The Wilson Moot 2011

Perry et al v. Canada

Section 2 of the *Civil Marriage Act*, S.C. 2005, c. 33 (the "*Act*") provides:

> *Marriage – certain aspects of capacity*
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> 2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

John Hudson, Julie Perry and Mona Sherwood have lived together in a polygamous relationship for 15 years. They share a home in the City of Riverville, Ontario. Julie is a family doctor. Mona runs her own bicycle repair and maintenance business. John stays at home with the family's three children – Sam (age 8), Kayla (age 4) and Molly (age 2 months). The children share a last name – Pesherson. Sam is Julie and John's biological child; Kayla and Molly are Mona and John's biological children. Sam and Kayla call their parents Mom, Mama and Dad, respectively, and it is expected Molly will do the same.

From time to time, John, Julie and Mona have discussed whether a pair of them ought to get married to afford some partial legal recognition to their relationship. All were dissatisfied with the possibility that two of them would be legally married while one would be left an outsider. They wanted recognition for their relationship, and the benefits of marriage for their family, particularly for their children. They have considered applying for orders allowing all three to be legal parents of their children[1], but have decided to wait until they are done adding to their family to do so.

Accordingly, in the fall of 2008, Julie, John and Mona brought an application pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking an order declaring that section 2 of the *Act* violates s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and that the words "or more" ought to be read into section 2 following the word "two" and before the word "persons".

At trial in the Ontario Superior Court of Justice, Dakana J. held that s. 2 of the *Act* violated section 15 of the *Charter*. In so holding, Dakana J. wrote:

> The applicants advanced various grounds on which section 2 is alleged to violate their equality rights under section 15, including family status, marital status and sexual orientation. I am satisfied that they have demonstrated that the *Act* creates a distinction based on the analogous ground of sexual orientation. While discussion of "sexual orientation" generally refers to notions of heterosexuality, bisexuality and homosexuality, I am satisfied that an individual's sexual orientation may also be defined in terms of a disposition to monogamous or non-monogamous personal relationships.

[1] Pursuant to *A.A. v. B.B.*, 2007 ONCA 2.

> For the sake of clarity, in this judgment I will use the term "polygamy" to refer to any situation in which a person has more than one spouse (or spouse-equivalent, given that polygamous marriages are not sanctioned by Canadian law), "polygyny" to refer to the situation of one man having several wives, and "polyandry" to refer to the situation of one woman having several husbands. I note that the applicants do not describe themselves as polygamists (or polygynists for that matter), and prefer the term (if one is necessary) "polyamorous" (though they acknowledge that this term also has connotations which do not fit with the relationship that they are parties to).
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> Although the evidence also demonstrates that non-monogamous relationships are accepted and even the norm in some societies, I have little difficulty concluding that those whose orientation is towards polygamous relationships suffer disadvantage and prejudice in Canadian society, which grants little recognition to such relationships and, indeed, criminalizes them. Exclusion from the fundamental institution of marriage is an affront to the applicants' dignity. While the government argues that section 2 is part of a regulatory scheme that includes criminal prohibitions on polygamy, the purpose of which is to ameliorate the harms suffered by women in polygynous relationships in accordance with Canada's international human rights obligations, such concerns do not arise in the context of the applicants' relationship. The prohibition as it stands refuses recognition to both fully consensual and coercive polygamist relationships.

Dakana J. went on to hold that section 2 of the *Act* was saved by section 1. In so holding, she wrote:

> The Attorney-General argues that section 2 is a measured response to the evils posed by polygamy, particularly polygyny, and in accordance with not only fundamental Canadian equality values but the country's international human rights obligations to women and children who often suffer harm as parties to such relationships. It is further argued that a more limited provision, which prohibited only certain forms of polygamous relationships would itself be subject to challenge. It is argued that the protection of women and children from harmful polygynous relationships outweighs any deleterious effects.
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> ... I am satisfied that any more limited provision barring particular forms of polygamist relationships would likely require the introduction of inappropriate subjective considerations. On balance, section 2 of the *Act* is justified.

In her decision, Dakana J. made the following findings of fact:

- the applicants have been in a committed, loving and stable relationship for over 15 years. They share a life together much like any married couple, insofar as they collectively support each other emotionally, spiritually (they describe themselves as spiritual, but not religious), socially and economically. They share household duties and are co-parents to three young children. They own their home jointly and have shared finances. They have each made provisions for the others in their wills. Their relationship, according to their evidence, is collective in all respects including physical intimacy;

- the applicants' children, to the extent appropriate to their age, view all three of the applicants as their parents;

- the applicants are unable to claim all the benefits that are available to married couples. For example, Dr. Perry is only able to name one of her partners for insurance and tax purposes (she named Mr. Hudson because "it was easier" to name him, rather than Ms. Sherwood, 15 years ago);

- the applicants' relationship, however, is not free from strife. All three applicants stated that there are a number of scenarios in which it is "easier" to simply present as a two-parent family. Ms. Sherwood in particular expressed that it upsets her that she is often left out of formal functions (such as fundraising dinners), which Dr. Perry regularly attends with Mr. Hudson as her companion. Each of the applicants acknowledged that they argue, from time to time, about how to present themselves in various public settings. Ms. Sherwood admitted that she is sometimes dissatisfied with the way the group handles presenting their relationship in public;

- each of the applicants testified that they had never had a fulfilling long-term monogamous relationship. Each applicant expressed the view that they were in some way disposed to a polygamous, but committed, relationship. Dr. Perry put it thusly:

  > "My married friends sometimes refer to having 'found their best friend' and feeling like they have a partner in life, when they talk about their spouses. I feel like I'm just the same, except that I found my two best friends. So what if we're not a pair – we're a team."

- the evidence of the applicants' eldest child was that he is "happy that I get to have Mom, Mama and Dad to play with. Most kids only get one mom", however, he also stated that "sometimes" he "gets made fun of and kids in [his] class say it is weird to have two moms". He also gave evidence that he was not invited to a birthday party for one of the girls in his class, but "everyone else was";

- the applicants adduced expert evidence of Dr. O'Harra, an evolutionary biologist, to the effect that polygamous tendencies may have some biological root. Dr.

O'Harra conceded that long-term committed human polygamous relationships are the result of various factors, which may include but certainly are not limited to biological determinates. I find it unnecessary for present purposes to determine the particular cause, if any, which leads individuals to participate in a polygamous relationship and I make no finding in that regard;

- the government also adduced expert evidence. The Crown's experts referred to, and gave evidence consistent with two recent studies concerning polygamy, both of which focus particularly on the impact on women: *Polygamy in Canada: Legal and Social Implications for Women and Children* ("Polygamy Papers") and *Polygyny and Canada's Obligations under International Human Rights Law* ("Polygyny Paper"). One of the Polygamy Papers refers to a study that indicates that 96% of Canadians disapprove of polygamy. In a review of a number of other studies, the Polygyny Paper cites a number of harms posed by polygynous relationships. With the caveat that I recognize that many of the studies cited relate to the experiences of women and children in relatively insular polygynous societies, rather than from polygamous families who exist in "mainsteam" society, I find that the potential harms of polygynous societies and relationships include:

    - frequent stereotyping of women into reproductive and service roles;

    - unequal sharing of material and emotional attention (the "harm of non-exclusivity");

    - competition among co-wives that can lead to jealously, tension and strain. Conversely, there is some evidence that co-wife relationships can be supportive and beneficial for women;

    - increased stress and mental health illnesses among women as compared to women in monogamous relationships and the general population;

    - feelings of physical, emotional, sexual and material neglect among women;

    - substantially increased feelings of loneliness among women in polygynous relationships as compared to those in monogamous ones (64.1% to 12.8%);

    - increased feelings of low self-esteem among women in polygynous relationships as compared to those in monogamous ones (58.4% to 7.7%);

    - demonstrated low levels of personal identity among polygynous wives, sometimes shown as an inability to respond to inquiries about their own identities as opposed to their social role;

    - diminished sexual and reproductive choice for women, and in some cases girls;

- diminished lack of marital choice for women;
- economic deprivation of women and children and a lower socio-economic status as compared against the general population;
- lack of independent access to wealth and assets for women;
- inadequate health care and nutrition for all family members;
- lower education levels for children;
- lower academic achievement for children (in one study, a mean achievement score for children from polygynous families (766.11) was significantly lower than for children from monogamous families (1035.62));
- deprivation of full intellectual, social, political and moral autonomy for women;
- lower levels of self-esteem in children;
- higher levels of family dysfunction as compared to monogamous families;
- increased stress in the mother-child relationship and deprivation of paternal bonding;
- increased levels of corporal punishment;
- social isolation from the "outside world"; and
- alienation of male children, including in extreme cases expulsion from the community given the competition for wives.

- some of the academic commentary presented argues that the lack of official recognition of polygamous relationships exacerbates a number of the problems experienced by women and children in polygynous families, and serves to further their isolation from so-called mainstream society;

- polygamous relationships have been found to exist in 80% of world cultures, though in very few are such relationships practiced widely. By way of example, it was estimated that, in 2004, there were 500,000 Americans living in polygamist families. In the vast majority of cases worldwide – almost 97% – a polygamous relationship is polygynous rather than polyandrous or a "group marriage" (involving multiple spouses of both genders);

- cultures where polygyny is widespread frequently experience social unrest and disorder, attributable to the competition for wives;

- no expert evidence was presented addressing polygamous relationships generally, outside the religious and cultural polygynous contexts which are the focus of the Papers referred to above. A friend of the applicants, however, who volunteers at the Riverville LGBT (lesbian, gay, bisexual and transgender) Centre offered the view that "polyamorous" relationships were "more accepted" in the LGBT community and that a number of those families attended events at the LGBT Centre;

- the applicants accepted that there is little scientific study available with respect to the type of polygynous relationship they are practicing (and, I note, they object to that term – they refer to themselves as "polyamorous"). They did, however, call expert evidence as to recent studies as to the effects of lesbian parents on children. Dr. Morioka testified that recent studies had shown, and I accept that:

    - children (male and female) raised in two-parent lesbian households performed academically at comparative levels with children raised in two-parent heterosexual households;

    - children (male and female) raised in two-parent lesbian households demonstrated comparative or slightly higher levels of social functioning, including empathy, than children raised in two-parent heterosexual households;

    - children (male and female) raised in two-parent lesbian households demonstrated comparative or slightly lower levels of behavioural and emotional problems than children raised in two-parent heterosexual households;

    - children (male and female) raised in two-parent lesbian households reported fewer incidents of physical and sexual abuse than children raised in two-parent heterosexual households;

- while I have accepted much of the expert evidence presented on both sides, I confess that I have not found that evidence terribly helpful in this matter as none of the studies discussed deal with relationships sufficiently similar to that of the applicants;

- the applicants have demonstrated that they have an extended social network of family and friends. They are active participants in "mainstream" society;

- Donald Chu, the principal of Sam and Kayla's (public) school, gave evidence that the Pesherson children are well-adjusted and behaved, and progressing normally in school;

- Dr. Joan Morales, the Pesherson children's paediatrician, gave evidence that all three children fall within the normal to high ranges of development for their age groups;

- the Attorney General argued that there would be costs of extending the economic benefits of marriage to polygamous couples, both at the federal and provincial levels, however those costs could not be quantified. I therefore make no finding in that regard.

The Ontario Court of Appeal upheld Justice Dakana's decision. (Mr.) Justice Shahmoradi (writing for the majority) wrote:

> Like Justice Dakana, we accept that the polygamous orientation of the Appellants is a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identity". With some reservation, we agree that section 2 of the *Act* violates the equality rights of the Appellants. We accept the Attorney General's argument that Canada's (and Ontario's) legislative approach to polygamous relationships is intended to discourage the creation of such unions in an effort to ameliorate or eliminate the negative consequences observed in certain polygynous relationships, which constitute the vast majority of polygamist relationships. We disagree with our colleague insofar as she has concluded that consensual polygamous relationships, in whatever form, cannot be meaningfully distinguished from a consensual two-person marriage (or marriage-like relationship). In a free and democratic society, marriage as a civil institution is one of equals and founded upon the value of, among other things, exclusive intimacy between two persons.
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> We agree with Justice Dakana that the means chosen by the government to address the harms posed to women and children by certain polygynous relationships are a measured, rational and proportionate response to those harms. Section 2 of the *Act* is justified in a free and democratic society.

In her dissent, Blin J.A. agreed that section 2 of the *Act* violates section 15 of the *Charter*, but would have held that such violation could not be saved by section 1. Justice Blin reasoned that if it was appropriate to ban all polygamous relationships on the basis that some polygamous relationships are harmful to the participants, the same could be said of monogamous relationships. Section 2 of the *Act* did not minimally impair the right in issue, as it banned relationships which posed no harm to the participants. Justice Blin also inclined to the view expressed by some scholars that legal prohibitions on polygamy do little to dissuade people from practicing it, but are likely to further isolate polygamists from mainstream society. Such prohibitions also deny women in polygynous relationships access to the full protection of the family law, which is available to spouses in traditional monogamous marriages.

The High Court of the Dominion of Canada[2] has granted Julie, Mona and John leave to appeal on the following questions:

1. Does s. 2 of the *Civil Marriage Act* infringe the applicants' right to equality under s. 15(1) of the *Charter*?

2. If the answer to (1) is yes, is the infringement reasonable and demonstrably justified in a free and democratic society?

3. If the answer to (2) is no, what is the appropriate remedy?

[2] Note that the High Court of the Dominion of Canada will not consider any facts other than those found by the lower Court.