. 15 and 7 of the *Canadian Charter of Rights and Freedoms*.

The Ontario government did not oppose the application or take a position on the appeal. The Court appointed an *amicus curiae* who supported the appeal. The Children's Lawyer, acting for D.D., also supported the appeal as did several intervenors, such as the Family Service Association of Toronto. Another intervenor, the Alliance for Marriage and Family, opposed the appeal.

The Decision

In a unanimous decision, the Ontario Court of Appeal reversed the decision of the Trial Judge and declared that A.A. was a mother of D.D. Justice Rosenberg, writing for the panel agreed that the judge could not make the declaration applying the *Children's Law Reform Act*. That *Act*, and all other relevant legislation, contemplated that a child has one mother and one father. For example, s. 12(2) of the *Children's Law Reform Act* provides that:

Two persons may file in the office of the Registrar General a statutory declaration, in the form prescribed by the regulations, jointly affirming that they are the father and mother of a child. Justice Rosenberg also found the applicants could not rely on the *Charter* on appeal as they had not raised it in the court below.

However, Justice Rosenberg found the court could make the declaration using its *parens patriae* jurisdiction. *Parens patriae*, Latin for "father of his country," is an ancient doctrine that the Crown is the ultimate guardian of all persons under a disability, especially children. The Crown's *parens patriae* power was vested in the courts centuries ago. It is an overriding power the courts have to rescue a child in danger or fill in gaps in the law, in the best interests of a child.

Here, the Court held that it was in the best interests of D.D. that a declaration of parentage be made. As the Children's Lawyer stressed, a declaration of parentage is of great importance to the child, as well as to the parent, in that:

1. it allows the parent to fully participate in the child's life;
2. the declared parent has to consent to any future adoption;
3. the declaration determines lineage;
4. the declaration ensures that the child will inherit on intestacy;
5. the declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for the child;
6. the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada
7. the declared parent may register the child in school; and,
8. the declared parent may assert her rights under various laws such as the *Health Care Consent Act*.

Justice Rosenberg noted that "Perhaps one of the greatest fears faced by lesbian mothers is the death of the birth mother. Without a declaration of parentage or some other order, the surviving partner would be unable to make decisions for their minor child, such as critical decisions about health care". If both of D.D.'s biological parents were to die, A.A. would be unable to make critical decisions for her child.

Justice Rosenberg found that there was a legislative gap in this case. The *Children's Law Reform Act's* purpose was to provide an equality in status to children born out of and in wedlock. The *Act*, though, was a product of its times when "[t]he possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme". Therefore it had not addressed the equality of status of children with two parents of the same sex, who were as much the child's parents as adopting parents or "natural" parents. It was contrary to D.D.'s best interests that he was deprived of the legal recognition of the parentage of one of his mothers. The Court could use its *parens patriae* jurisdiction to fill the legislative gap. On January 2, 2007 the Court declared that A.A. was also the mother of D.D.

The Attorney General of Ontario did not appeal the decision of the Ontario Court of Appeal to the Supreme Court. The intervenor, the Alliance for Family and Marriage, applied to the Supreme Court to be added as a party so that it could seek leave to appeal to the Supreme Court. The Supreme Court found the Alliance did not have standing to be added as a party in order to qualify to apply for leave to appeal. This ended the case.

Discussion Issues

1. Do you think the Court should have left this social policy to the legislature?
2. Do you agree with the result of the Court's decision? If you do not agree, do you object to the recognition of three parents or of two mothers-i.e. would you recognize the two partners of a same sex couple as the two parents of a child? If you do not agree, would it affect your opinion if A.A.'s egg had been fertilized by B.B. outside the womb and then carried to term by C.C.? Would it affect your decision if C.C. were terminally ill and C.C.'s parents intended to take custody of D.D. upon her death?
3. Could A.A. and C.C. apply to jointly adopt D.D.? What affect would an adoption order have had on B.B.?
4. The Court, in its reasons, referred to "a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father...". How broadly do you think the decision could be applied?