

Amendments to the *Family Law Act* – What’s New? (*Family Law Statutes Amendment Act, 2010*)

I. INTRODUCTION

A. What is the *Family Law Act*?

The *Family Law Act* contains the core principles of family law in Alberta and affects all Albertan families. It governs parent-child relationships and the rights and obligations of guardians, whether the parents are in an intact relationship or have separated.

B. Why were amendments to the *Family Law Act* needed?

When the *Family Law Act* was proclaimed on October 1, 2005, it consolidated, harmonized and updated provisions from several provincial family law acts and contained a number of substantial changes to policy. As such, it was anticipated that it would be necessary to monitor and evaluate how the *Family Law Act* was received by the Court, the Bar, service providers and the public.

Alberta Justice has received comments about the *Family Law Act* through both formal and informal channels. Decisions made by all levels of the Alberta Courts in relation to the *Family Law Act* have been monitored. Finally, the release in 2009 of the independent evaluation by the Canadian Research Institute for Law and the Family (CRILF) provided detailed insight into how the Act was operating.

Overall, the *Family Law Act* has been well received, however some amendments were needed to ensure it operates as intended and continues to provide answers to the legal issues relevant to Alberta families.

C. When will the amendments to the *Family Law Act* come into force?

While Cabinet will make the final decision on when the amendments to the *Family Law Act* contained in the *Family Law Statutes Amendment Act, 2010* will come into force, Alberta Justice is working towards proclamation in the summer of 2011. Prior to implementation, several months' work is required to ensure regulations are amended, changes to forms are made and training is provided. Further information on amendments to the regulations and a proclamation date will be provided as soon as possible. For an update on status, check on the Alberta Justice website at www.justice.alberta.ca or the Legislative Assembly website at www.assembly.ab.ca.



D. How do I get a copy of the *Family Law Statutes Amendment Act, 2010*?

The *Family Law Statutes Amendment Act, 2010* can be printed from the Alberta Queen's Printer website at <http://www.qp.gov.ab.ca>.

II. OVERVIEW OF AMENDMENTS¹

A. Court Jurisdiction

The Court of Queen's Bench and the Provincial Court will continue to both have jurisdiction under the *Family Law Act*. The Court of Queen's Bench has jurisdiction over all matters under the Act, while the Provincial Court has jurisdiction over most matters, limited only as required by the Constitution of Canada.

New: **Section 4** will have a new provision to allow a party to a *Family Law Act* proceeding to make an application to the court in which the proceeding was brought, for an order transferring the matters in issue to the other court.

B. Establishing Parentage

1. Introduction

The parentage provisions of the *Family Law Act* determine the legal status of parent-child relationships for all purposes of the law in Alberta. The basic rule remains that the parents of a child are the birth mother and the biological father, unless there has been an adoption², or the child is conceived using methods of assisted human reproduction (AHR). The amendments set out special rules for parentage when a child is born as a result of AHR.

Infertility is a real barrier to many Albertans who wish to create a family. Advances in AHR technology have created new opportunities for infertile couples to become parents. Most couples utilizing AHR to create a family are heterosexual couples, although same-sex couples and single persons also use AHR. It is necessary for parentage law to provide certainty regarding the legal parent-child relationships in all of these situations.

¹ This document has been prepared by Alberta Justice and is an overview of the amendments to the *Family Law Act* contained in the *Family Law Statutes Amendment Act, 2010*. Numerous less substantive amendments are not set out in this document. The actual *Family Law Statutes Amendment Act, 2010* must be consulted for all purposes of interpreting and applying the law.

² The *Child, Youth and Family Enhancement Act* governs adoption in Alberta.

When the *Family Law Act* was implemented in 2005, its parentage provisions were the most advanced in Canada in relation to AHR. However, not all combinations of parents and children were considered, and as a result, the Court identified *Charter* deficiencies.

While the technical aspects of AHR, such as what AHR technologies can be utilized, fall within the jurisdiction of the federal government, the challenge for provinces and territories is to establish parentage status when children are born as the result of the use of this technology. Since all Canadian jurisdictions are faced with this challenge, in 2007, Federal, Provincial and Territorial Ministers and Deputy Ministers Responsible for Justice directed that a joint working group with representatives from the various jurisdictions be formed to create uniform parentage legislation. The *Uniform Child Status Act* created by that working group has received the approval of the Deputy Ministers and the Uniform Law Conference of Canada.³ The parentage amendments to the *Family Law Act* are based on that work.

2. Definitions

New: A number of amendments were included to achieve the following goals:

- to assist in the interpretation of statutes that refer to "mother" and "father" and "parent",
- to promote consistent policy regarding who is a parent throughout Alberta statutes; and,
- to make it clear that a child can have one or two fathers or one or two mothers.

First, the definition of "parent" is amended (**section 1(j)**) to make it clear that the parentage provisions determine the legal status of parent-child relationships for all purposes. In addition, definitions of "mother" and "father" will be defined as "a parent who is a female person", and "a parent who is a male person", and those definitions are moved to the *Interpretation Act*. Finally, **section 7(6)** abolishes all distinctions between the status of a child born inside marriage and a child born outside marriage.⁴

3. Possible legal parent-child relationships

New: **Section 7** is now the foundational section of the parentage provisions, as it provides a complete list of possible legal parent-child relationships. The amendments do not change the basic rules of who is a legal parent, but they clarify parentage of all children conceived using AHR.

³ A copy of the Act is available on the Uniform Law Conference of Canada website at www.ulcc.ca.

⁴ The amendments also repeal the *Legitimacy Act* and consequentially amends a number of Alberta enactments that still retained references to illegitimacy.

4. Parentage of children conceived through assisted reproduction

To understand the new provisions, it is necessary to become familiar with a number of concepts. First, the phrase "assisted reproduction" is defined in **section 5.1(1)(a)** as a method of conceiving other than by sexual intercourse. Because a number of the provisions refer to "the time of conception", **section 5.1(2)** clarifies that if a child is born as a result of AHR, the time of conception is deemed to be the time that the procedure that resulted in the implantation (artificial insemination, in vitro fertilization or frozen embryo transfer) was performed.

It is also important to understand that the basic family paradigm of a maximum of 2 parents applies to both children born without the assistance of AHR and children born as the result of AHR.

Regardless of the method of conception, the birth mother will be one of the legal parents of the child, unless and until she chooses to relinquish that parentage so the child can be adopted or a declaration can be made in favor of the intended parents in the situation where she is a surrogate⁵.

When considering the amended parentage provisions, it is beneficial to think in terms of 3 combinations of parents and child (illustrated in the diagram below):

- children who were conceived without assisted reproduction;
- children who were conceived with assisted reproduction and whose birth mother is the intended parent; and
- children who were conceived with assisted reproduction and whose birth mother is a surrogate⁶ who relinquishes her parentage after the child's birth so that a parentage declaration can be made in favor of the intended parents.

Children conceived without AHR	Children conceived with AHR whose birth mother is an intended parent	Children conceived with AHR whose surrogate birth mother relinquishes her parentage after birth
If the child was conceived without the use of AHR, the legal parents are:	If the child was conceived with AHR and the birth mother is an intended parent, there are 4 possibilities :	If the child was conceived with AHR and the birth mother is a surrogate who relinquishes her parentage after the child's birth, there are 3 possibilities :

⁵ The phrase "intended parent" is not used in the Act, but is used in this document as a shorthand way to refer to a person who provides his or her own human reproductive material for purposes of becoming a parent or a person who is the spouse or in a conjugal relationship of interdependence of some permanence (conjugal relationship) with the person who provided material and consented to be a parent of the resulting child at the time of conception.

⁶ The surrogate must both intend to relinquish the child at the time of conception and actually relinquish the child after birth. The situation where the surrogate does not relinquish the child is discussed below.

Children conceived without AHR	Children conceived with AHR whose birth mother is an intended parent	Children conceived with AHR whose surrogate birth mother relinquishes her parentage after birth
<ul style="list-style-type: none"> • the birth mother; and • the biological father⁷. 	<p>1. If the embryo was created from an intended male parent's sperm and a donated egg, the legal parents are⁸:</p> <ul style="list-style-type: none"> • the birth mother; and • the intended male parent. 	<p>1. If the embryo was created from an intended male parent's sperm and a donated egg, on application⁹ the Court will declare as legal parents¹⁰:</p> <ul style="list-style-type: none"> • the intended male parent; and • a person who was married to or in a conjugal relationship with the intended male parent and consented to be a parent at the time of conception (if any).
	<p>2. If the embryo was created from an intended female parent's egg and donated sperm, the legal parents are¹¹:</p> <ul style="list-style-type: none"> • the birth mother; and • a person who was married to or in a conjugal relationship with the birth mother and consented to be a parent at the time of conception (if any). 	<p>2. If the embryo was created from an intended female parent's egg and donated sperm, on application¹² the Court will declare as legal parents¹³:</p> <ul style="list-style-type: none"> • the intended female parent; and • a person who was married to or in a conjugal relationship with the intended female parent and consented to be a parent at the time of conception (if any).
	<p>3. If the embryo was created from both an intended male parent and an intended female parent's reproductive material the legal parents are¹⁴:</p> <ul style="list-style-type: none"> • the birth mother; and • the intended male parent. 	<p>3. If the embryo was created from both an intended male parent and an intended female parent's reproductive material, on application¹⁵ the Court will declare as legal parents¹⁶:</p> <ul style="list-style-type: none"> • the intended male parent; and • the intended female parent.
		<p>4. If the embryo was donated or created from all donated reproductive material, the legal parents are¹⁷:</p>

⁷ Unless the child has been adopted.

⁸ Section 8.1(2)(a)

⁹ Section 8.2

¹⁰ Section 8.1(2)(b)

¹¹ Section 8.1(3)(a)

¹² Section 8.2

¹³ Section 8.1(3)(b)

¹⁴ Section 8.1(4)(a)

¹⁵ Section 8.2

¹⁶ Section 8.1(4)(b)

¹⁷ Section 8.1(5)

Children conceived without AHR	Children conceived with AHR whose birth mother is an intended parent	Children conceived with AHR whose surrogate birth mother relinquishes her parentage after birth
	<ul style="list-style-type: none"> • the birth mother; and • a person who was married to or in a conjugal relationship with the birth mother and consented to be a parent at the time of conception (if any). 	

5. Declaration of parentage - surrogate birth mother

If the birth mother is a surrogate (she intended at the time of conception to relinquish the child), she is the legal mother of the child unless and until she relinquishes her parentage by consenting to an application under **section 8.2**. **New:** the amendments make it clear that the application can be made by an intended parent, whether that parent is male or female.

New: An application under **section 8.2** can be commenced in the Court of Queen's Bench within 30 days of the child's birth by: the surrogate, an intended parent who provided his or her reproductive material, or a person who was married to or in a conjugal relationship with an intended parent and consented to be a parent at the time of conception (if any).

As was the case prior to the amendments, the Court can only grant the declaration applied for if the surrogate has consented to the application. If the surrogate does not consent to such an application, she will remain the only legal parent of the child.

6. Presumption of parentage for “standard” situations (no assisted reproduction)

While we always know who gave birth to the child, it is a basic principle of biology that there is no way of knowing for certain who the child's father is without requiring a DNA test. Therefore, the parentage provisions continue to include a list of presumptions (**section 8**) as to who the biological father is. **New:** A minor amendment has been made to the list to recognize that a male person should be presumed to be a parent of a child if he was married to the birth mother, even if the marriage ended by death within 300 days before the birth of the child.

7. Declaration of parentage

If there is a dispute as to parentage, an application can be made pursuant to **section 9** for a declaration that a person is or **new** is not a parent of the child.¹⁸ **New:** This section now clarifies that the Court can make a declaration regarding a deceased person, if the child was conceived before that person's death. **New:** An express provision has been added stating that a declaration cannot be made that would result in the child having more than 2 parents.

C. Guardianship, Parenting and Contact Orders and Enforcement of Time with a Child

1. Guardianship

In Alberta, the ability to make decisions with regard to a child is tied to guardianship status rather than parentage status, whether the guardians are in an intact relationship or not. A person who is a guardian of a child pursuant to the provisions of the *Family Law Act* is a guardian of that child for all purposes of the law (**section 19**). A guardian may obtain their authority by operation of law (**section 20** - parents only), by court appointment (**section 23**), or by nomination by a guardian (**section 22**).

The *Family Law Act* specifies the powers, responsibilities and entitlements of guardianship (**section 21**). When guardians live together, they each have the full array of powers, responsibilities and entitlements that the law attaches to guardianship. When they live separate and apart, they each have the ability to exercise all incidents of guardianship unless those incidents have been otherwise allocated by agreement or through a Parenting Order.

Section 20 specifies when a parent is also a guardian of the child automatically, by operation of law. Prior to the amendments, this section provided that:

- If the parents had a relationship that fit within a specified list, generally involving cohabitation or marriage, both parents would be guardians of the child.
- If they did not have one of the specified relationships (generally, if they were in a short term relationship), both parents would be guardians of the child unless and until the child began to "usually reside" with one parent, at which time the other parent would lose guardianship, unless the parents agreed otherwise (case law suggested that this would be a period of time somewhere between several months to a year).

Some concerns were raised regarding **Section 20** including:

¹⁸ An application cannot be made under this section if a surrogate gave birth to the child; it must be made under section 8.2.

- difficulties arising from fathers in short term relationships having automatic guardianship status for a period of time after birth even if he has no involvement with the mother or the child; and
- lack of clarity since there are no objective measures to determine usual residence of the child.

New: To address those issues, **section 20** has been amended to provide that a parent is automatically a guardian of the child by operation of law if that parent, within one year from either becoming aware of the pregnancy or becoming aware of the birth of the child, whichever is earlier:

- acknowledges that he or she is a parent of the child, and
- demonstrates an intention to assume the responsibility of a guardian in respect of the child.

A non-exhaustive list of steps that a parent can take to demonstrate his or her intention to assume the responsibility of a guardian in respect of the child is provided in **subsection 20(3)** and includes:

- being in a specified relationship with the other parent, generally involving cohabitation or marriage, around the time of the birth or conception (this continues the old law) ;
- voluntarily providing reasonable direct or indirect financial or other support for the child, other than by court order; and
- entering into a guardianship agreement with the other parent.

Some parents, generally fathers who were in a short term relationships with the mothers and haven't taken a step to demonstrate an intention, will be excluded from being automatic guardians by operation of law. However, it is important to note that an excluded parent could still apply to the Court to be appointed a guardian under **section 23**.

New: If the pregnancy was the result of a sexual assault, the parent committing the assault is not eligible to become a guardian under this section. Such a parent would have to apply for guardianship under **section 23**.

New: If there is a dispute, **section 20(6)** provides that the Court can make a determination as to whether or not a parent has met the requirements to automatically be a guardian by operation of law. The Court can make this determination on application or on its own motion within the context of a proceeding under the *Family Law Act* or under the *Child, Youth and Family Enhancement Act*. Since this would simply be a finding of fact by the Court, the best interests test in **section 18** would not apply. As noted above, a parent who has not met the requirements can apply for guardianship under **section 23**.

New: **Section 20(6)** can also be used by a parent who is the sole guardian of the child to make an application to the Court for an order confirming that status. Such a Court ruling will be helpful where a parent requires proof of his or her status for international travel or similar purposes. The Court may also identify the powers, responsibilities and entitlements of the guardian (**section 20(7)**).

New: **Section 20(9)** is a transitional provision which states that a person who is a guardian of a child immediately before the amendments coming into force does not cease to be a guardian by reason of this section.

New: **Section 22** has been amended by replacing the reference to testamentary appointment of a guardian "by deed" with a reference to "a written document that is signed and dated by the guardian and an attesting witness".

2. Parenting orders

No substantial amendments have been made to the parenting order provisions. When guardians live separate and apart, they each have the ability to exercise all incidents of guardianship unless those incidents have been otherwise allocated by agreement or through a parenting order. The Court can use provisions in a parenting order to craft the right solution for the each family (**section 32**).

3. Contact orders

The amount of time that a non-guardian has with a child is governed by a contact order granted under **section 35**. An application for a contact order can be commenced by the non-guardian who wants to have contact or **new** by a guardian. This would be useful in situations such as when a non-guardian parent or grandparent is asking the guardian for contact with the child, and the guardian wants the contact specified in an order.

4. Enforcement of time with a child

There are no amendments that affect provisions governing the enforcement of time with a child. A person who has court ordered time with a child but has been denied that time can make an application to the Court under **section 40** for an enforcement order, whether the time with a child is under a parenting order or contact order under the *Family Law Act*, or a custody order or access order under the *Divorce Act*.

5. Effect of divorce proceedings

New: **Section 45.1** expressly provides that the Court's jurisdiction under the *Family Law Act* to grant or vary a guardianship order, parenting order or contact order continues even if divorce proceedings between the parties have been commenced, unless and until an interim or final custody or access order has been granted in the divorce proceedings. This parallels **section 81** which clarifies the Court's jurisdiction in support matters.

D. Support Obligations

1. Support of child

Every parent, as well as every person who fits within the definition of "standing in the place of a parent", has an obligation to provide support for his or her child (**section 49**). **New:** The amendments make some minor adjustments to reflect the fact that a child can have two fathers or two mothers rather than one mother and one father, but no substantive changes have been made.

2. Support of spouse or adult interdependent partner

Section 56 sets out the obligation for spouses or adult interdependent parents to support each other. **New:** The words "Subject to this Division" have been added. This clarifies that the enforcement of this obligation is subject to the factors and objectives found in the remainder of the provisions, and these must be considered before a support order can be granted.

3. General Support Matters

New: The provisions regarding the grant of exclusive possession of home in conjunction with a support order have been changed to refer to the "family home" rather than the "primary home". This coincides with the wording that will be used in the *Wills and Succession Act*.

Section 80 provides that a support order or support agreement will bind the estate of the person having the support obligation, unless the support order or agreement says otherwise. **New:** Where a support order or agreement is binding on an estate, **section 80.1** will allow an application to be made to the Court to vary or terminate that order or agreement. The new provision is designed to factor in the needs of other children (or dependents) and to allow the estate to be wound up. The factors to be considered under this section are different from those in **sections 51 and 77**, which govern applications to vary an order during the lifetime of the paying parent.