



RESEARCH NOTE

Number 29, 1999–2000
ISSN 1328-8016

Same Sex Couple Adoption: The Situation in Canada and Australia

Introduction

Same sex parenting is becoming more common, yet parenting by gay and lesbian couples is not recognised under Australian law; same sex couples may not marry and currently there is no provision for joint adoption applications from same sex couples.¹

This note will briefly examine the law in Australia, the law in Canada and the outcome of a recent landmark Canadian decision concerning same sex adoption.

The Law in Australia

In Australia, the law governing adoption is mainly contained in State and Territory legislation. That legislation determines who may adopt and be recognised as the parent of a child. While the *Family Law Act 1975* regulates private aspects of parenting such as with whom a child lives or has contact, it does so against the background of parental status as determined by State/Territory laws.² Generally speaking, Australia's adoption laws are geared towards heterosexual couples. The law in Victoria and NSW will be used as illustrative examples.

Victoria

In Victoria The Adoption Act 1984 states:

An adoption order may be made in favour of a man and a woman who are married to each other and have been so married for not less than two years.³

As well as de facto relationships, traditional indigenous marriages are also given recognition. The Act goes on to state that where the Court is satisfied that special circumstances exist, it may make an adoption order in favour of one person.⁴ In some instances under the *Children and Young Persons Act 1989* (which is unique to Victoria) same sex couples may be granted permanent care orders.⁵ However,

permanent care, unlike adoption, does not sever parental ties, so same sex couples face the prospect of the child's biological parent(s) playing an on going role in the child's life, or possibly having the child legally returned to the biological parent(s).

New South Wales

The Adoption of Children Act 1965 states:

An adoption order shall not be made otherwise than in favour of a husband and wife jointly.⁶

The Court may make an adoption order in favour of a man and a woman who are living together as husband and wife on a bona fide domestic basis although not married.⁷ Where the Court is satisfied that in the particular circumstances of the case it is desirable to do so, the court may make an adoption order in favour of one person.⁸

The Law in Canada

Canadian law has not recognised same sex couples in the way it has married couples (and in some cases, opposite sex defacto couples). However the courts have had to grapple with a growing number of challenges to legislation and policies which treat these couples differently, particularly challenges which have been based on the principle of equality enshrined in the Canadian Charter of Human Rights and Freedoms 1982 (the Charter), and in provincial and federal human rights legislation. These challenges have focused on a range of legislation and policies, including marriage, adoption and pension plans.

The Canadian Charter of Human Rights and Freedoms 1982

Section 15 of the Charter guarantees every person the equal benefit and protection of the law without discrimination. In particular the Charter prohibits discrimination on grounds of sex. The Supreme Court

of Canada has held that sexual orientation is an additional ground of discrimination prohibited by the Charter.⁹ Canadian federal and provincial anti-discrimination law now prohibits discrimination on the basis of sexual orientation. In fact in *Haig v Canada*¹⁰ and *Vriend v Alberta*,¹¹ it was held that failure to prohibit discrimination on the grounds of sexual orientation in the Canadian Human Rights 1985 and the Individual's Rights Protection Act 1980 violated s15 of the Charter—it denied homosexual people the formal equality and protection from discrimination given other disadvantaged groups.

In the case of *Re K and B*,¹² the Ontario Court found the Child and Family Services Act 1990 (Ontario) infringed section 15 of the Charter by not allowing same sex couples to bring a joint application for adoption. The court modified the Act's definition of spouse to include same sex couples, thereby permitting same sex joint applications under the Act. As the result of legislative amendments same sex couples may also jointly apply to adopt in the provinces of Quebec, British Columbia, Ontario and Saskatchewan. These provinces have already amended laws to remove discrimination against gay men and lesbians, following a Supreme Court of Canada ruling that homosexual couples should enjoy the same rights as heterosexual couples.

Landmark Decision: *Re A*

Alberta can be added to the list of provinces that permits same sex couples to adopt jointly. The judgement in *Re A* was given on November 26, 1999 in the Alberta Court of Queens Bench by Martin J.¹³ The questions addressed by the Judge were whether the definition of 'spouse' in the spousal adoption provisions of the Child Welfare Act 1984 included same sex couples,

and, if not, whether these sections violate section 15 of the Charter.

Martin J summarised the issues as follows:

- It is reasonable and just to interpret the term 'step-parent' to include same sex couples. (In particular because the legislature acknowledged that there are diverse family structures.)
- Same sex couples may constitute 'families', able to perform enumerated functions to the same extent as traditional families.
- The overriding consideration must be: the nature of the petitioner's relationship with the child, i.e. whether that person has made a commitment to assume the role of the parent to that child .

Given the answer to the first question was that the legislative definition included same sex couples, the Charter issue was not addressed. However Martin J did note that in *Re K and B* the court found that a restrictive definition of 'spouse' in adoption legislation was unconstitutional.

Outcomes

In his ruling, Martin J approved the adoptions, looking past the traditional approach and focussing instead on the best interests of the children. He held that the lesbian couple were amply qualified to become the legal parent of a child that they had raised since birth. He pointed out that every case is decided on the basis of individual facts, and, as in all cases, the application will only be approved if the court is satisfied that it is in the best interests of the child.

The Role of Legislation

Adoption legislation provides minimum requirements for eligibility, guiding the Court as to what it must examine in considering whether to grant an order for adoption. In *Re A*, Martin J stated that legislation should only look to the suitability of parents, rather than to their sexual orientation. Comparable propositions were made on this issue by a NSW Law Reform Commission Report in 1997

which stated that legislation should support flexibility and adaptability in agency decision-making, rather than restrict the types of adoptive parents able to be considered by adoption professionals.¹⁴ As the Report says, '[t]here is no established connection, positive or negative, between people's sexual orientation and their suitability as adoptive parents.'¹⁵

Arguably, legislation must take into consideration different types of family structure, differences in the lifecycle stages and differing community contexts.¹⁶ It must also be examined to ensure that it is based on assumptions that reflect current attitudes and beliefs.

Conclusion

The law in Australia has not moved in the same direction as Canada on the issue of granting same sex couples adoption rights. In fact, like many other countries, same sex couples face discrimination in many Australian pieces of legislation—State, Territory and Commonwealth. In legal terms, the traditional nuclear family is still paramount. The growing popularity of gay parenting is set to cause its own share of legal complications, especially when gay men and lesbians want to be actively participating in parental caring. Canadian decisions in various provinces and the most recent ruling in Alberta do not mean that gays and lesbians will automatically be granted adoption rights. The best interests of the children involved will be considered in same sex cases, as it is in other applications. Canada has explored these issues, while Australian courts and parliaments have yet to address or consider them in detail. It is conceivable that Australia might choose to utilise Canadian precedent in this area.

1. See for example 'Gay groups seek changes to parenting laws', *Sunday Age*, 9 Jan 2000; Jenni Millbank 'The De Facto Relationships Amendment Bill 1998', *Australasian Gay and Lesbian Law Journal*, vol. 8, May 1999; William Rubenstein, 'We are family: a

reflection on the search for legal recognition of lesbian and gay relationships' *Journal of Law and Politics*, vol. 8, no. 1, Fall 1991.

2. Danny Sandor, 'Same Sex Couples can Adopt in Ontario: The Canadian Case of *Re K* and its Significance to Australian Family Law', *Australian Journal of Family Law*, vol. 11, March 1997, p.38.
3. Subsection 11 (1)(a).
4. Subsection 11(3)
5. Section 112
6. Subsection 19(1)
7. Subsection 19 (1A)
8. Subsection 19(2) and (1B).
9. *Vriend v Alberta* (1998) 156 DLR (4th).
10. (1992) 94 DLR (4th).
11. (1998) 156 DLR (4th).
12. (1995) 125 DLR (4th) 653.
13. [1999] A.J. No. 1349.
14. NSW Law Reform Commission Report 81, *Review of the Adoption of Children Act 1965* (1997). Chapters 6.
15. *ibid*, p. 230.
16. *ibid*.

Tanya Canny Law and Bills Digest Group Information and Research Services

11 April 2000

Views expressed in this Research Note are those of the author and do not necessarily reflect those of the Information and Research Services and are not to be attributed to the Department of the Parliamentary Library. Research Notes provide concise analytical briefings on issues of interest to Senators and Members. As such they may not canvass all of the key issues. Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

© Commonwealth of Australia