Top court rejects opt-out for non-biological parent

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EDMONTON – Legal wrangling over whether a Calgary man should be allowed to opt out of being a father highlights the evolving definition of family in Canada, says a family law expert.

On Thursday the Supreme Court dismissed an application for leave to appeal by a woman who wanted to absolve her common-law husband of responsibility for a child she had through artificial insemination.

The couple, identified only as John and Jane Doe, signed a pre-parenting agreement stating John Doe would not be considered the child's father. The couple took the agreement to court seeking legal validation.

Last February, the Alberta Court of Appeal ruled against the agreement, saying the common-law husband will inevitably act in the role of father because he lives with the woman and her child.

"Can it be seriously contended that he will ignore the child when it cries? When it needs to be fed? When it stumbles? When the soother needs to be replaced? When the diaper needs to be changed?" Justice Ronald Berger wrote in that decision.

As is its usual practice, the Supreme Court did not give reasons for its decision not to hear the appeal.

Nicholas Bala, a family law professor at Queen's University in Kingston, Ont., has been studying the case as part of a paper he's writing on "social parents" – non-biological parents who raise children.

"Many of the social parents would be people who are step-parents, and I think that this decision clearly has implications for step-parents," said Bala, who will present the paper at a National Judicial Institute education program for judges in September.

"Some of them are people, both gays and lesbians and heterosexuals, who are involved in situations with artificial insemination, potentially grandparents."

Changing attitudes towards same-sex marriage and family relationships, as well as advances in technology such as artificial insemination, are affecting these decisions, said Bala.

"We're seeing changes in familial relationships, changes in attitudes to what is a family. And this is an illustration of an ongoing evolution in Canada of what is a family."

In the leave to appeal, Jane Doe contends the Appeal Court's decision failed to recognize her charter rights to make fundamental choices on behalf of her child.

But Terry Romaniuk, a lawyer at the University of Alberta's Centre for Constitutional Studies, agreed with the court's decision.

"She argued that her rights were being affected by all of this, and the court said, well, yes, that may be true, but you also didn't consider the rights of the child. The child is a living, breathing human being that is being affected by all of this, and you didn't consider the kid's side, too."

Bala said that in refusing to allow the contract, the court didn't keep the couple from parenting the way

they originally planned. The decision simply means that a decision on a child's future can't be made in advance.

"For example, these people could make a decision about property that would be binding (in case of a relationship break-up).

"So one of the messages is that we treat children differently from property."

As a result of the decision, if the couple were to split, Jane Doe would have the right to change her mind and seek financial support, while John Doe could change his mind and seek contact with the child. And the child himself could also potentially seek support from the non-custodial parent.

The adults could both waive those rights, however, if they wanted to stick with their contract.

University of Toronto law professor Brenda Cossman provided an affidavit for Jane Doe's request that the Supreme Court hear the appeal.

She argued that there were a number of "issues of national public importance" in the case.

She raised issues ranging from three-parent scenarios to women's autonomy and whether a person has the choice to retain the tag of ``single parent."

Bala said he was a little disappointed that the Supreme Court didn't choose to hear the case, although he said it wasn't surprising based on the fact that the two previous courts reached the same decision.

"People who are interested in the development of the law always would like to get a decision from the Supreme Court so we have a higher authority, and sometimes they expand upon issues and provide more direction."

But the refusal still sets a precedent, said Romaniuk.

"They have given a national view. By dismissing it, they've agreed with the Alberta Court of Appeal's decision, and that becomes part of our national case law."

Neither Jane Doe's lawyer nor Crown lawyers returned calls for comment on the Supreme Court's decision.