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# Evolution of the family – The Importance of Biological Ties

By Laurie H. Pawlitza

In Canada, as the make up of families change, the resolution of parenting issues becomes more complex. The laws in each province and the federal laws set out a non-inclusive list of factors for the Court to consider when deciding parenting issues. Included in those factors is the relationship between the child and the parent and with other family members.

Two recent cases highlight a significant change in interpreting the law regarding a child's best interests and the effect of a child's biological ties on the outcome.
Earlier this year, the Supreme Court of Canada released a decision which considered the importance of biological ties when determining a child's best interests. In B.J.T. v. J.D., the biological mother and father lived in one of Canada's western provinces, and had a short but tumultuous marriage. The mother had mental health issues; the father had allegedly been physically violent. The mother returned to the east coast of Canada, without the father knowing about the pregnancy. The mother's mental health issues worsened after the baby's birth, and ultimately the baby's maternal grandmother moved to the east coast to help care for the child. The grandmother cared for the child for over two years. The mother's mental health declined further and she refused to allow the grandmother to continue to care for the child. Child protection services apprehended the child from the mother, and the grandmother returned to care for the child. Meanwhile, the father, despite that he had never met the child, decided that he should bring the child back to western Canada to live with him. After a period of integration between the child and the father, child protection services agreed that the father should have the child. The grandmother disagreed.
The trial judge decided that it was in the child's best interests for the grandmother to continue to raise the child. The provincial Court of Appeal set aside the trial judge, relying in part on the father's closer biological ties with the child.

Justice Sheila Martin of the Supreme Court of Canada, wrote for a unanimous Court. In restoring the trial judge's decision, Justice Martin considered the relevance of a biological tie when determining a child's best interests. Martin, J. recognized that the institution of the family in Canada has undergone a profound evolution, and a biological tie is just "one factor among many".

As both the grandmother and the father had a biological connection to the child, Martin, J. went further, commenting that “a biological tie may be intangible and difficult to articulate; it is difficult to prioritize over other more concrete best interest factors”. The Supreme Court of Canada agreed with the trial judge, who had decided that the grandmother was more inclined to facilitate the father’s time with the child than vice versa, and as such, the grandmother should be the child’s primary caregiver.
In B.J.T., Justice Martin recognized the changing nature the Canadian family, observing that children are increasingly being raised in families where biological ties do not define the family relationship.

Again in 2022, the issue was front and centre in the province of Ontario where the parties seeking to be the child’s primary parents had no biological ties at all to the child.

J. and C. were male same sex partners who had been together for 10 years. They were friends with a woman, B. and her new partner, A. As friends, the woman, B., had discussions with J. and C. about acting as their surrogate. Both couples were of limited means, and while they tried to deal with the legal aspects of a surrogacy arrangement, no surrogacy agreement was signed. Circumstances changed when B. inadvertently became pregnant with her partner, A’s child. Even though the initial plan had been that C would provide the sperm, once B became pregnant, plans for the baby did not really change. However, a formal surrogacy arrangement was no longer possible as surrogacy law requires that a legally binding agreement be made before pregnancy.

Throughout B’s pregnancy, J. and C. prepared their home for a newborn, contributed to B’s pre-natal expenses and organized their future work schedules so that between them, they would be full time caregivers for the baby.
B and A did none of these things.
When the baby was a day old, B and A handed her over to J and C in a coffee shop parking lot. But when the baby was four months old –having not seen her at all since her birth, –B. and A. demanded the baby back.

Predictably, litigation followed.

At a trial in the Superior Court of Ontario, the judge, Gregson, J. had to decide whether the child should continue to live with .J and C., who should be responsible for making major decisions for the child and what arrangements, if any, should be for contact with the non-residential couple.
Gregson, J. decided that J. and C.–despite having no biological ties to the baby –should be the child’s primary caregivers and should make all major decisions for the child. Among other reasons, she found that the baby was flourishing in the care of J. and C., and that they were also prepared to facilitate B.’s and A.’s relationship with the baby.

As Justice Martin of the Supreme Court of Canada observed in B.J.T., “change and evolution [in the Canadian family] continues today.” As a result, in Canada, a mere biological connection to a child is no longer a ‘tiebreaker’ when the best interests of a child are involved.

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## Author

**Laurie H. Pawlitza**
Partner

**Tel:** 416 777 5192
lpawlitza@torkinmanes.com