COMMENTARY: Lawmakers should create intermediate parenting category

By Robert Leckey

It’s finally a six-year-old Ontario boy who has one father and two mothers. The litigation is over, but discussion of how law recognizes more than two parents shouldn’t stop there.

In September, the Supreme Court of Canada refused to hear an appeal by the Alliance for Marriage and Family. The Alliance was trying to overturn, A.A. v. B.B., [2007] O.J. No. 2, a January decision by Ontario’s highest court.

In A.A., D.D had a birth mother like every child. He had a biological father. But until the judgment, the law viewed his birth mother’s lesbian partner as a stranger, even though she was helping to raise him. She too is now his legal mother.

The three adults had planned the child’s conception. They planned for the woman to be the child’s primary caregiver and for the man to remain involved as father. They all agreed on the right outcome. By contrast, litigation over parentage often arises when a couple splits up and one biological parent tries to deny the former parent access to the child.

This case isn’t about gay parenting. Same-sex couples can adopt under Ontario law. The birth mother’s partner could have applied to adopt the child, but all three adults rejected that option. Her adoption of the child would have erased the legal bond between the child and his father. The novel result of recognizing a third parent retains something conservative often want: a father.

In recognizing the third parent, the court didn’t invalidate Ontario’s legislation as discriminatory under the Charter. It used its parents patria power to fill a gap. The judges concluded that the legislation hadn’t considered such cases when it modernized the rules in the 1970s.

Nobody knows how easily others will be able to invoke this precedent. The judges were convinced that recognizing the second mother advanced this child’s best interests. It seems unlikely that a court would have given the same ruling had the parents not agreed among themselves before conception.

Criticisms that the judgment creates intermediate parenting category and racy conception and parenting practices. If they don’t, they abdicate their responsibility to the courts.

It’s not plain that legislative change would enforce the identical outcome for other families.

Five years ago, the Quebec legislature recognized assisted reproduction by lesbian couples. Depending on the parties’ intentions, the sperm donor may be recognized as the father or he may remain a stranger toward the child. If he is viewed as the father, the birth mother’s partner will be a stranger to the child. There can be no more than two parents.

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