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Citizenship requires genetic connection to Canadian parents

BY ARSHY MANN
Law Times

A judge has ruled children born abroad must have a genetic connection to their Canadian parents in order to receive Canadian citizenship.

The case involved a child born in India to a Canadian father and an Indian mother. The married couple, who were both infertile, used sperm and ova donations to conceive the child.

The Canadian government refused to give the child citizenship on the basis that it had no genetic connection to a Canadian citizen. In *Canada (Citizenship and Immigration) v. Kandola*, a case decided in March, the Federal Court of Appeal sided with the government and overturned a previous decision.

The court's ruling hinged on the interpretation of the French-language phrase "née d'un père" in the Citizenship Act, something the court argued required a genetic link to the father in or-der to confer citizenship.

The ruling came as a disappointment to Sara Cohen, a fertility lawyer based in Toronto.

"This is an absurd result, the way I see it, and it doesn't make sense as a body of law altogether," she says.

Cohen believes that not only did the ruling lead to a bad result but it stemmed from faulty reasoning.

"I don't think this was that case where you had to bend the legislation to make it fit something that was not an absurd result and that made good policy sense," she says.

"Because what I see as the right decision was really easily available to the majority, but they chose not to go that way."

Cohen points out that both Canadian and Indian law operate with a presumption of paternity when it comes to conferring citizenship.

"The baby in Indian law is a child of its mother and a child of its father because the parents are married. Under Canadian law, in every single province there's al-

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ways a presumption of paternity if someone is married, regardless of the genetic connection."

Instead, she sees the ruling as discriminating against children by the way in which they were conceived.

"We haven't said for any other child born in that situation when you're not using assisted reproductive technologies that they're not entitled to citizenship on the basis that they don't have that genetic connection. So why are we now doing it just because the child was born using assisted reproductive technologies?"

In the dissent, Justice Robert Mainville found the ruling would lead to the absurd result that a child born anywhere in the world of donor sperm or ova from a Canadian would automatically get Canadian citizenship. "In this way, derivative Canadian citizenship is conferred to a child born to a Canadian parent following a fertilization technique, and this irrespective of the nationality of the genetic donors," wrote Mainville.

"On the other hand, derivative citizenship is not conferred to a child born to foreigners following a fertilization technique which uses genetic material from a Canadian citizen, since in such circumstances the genetic contributor is not deemed in law to be a parent."

Cohen hopes Parliament will amend the Citizenship Act to make it clear that children born through gamete donation can also obtain Canadian citizenship by virtue of descent.

Although Cohen would like to see the case go before the Supreme Court, the parents have already moved to Canada and don't have the funds to pursue a further challenge.

"It's clearly a decision that is ripe for the Supreme Court," she says.

The only other route would be for Parliament to amend the Citizenship Act to make it clear that children born through gamete donation can also receive citizenship by virtue of descent.

Considering how common transnational third-party reproduction is today, Cohen believes another court challenge is inevitable.

"I think there's going to be more and more cases that have to do with this and I think someone is going to challenge it at some point because I think it's bad law," she says.

"I really hope someone does something. It's just so sad. It just doesn't feel good." **LT**