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Declaration of Parentage in a Polyamorous Relationship: A Significant Step Forward

In the recent British Columbia Supreme Court case, **British Columbia Birth Registration** No. 2018-XX-XX5815, 2021 BCSC 767, Justice Wilkinson has exercised the Court's *parens patriae* jurisdiction to issue a declaration of parentage to the third female adult, "Olivia", in a 3-person polyamorous relationship. A child, conceived through sexual intercourse, was born to a married couple, "Eliza" and "Bill". Pursuant to the *Family Law Act*, SBC 2011, c. 25, the biological parents were the only legal parents named on the child's birth certificate. In exercising the court's inherent power and authority to "fill gaps that have arisen from changing social conditions" (para 40) and in considering whether a declaration of parentage was in the child's best interests, Justice Wilkinson ordered that the birth certificate be amended accordingly.

The *Family Law Act* of British Columbia provides that, in addition to a child being born to biological parents or adopted, parentage may also be determined if the child is conceived by artificial insemination. The Court is empowered to make a declaration of parentage if there is a "dispute" or "uncertainty" regarding a person's parentage (FLA s. 31). Despite extensive attention to the matter of determining parentage in the FLA (Division 2), the facts in the case of Olivia, Eliza and Bill did not enjoin any of the forgoing – biology, adoption or artificial insemination, and there was no "dispute" or "uncertainty" found by the judge.

Justice Wilkinson was tasked with deciding whether she would grant Olivia, the third adult in the polyamorous triad, a declaration of parentage, thereby entitling Olivia to all the legal rights of a parent.

It is important to note that all three adults were found by the judge to be "loving, caring, and extremely capable individuals" (para 17). It is also noteworthy that all three adults were in support of the application for the declaration of parentage of Olivia. The Attorney General of British Columbia opposed the application, and the Registrar General of the Vital Statistics Agency took no position and made no submissions.

To better understand the decision, a brief explanation of polyamory is required. John-Paul E. Boyd QC provides an excellent overview in "Polyamorous Relationships and Family Law in Canada", Canadian Research Institute for Law and the Family, 2017 CanLIIDocs 193 <https://canlii.ca/t/7d3>. People who are polyamorists are involved in a wide range of intimate partner arrangements that vary as to the number of people involved, the level of commitment of those involved, and the nature of the relationships pursued – the term itself is gender neutral and the relationship may include partners of any gender in a wide array of arrangements. What is consistent, however, is that polyamory is characterized

by having relationships with more than one person at the same time (and is to be distinguished from bigamy and polygamy, both of which involve marriages). There are, however, various themes regarding polyamory, including adaptability, choice, transcendence of traditional gender and parenting roles and transparency and honesty. Thus, “a polygamous cohabiting ménage is formed by freely consenting, informed adults, whose personal values emphasize equality and honesty . . . ” (Boyd at p. 15). As Justice Wilkinson explained: “[t]o [the petitioners] this means that they each have a relationship with one another and each of their relationships with each other are considered equal” (para 8).

According to research done by the Canadian Research Institute for Law and Family, as recounted by John-Paul E. Boyd QC, those involved in a polyamorous relationship tend to be younger than the general Canadian population, with 75% of those participating in a survey and identifying as polyamorous being between the ages of 25 and 44 years. Most had significantly higher levels of educational attainment than the general Canadian population, with 19% of respondents to the survey holding a post-graduate or professional degree. The survey respondents tended to have a higher income and over one-half identified as atheist or agnostic.

In this case, the “best interests of the child” were at the heart of the decision regarding a declaration of parentage.

Justice Wilkinson reviewed why it would both be important for the third adult in the triad to gain legal parentage and be in the best interest of the child:

- 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 health care 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; and
- the declared parent may assert his or her rights under various laws governing, for example, health care (para 42).

Further, a declaration of legal parentage would secure that parent’s legal financial obligations to the child, which require par-

ents to provide support for their children (para 80). Finally, and perhaps, as stated by Justice Wilkinson to be the most important, “parentage is immutable – the relationship between a parent and their child cannot be broken” (para 46).

In the result, Justice Wilkinson found that there was a gap in the *Family Law Act* with regard to children conceived through sexual intercourse who have more than two parents:

[68] . . . that there is a gap in the FLA with regard to children conceived through sexual intercourse who have more than two parents. 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. This oversight is perhaps a reflection of changing social conditions and attitudes . . . or perhaps is simply a misstep by the legislature. Regardless, the FLA does not adequately provide for polyamorous families in the context of parentage. (Emphasis in original)

Justice Wilkinson invoked her *parens patriae* jurisdiction to fill the legislative gap, declaring Olivia to be a parent alongside the child’s other two parents, Eliza and Bill.

The most important (it was already stated as noteworthy in a previous paragraph) feature of this case is that all three putative parents of the child agreed to the declaration of parentage. The case is a significant step forward in advancing the rights of polyamorous families. What would have been the result if Eliza and Bill had objected to the application of Olivia for a declaration of parentage, after a falling out of the parties and a dissolution of the ménage? Would the declaration of parentage of Olivia nonetheless been found to be in the best interests of the child? Perhaps ***British Columbia Birth Registration*** No. 2018-XX-XX5815, 2021 BCSC 767 is best seen as an important first step in what will be developing case law. **VI**