CITATION: A.A. v. B.B., 2007 ONCA 2
DATE: 20070102
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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., LABROSSE and ROSENBERG JJ.A.

B E T W E E N :	)	
	)	
A. A.	)	**Peter A. Jervis, Jennifer Mathers**
	)	**and Shelby Austin**
Appellant	)	**for the appellant A.A.**
	)	
	)	**Alfred A. Mamo and Meysa Maleki**
- and -	)	**for the respondent B.B.**
	)	
B. B. and C. C.	)	**C.C. in person**
	)	
	)	**Thomas G. Bastedo, Q.C.**
Respondent	)	***Amicus Curiae***
	)	
	)	**Clare E. Burns and**
	)	**Katherine Kavassalis**
	)	**Office of the Children's**
	)	**Lawyer for D.D.**
	)	
	)	**Michael A. Menear, Robert W. Staley**
	)	**and Ranjan Agarwal for the**
	)	**intervenor, Alliance for Marriage and**
	)	**Family**
	)	
	)	**Bradley Berg and Courtney Harris**
	)	**for the intervenor, Family Service**
	)	**Association of Toronto**
	)	
	)	**Martha A. McCarthy and Joanna**
	)	**Radbord for the intervenor**
	)	**Melissa Drake Rutherford. et al.**
	)	
	)	**Heard: September 25, 2006**

On appeal from the judgment of Justice David R. Aston of the Superior Court of Justice dated April 11, 2003.

ROSENBERG J.A.:

[1] Five-year-old D.D. has three parents: his biological father and mother (B.B. and C.C., respectively) and C.C.'s partner, the appellant A.A. A.A. and C.C. have 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. The two women would 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.

[2] In 2003, A.A. applied to Aston J. for a declaration that, like B.B. and C.C., she was D.D.'s parent, specifically his mother. Had he thought he had jurisdiction, Aston J. would have made that declaration. He found at para. 8 that:

> The child is a bright, healthy, happy individual who is obviously thriving in a loving family that meets his every need. The applicant has been a daily and consistent presence in his life. She is fully committed to a parental role. She has the support of the two biological parents who themselves recognize her equal status with them.

[3] However, the application judge found that he did not have jurisdiction to make the declaration sought, either under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 [the *CLRA*] or through exercise of the court's inherent *parens patriae* jurisdiction. He therefore dismissed the application. No constitutional argument was made before him.

[4] On appeal to this court, the appellant repeats the same arguments as those made before the application judge. For the first time, she also raises constitutional issues alleging violation of her rights to equality and fundamental justice under ss. 15 and 7 of the *Canadian Charter of Rights and Freedoms.* The appellant is supported by B.B., C.C. and various intervenors, including the Children's Lawyer[1] acting on behalf of D.D., and the applicants from *M.D.R. v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268 (S.C.J.), a case that raised related issues.

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[1] The Children's Lawyer submits that the *CLRA* can be interpreted to permit the declaration sought and therefore argues that there is no gap in the legislative scheme to permit invoking the court's *parens patria* jurisdiction. If the *CLRA* cannot be interpreted to permit making the declaration, the Children's Lawyer supports the appellant's submissions that the legislation violates ss. 7 and 15 of the *Charter*.

[5] The Alliance for Marriage and Family, a coalition of five public interest organizations, was permitted to intervene. The Alliance submits that the application judge properly dismissed the application, that the *CLRA* is not capable of being interpreted to permit a declaration that a child has two mothers, and that the *parens patriae* jurisdiction is not available. The Alliance also submits that this court should not entertain the *Charter* arguments and that, in any event, the *CLRA* is not unconstitutional.

[6] The Attorney General for Ontario has chosen not to intervene to support the legislation. In these circumstances, the court appointed Mr. Thomas G. Bastedo, Q.C. as *amicus curiae*. Mr. Bastedo submits that the application judge properly interpreted the *CLRA*. He submits, however, that the court should make the declaration sought under its *parens patriae* jurisdiction.

[7] For the following reasons, I would allow the appeal. While I agree with the application judge that the *CLRA* does not permit the making of the order sought, I am satisfied that the order can be made by exercising this court's *parens patriae* jurisdiction. Because they were not raised before the application judge, I would decline to deal with the *Charter* issues. I will deal with this latter issue first.

Raising a Constitutional Issue for the First Time on Appeal

[8] On September 16, 2005, McMurtry C.J.O. granted leave to the appellant to file a supplementary factum and amended Notice of Appeal to "deal with Charter issues". Whether this court should decide the *Charter* issues, however, is a matter for the panel hearing the appeal. In her appeal, A.A. submits that her rights under ss. 7 and 15 of the *Charter* were infringed. A.A. did not file any additional material in support of these arguments. She submits that the material filed before the application judge is sufficient to allow this court to undertake a *Charter* analysis. Further, any deficiency in the record is cured by reference to the record from *M.D.R. v. Ontario (Deputy Registrar General)*. That record was placed before this court as part of the order granting M.D.R. intervenor status on this appeal.

[9] L'Heureux-Dubé J. in her dissenting opinion in *R. v. Brown* (1993), 83 C.C.C. (3d) 129 (S.C.C.) at 133-4, set down three prerequisites for when a court will permit a party to raise a *Charter* issue for the first time on appeal. In *R. v. R. (R.)* (1994), 91 C.C.C. (3d) 193 (Ont. C.A.) this court accepted that, while L'Heureux-Dubé J. was speaking in dissent, the majority did not take issue with this part of her reasons for judgment. The three prerequisites were as follows:

> First, there must be a sufficient evidentiary record to resolve the issue. Secondly, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial. Thirdly, the court must be satisfied that no miscarriage of

> justice will result from the refusal to raise such new issue on appeal (*Brown*, p. 136).

I note that the onus is on the party seeking to raise the *Charter* issue to demonstrate that they meet these requirements.

[10] I have some concern that the appellant cannot meet the first prerequisite in view of the comments of the majority of the Supreme Court of Canada in *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 at 694: "In the absence of facts specific to the appellants, both the Court's ability to ensure that it hears from those most directly affected and that *Charter* issues are decided in a proper factual context are compromised." In *Hy and Zel's Inc.* the appellants sought to rely on a record filed in another case raising identical issues. A.A. similarly seeks to rely upon the *M.D.R.* record to supplement the record in this case.

[11] However, I need not decide whether there is a sufficient evidentiary record because the appellant has not met the second prerequisite by showing that she did not raise the *Charter* issues for tactical reasons. Before the application judge there was no party, including the Attorney General, opposing the application for a declaration under the Act. Since no *Charter* issues were raised, the application judge refused to permit the Alliance to intervene to oppose the application. It would seem that the appellant wished to take advantage of the obvious tactical advantage of proceeding with an unopposed application. The appellant has not advanced any explanation in this court for not advancing the *Charter* issues at first instance.

[12] Finally, the appellant does not meet the third prerequisite set out in *Brown.* I have concluded that this court's *parens patriae* jurisdiction is available to give the appellant the remedy she seeks. Therefore, no miscarriage of justice will ensue to these litigants if this court does not decide the *Charter* issues. In the result, I would decline to address the *Charter* issues in this case. The *Charter* claims under ss. 7 and 15, which would have broad implications beyond the facts of this particular case, can be dealt with in another case on the basis of a proper record.

The Importance of a Declaration of Parentage

[13] A.A. seeks a declaration that she is a mother of D.D. She and C.C. have not applied for an adoption order because, if they did so, B.B. would lose his status as D.D.'s parent by reason of s. 158(2) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11. That section provides: "For all purposes of law, as of the date of the making of an adoption order … (b) the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent".

[14] A.A., B.B. and C.C. seek to have A.A.'s motherhood recognized to give her all the rights and obligations of a custodial parent. Legal recognition of her relationship with her son would also determine other kindred relationships. In their very helpful factums, the *M.D.R.* Intervenors and the Children's Lawyer summarize the importance of a declaration of parentage from the point of view of the parent and the child:

- 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 declared parent may obtain an OHIP 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 (*Citizenship Act*, R.S.C. 1985, c. C-29, s. 3(1)(b));[2]
- the declared parent may register the child in school; and,
- the declared parent may assert her rights under various laws such as the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A., s. 20(1)5.

[15] 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: see *M.D.R.* at para. 220. As the M.D.R. Intervenors say: "A declaration of parentage provides practical and symbolic recognition of the parent-child relationship." An excerpt from the *M.D.R.* record dramatically demonstrates the importance of the

[2] D.D.'s citizenship is not an issue in this case as he was born in Canada.

declaration from the child's point of view. I resort to this part of the *M.D.R.* record because D.D. is too young to provide this kind of information. The twelve-year old child of one of the applicants said this in her affidavit:

> I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this—they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women.
>
> …
>
> It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family.

[16] In *M.D.R.* at paras. 227 and 228, Rivard J. referred to some of the submissions discussed in the Victorian Law Reform Commission's position paper entitled *Assisted Reproductive Technology & Adoption: Position Paper Two: Parentage* at pp. 15 and 17:

> These submissions reported that the non-birth mother often encounters obstacles and ignorance, and at times hostility, in her dealings with government agencies and service providers where legal status is a relevant factor. Because the non-birth mother cannot be named as a parent on the child's birth certificate, she is unable to produce evidence of her relationship to the child unless she has taken steps to obtain a Family Court parenting order or some form of written authority from the birth mother.
>
> [W]e [Lesbian Parents Project Group] feel that legal recognition of our role as parents to our children is essential for their safety and social well being. It is critical to children that they have reflected back to them the value and integrity of their lives, including the legitimacy of their families ... Equal familial status sends a powerfully positive message to all social institutions that have an influence on our children's lives. It obliges them to acknowledge and respect the families our children live in.

The Children's Law Reform Act

[17] The appellant applied for an order that she is the mother of D.D. under s. 4 in Part II of the *CLRA*. Section 4 provides as follows:

> (1) *Any person having an interest may apply to a court for a declaration* that a male person is recognized in law to be the father of a child or *that a female person is the mother of a child.*
>
> (2) Where the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.
>
> (3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.
>
> (4) Subject to sections 6 and 7, an order made under this section shall be recognized for all purposes. [Emphasis added.]

[18] The application judge accepted that the relationship of mother and child need not be biological or genetic, but after a careful consideration of the legislative scheme and the applicable rules of interpretation, he held that Part II of the *CLRA* contemplates only one mother of a child. He relied principally on the use of the words "the father" and "the mother" in s. 4(1), which connote a single father and a single mother. I do not find it necessary to repeat the same analysis. The application judge's reasons are reported at 225 D.L.R. (4th) 371 and 38 R.F.L. (5th) 1. I agree with his analysis of the statute. I would, however, elaborate on three points.

[19] As the application judge noted, the process of statutory interpretation favoured by the Supreme Court of Canada requires a court to consider the grammatical and ordinary meaning of the provisions in question, the legislative history and the intention of the Legislature, the scheme of the Act, and the legislative context. I wish to further elaborate on the legislative history and intention of the Legislature as well as on the scheme of the Act. Finally, I will comment on the use of the *Charter* as in interpretative aid.

Legislative History and Intention of the Legislature

[20] The *CLRA* was intended to remove disabilities suffered by children born outside of marriage. As the Ontario Law Reform Commission observed in its 1973 Report on Family Law at p. 1: "These disabilities arise at the moment of birth and may remain with the child throughout his lifetime." The Commission therefore "accorded high priority to finding a means by which the child born outside marriage may be allowed to enjoy the same rights and privileges as other children in our society". The Commission's central recommendation was that Ontario should abolish the concepts of legitimacy and illegitimacy and declare positively that all children have equal status in law. The Commission's recommendations were enacted into legislation in the form of Parts I and II of the *CLRA*. The Commission's central recommendation concerning equality of children is found in the Act's first section:

> 1. (1) Subject to subsection (2), for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.
>
> …
>
> (4) Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section.

[21] The *CLRA* was progressive legislation, but it was a product of its time. It was intended to deal with the specific problem of the incidents of illegitimacy – the need to "remove, as far as the law is capable of doing so, a stigma which has been cast on children who in the nature of things cannot be said to bear responsibility for it" (p. 11). The possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme. The Act does not deal with, nor contemplate, the disadvantages that a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father might suffer. This is not surprising given that nothing in the Commission's report suggests that it contemplated that such relationships might even exist.

Scheme of the Act

[22] When the scheme of the *CLRA* is considered, especially the relationship between the various provisions in Parts I and II, it is apparent that the Act contemplates only one

mother and one father. The application judge drew attention to many of these provisions. He referred in particular to s. 8, which deals with the presumption of paternity. He was of the view that this section contemplated only one father. This view of the legislation is also consistent with the adoption provisions in the Act whereby no more than two persons can apply for an adoption order and the order extinguishes other parental status. I agree with that interpretation of the legislation.

[23] Further, in my view, an interpretation of the Act that allows for a declaration of a single father and a single mother is fortified by s. 12(2) of the Act, which 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*. [Emphasis added.]

[24] I agree with the application judge that the *CLRA*, and in particular s. 4(1), is unambiguous. The court has jurisdiction to make a declaration in favour of one male person as the father and one female person as the mother. Since D.D. already had one mother, the application judge had no jurisdiction under s. 4(1) to make an order in favour of A.A. that she too was the mother of D.D.

Use of the *Charter* as an Interpretative Aid

[25] A.A. and certain intervenors submit that the *CLRA* should be interpreted in a manner consistent with the *Charter*, and in particular the equality rights guaranteed in s. 15. However, the *Charter* may be used as an interpretive guide only in circumstances of genuine ambiguity. See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 62 where Iacobucci J. wrote: "[I]t must be stressed that, to the extent this Court has recognized a '*Charter* values' interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations". [Emphasis in original.] Also see *Symes v. Canada*, [1993] 4 S.C.R. 695 at para. 105.

[26] Since I have found that there is no ambiguity, it is not open to this court to use *Charter* values to interpret the provision.

***Parens Patriae* Jurisdiction**

[27] The court's inherent *parens patriae* jurisdiction may be applied to rescue a child in danger or to bridge a legislative gap. This is not a case about a child being in danger. If the *parens patriae* authority were to be exercised it would have to be on the basis of a legislative gap.

[28] The application judge held that the court's *parens patriae* authority was not available to make the declaration in favour of A.A., although he appeared to accept that such an order would be in the best interests of the child. In his view, any gap was deliberate and the court was effectively being asked to legislate because of a perception that the legislation was under-inclusive. The application judge was also concerned about the potential impact on other children if other persons, such as stepparents or members of a child's extended family, came forward seeking declarations of parenthood.

[29] I take a different view of the exercise of the *parens patriae* jurisdiction. The Supreme Court of Canada has considered this jurisdiction on several occasions, in particular in *Beson v. Director of Child Welfare for Newfoundland*, [1982] 2 S.C.R. 716 and *E. (Mrs) v. Eve.*, [1986] 2 S.C.R. 388. La Forest J. reviewed the history of the *parens patriae* jurisdiction at length in *Eve*. He concluded at p. 426 with the following statement:

> As Lord MacDermott put it in *J. v. C.*, [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, *but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion* ...." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X, supra*, at p. 699, that the *jurisdiction is of a very broad nature*, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive. [Emphasis added.]

[30] The comments of La Forest J. about the broad nature of the *parens patriae* jurisdiction and the broader discretion under the impact of changing social conditions are particularly apt in this case. However, *Eve* concerned the court's jurisdiction to authorize a medical procedure. It was not principally concerned with the court's jurisdiction to fill a legislative gap. A case somewhat closer to the problem at hand is the Supreme Court's decision in *Beson.* In that case, the Director of Child Welfare for Newfoundland removed a child from an adoptive home shortly before the expiration of the probationary residence period required for an adoption. The legislation did not give the potential adoptive parents any right of appeal from the Director's action taken during the probationary period. Speaking for the court, Wilson J. found that there was accordingly a legislative gap that could be filled by the exercise of the *parens patriae* jurisdiction. She adopted the following statement from the reasons of Lord Wilberforce in *A. v. Liverpool City Council and another*, [1981] 2 All E.R. 385 (H.L.) at 388-89:

> But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court. Then the wardship may be continued with a view to action by the court. *The court's general inherent power is always available to fill gaps* or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority. [Emphasis added.]

[31] The determination of whether a legislative gap exists in this case requires a consideration of whether the *CLRA* was intended to be a complete code and, in particular, whether it was intended to confine declarations of parentage to biological or genetic relationships. If the *CLRA* was intended to be confined to declarations of parentage based on biology or genetics, it would be difficult to find that there is a legislative gap, at least as concerns persons with no genetic or biological link to the child.

[32] As discussed above, the application judge was of the view that the jurisdiction to make parentage declarations is not confined to biological or genetic relationships. The Alliance for Marriage and Family challenges that proposition. The Alliance points out that s. 1(1) of the *CLRA* refers to a person being the child of his or her "natural parents". I agree that the Act favours biological parents. For example, s. 10 gives a court power to order blood tests or DNA tests where it is called upon to determine a child's parentage. However, the Act does not define parentage solely on the basis of biology. For example, s. 1(2) treats adopting parents as natural parents. Often one or both of the adopting parents will not be the biological parents of the child. Similarly, s. 8 enacts presumptions of paternity that do not all turn upon biology; the obvious example is the presumption of paternity flowing simply from the fact that the father was married to the child's mother at the time of birth. Further, as Ferrier J. pointed out in *T.D.L. v. L.R.L.*, [1994] O.J. No. 896 (S.C.J.) at para. 18, the declaration made under s. 4(1) is not that the applicant is a child's natural parent, but that he or she is recognized in law to be the father or mother of the child.

[33] Further, even if the *CLRA* was intended to limit declarations of paternity and maternity to biological parents, that would not answer the question of whether there is a gap. Advances in reproductive technology require re-examination of the most basic questions of who is a biological mother. For example, consider the facts of *M.D.R. v. Ontario (Deputy Registrar General)*. *M.D.R.* involved a case where one lesbian partner was the gestational or birth mother and the other partner was the biological mother, having been the donor of the egg.

[34] I return to the earlier discussion of the intention of the *CLRA*. The legislation was not about the status of natural parents but the status of children. The purpose of the legislation was to declare that all children should have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The Legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day. As MacKinnon A.C.J.O. said in *Re Bararic and Juric et al.* (1984), 44 O.R. (2d) 638 (C.A.) at : "The Legislature recognized by this legislation present social conditions and attitudes as well as recognizing that such declarations have significance beyond material ones."

[35] Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The *CLRA*, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.

[36] In my view, this is as much a gap as the gap found in *Beson*, where adopting parents were deprived of a right of appeal. Wilson J. described the gap in that case in the following terms at p. 724:

> If the Besons had indeed no right of appeal under the statute from the Director's removal of Christopher from their home, then I believe there is a gap in the legislative scheme which the Newfoundland courts could have filled by an exercise of their *parens patriae* jurisdiction. Noel J., in other words, could have done more than recommend that the Director give Christopher the chance of the good home available with the Besons. He could have so ordered. It was not a matter of substituting his views for those of the Director. It was a matter of exercising his *parens patriae* jurisdiction in light of a deficiency in the statute. If it were not in Christopher's best interests that he be removed from the appellants' home, then in the absence of any statutory right of appeal through which his interests might be protected, Noel J. had an obligation to intervene.

[37] It is contrary to D.D.'s best interests that he is deprived of the legal recognition of the parentage of one of his mothers. There is no other way to fill this deficiency except

through the exercise of the *parens patriae* jurisdiction. As indicated, A.A. and C.C. cannot apply for an adoption order without depriving D.D. of the parentage of B.B., which would not be in D.D.'s best interests.

[38] I disagree with the application judge that the legislative gap in this case is deliberate. There is no doubt that the Legislature did not foresee for the possibility of declarations of parentage for two women, but that is a product of the social conditions and medical knowledge at the time. The Legislature did not turn its mind to that possibility, so that over thirty years later the gap in the legislation has been revealed. In the result, the statute does not provide for the best interests of D.D. Moreover, a finding that the legislative gap is deliberate requires assigning to the Legislature a discriminatory intent in a statute designed to treat all children equally. I am not prepared to do so. See the comments of Rivard J. in *M.D.R.* at paras. 93 -103. There is nothing in the legislative history of the *CLRA* to suggest that the Legislature made a deliberate policy choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the Act.

[39] This holding would, it seems, be consistent with the position of the government. As stated earlier, the Crown in Right of Ontario did not intervene in this case, but its position on this issue is known. In *M.D.R.*, the Crown took the position that the *CLRA* in fact could be interpreted to allow for a declaration that two women were the mothers of a child. Since I have found otherwise, it does no violence to the government's position to make the declaration sought by the appellant in this case through exercise of the *parens patriae* jurisdiction.

[40] One final note. In *C.R. v. Children's Aid Society of Hamilton*, [2004] O.J. No. 3301 (S.C.J.) at para. 125, Czutrin J. held that the exercise of the *parens patriae* jurisdiction does not depend upon a legislative gap if the exercise of that jurisdiction is the only way to meet the paramount objective of legislation. I should not be taken as foreclosing that possibility. Since I have found a gap, I have not found it necessary to decide whether the same result could be achieved in the way suggested by Czutrin J.

DISPOSITION

[41] Accordingly, I would allow the appeal and issue a declaration that A.A. is a mother of D.D. I would order that there be no costs of the appeal or of the application. Finally, I would like to thank all counsel for their submissions, especially Mr. Bastedo who agreed to act as *amicus curiae* in this important and novel case.

Signed: "Marc Rosenberg J.A."

"I agree R. Roy McMurtry C.J.O."

"I agree Jean-Marc Labrosse J.A."

RELEASED: "RRM" January 2, 2007