

## Family

## B.C. court declares parentage order for parent in polyamorous relationship

By Jeannette Aucoin and Chantal Cattermole



Jeannette Aucoin

(May 3, 2021, 2:50 PM EDT) -- On April 23, a B.C. court ordered that a second mother in a polyamorous triad relationship be declared a legal parent. *British Columbia Birth Registration No. 2018-XX-XX5815 2021 BCSC 767* is the first case of its kind in B.C. and groundbreaking, not only for polyamorous relationships, but also for the evolving legal concept of parentage.

The petitioners, Olivia, Eliza and Bill, had lived together in a committed polyamorous relationship for several years. In 2018, they welcomed Clarke, who is the biological child of Eliza and Bill. As a result of s. 26 of the B.C. *Family Law Act* (the FLA), only Bill and Eliza were named as legal parents on Clarke's birth registration. The application to add Olivia as Clarke's parent was opposed by the Attorney General of B.C.

Olivia, Bill and Eliza argued that:



Chantal Cattermole

1. The court could make a parentage declaration for Olivia under s. 31 of the FLA, on the basis that legal parentage was disputed or uncertain;
2. The court could make the declaration under its *parens patriae* powers, which give the court inherent authority to protect persons who are legally unable to act on their own behalf, such as children; or
3. The court could find that s. 26 of the B.C. FLA is an unconstitutional violation of the Canadian Charter.

Bill and Eliza had been in a committed relationship since the early 2000s. In 2016, they began a polyamorous "triad" relationship with Olivia, which the court found "means they each have a relationship with one another and each of their relationships is considered equal." It was clear that at some point during Eliza's pregnancy the petitioners agreed that Olivia would be involved in Clarke's life as a full parent.

At the time of this application, Clarke was 2 and half years old. Olivia had played an active role from the start, and even induced lactation so she was able to feed Clarke when he was born. Although she was not entitled to parental leave, she took unpaid leave to stay home with the family. She continues her involvement in Clarke's life as a parental figure. The court found that it was undisputed that "Clarke is being raised by three loving, caring, and extremely capable individuals."

The court found that a s. 31 parentage declaration could not be made in this case. There was no "dispute" or "uncertainty" as to Clarke's parentage under Part 3 of the FLA — his parents are Eliza and Bill, not Olivia. The FLA does not contemplate a child having a third parent, unless that child is conceived using assisted reproduction.

While an order could not be made under s. 31, Justice Sandra Wilkinson found that a parentage order could be made for Olivia as a result of the court's *parens patriae* power — finding a "gap" in the FLA. The court stated that "the evidence indicates that the legislature did not foresee the possibility a child might be conceived through sexual intercourse and have more than two parents. Put bluntly, the

legislature did not contemplate polyamorous families.”

Under the *parens patriae* jurisdiction, the court has broad discretion to fill gaps that have arisen from changing social conditions. The court noted that “the importance of a child’s birth registration cannot be underestimated” and a guardianship order does not replace a parentage order, as “there are clear and tangible differences between being a parent and being a guardian.”

Parentage is a symbolic indicator of a parent-child relationship, and is a “lifelong immutable status” as set out in *A.A. v. B.B.* 2007 ONCA 2, where the Ontario Court of Appeal made parentage orders for a same-sex female couple who wanted both of their names listed as mothers alongside the biological father:

- 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 child of a Canadian citizen is a Canadian citizen, even if born outside of Canada (*Citizenship Act*, R.S.C. 1985, c. C-29, s. 3(1)(b)).

Interestingly, in a similar case from the Supreme Court of Newfoundland and Labrador, the judge allowed three members of a polyamorous relationship to be declared parents, with the difference being that the relationship included two men and one woman, and the parties did not know which male partner fathered the child: see *C.C. (Re)* 2018 NLSC 71.

In response to the Attorney General’s argument that declaring a third legal parent would open the floodgates to parentage declarations in the future, the court disagreed, noting that people often came to court to avoid parental responsibilities, not embrace them.

This is a fascinating case in a growing area of law. Parentage issues are becoming more prevalent as a result of an increase in reproductive technology, the use of alternative methods of conception and the evolving understanding of what constitutes a family unit.

*Jeannette Aucoin is a family and fertility lawyer at Clark Wilson LLP in Vancouver. She represents clients dealing with a variety of legal issues, including divorce, property division, child support and spousal support. Aucoin also has experience in fertility law and assisted reproductive technologies. Chantal Cattermole is a family lawyer, mediator, parenting co-ordinator and partner at Clark Wilson LLP in Vancouver. She is also experienced in multigenerational estate planning to protect and preserve family wealth.*

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