COMMENTARY: Lawmakers should create intermediate parenting category

By Robert Leckey

It's final: a six-year-old Ontario boy 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 women to be the child's primary caregivers 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 partner 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 conservatives 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 *parens patriae* power to fill a gap. The judges concluded that the legislature 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 heralds the end of the family are overblown. Still, the case calls our lawmakers to address contemporary conception and parenting practices. If they don't, they abdicate their responsibility to the courts.

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It's not plain that legislative change would enshrine 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.

Despite their differences, the Ontario judgment and Quebec's rules share the idea that a person is a parent or a stranger. They disagree on how many parents there can be. Rethinking this all-or-nothing approach is overdue.

In the cases of relationship breakdowns and blended families, the law sometimes recognizes, for some purposes, an intermediate position. Step-parents may be required to pay child support and they may, in turn, seek access or even custody. In such cases, the third parent figure arrives only after a relationship breakdown. Why can't law recognize three "parents" as a planned, cooperative matter?

Admittedly, there are reasons for caution. Parental decision making, hard with two parents, might be harder with three. Custody disputes could become more complex with three individuals on an equal footing to demand that the child live with them. It is wonderful that the three parents get along so well, but they might not forever.

Our lawmakers should consider creating a new intermediate category. A key question is whether it would apply only to persons involved in planning a child's conception or whether it would include the possibility of opting-in later, say by a new step-parent. Another issue is whether it would arise through formal agreement with the child's legal parents or through conduct.

Fixing its legal content would require unbundling the rights and obligations of parenthood. Individuals in this intermediate position would have the power to visit the child in hospital and pick him up at school. But the position would bring a less-than-equal claim to custody. It might be fair for the child support duty to be lighter, perhaps enforceable only if the two primary parents cannot pay.

The law fails to address contemporary practices. Law's role is to provide guidelines around which we can plan conduct as free and responsible individuals. A family regime in which individuals with a child – however conceived – have to go through the cost and uncertainty of prolonged litigation to find out who a child's parents are isn't serving that function. We can demand better of our lawmakers.

Robert Leckey, a member of the Law Society of Upper Canada, teaches family law at McGill University.

'Spaghetti bowl' of standards created by differing rules

TRADE
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Union) due to a lack of consensus on the legal interpretation of the Article XXIV rules. As a result, FTAs fall largely outside of WTO supervision, in spite of their large, and dramatically increasing, share of world trade.

Even where the WTO requirements are satisfied, concern remains that FTAs undermine the multilateral trading system by allowing differing rules to proliferate. The result has been commonly characterised as a "spaghetti bowl" of crisscrossing rules and standards. The plurality of rules of origin in particular has fuelled criticism that the proliferation of regional trading arrangements is not enhancing trade but rather is contributing to greater opacity and inefficiency in the trading system.

This apparently irreversible trend has caused some commentators to demand a detente between multilateral and regional trading systems, entailing a legitimization of regionalism as an alternative to, and not an interim step toward multilateralism.

Ironically, FTAs consume negotiating resources in both the private and public sector, that might otherwise be directed to multilateral efforts. Further, FTA partner candidates are, not surprisingly, chosen from among trading partners with an established history of significant trade volumes. The successful conclusion of an FTA with these partners will likely entrench these trading relationships further, at the expense of the development of new, diversifying trade relationships.

In addition, potential FTA partners are chosen with a view to addressing specific, crucial trade irritants, reducing the urgency for a multilateral solution that could more fully deal with a broader range of trade barriers.

Unfortunately, Canada's short-term self-interest leaves little choice but to pursue its own contribution to the proliferation of FTAs, particularly with the WTO Doha Round's failure to achieve meaningful progress.

Greg Somers is a partner at Ogilvy Renault LLP in Ottawa, practising international trade and investment law. Alison FitzGerald is an associate in the litigation group in the same office.