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Gay fathers not seen as a parental unit under the Family Law Act

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Cases Considered:

D.W.H. v. D.J.R., 2009 ABQB 438

The law is still unclear when dealing with gay and lesbian parental units. These families slip through the gaps in legislation and under the *Family Law Act*, S.A. 2003, c. F-4.5. This case demonstrates some of the legal gaps that affect children and their gay, lesbian and bisexual parents.

Mr. H. and Mr. R. were in a committed interdependent adult relationship together. In 2001 they met a lesbian couple, Ms. D and Ms. C.S. The two men wanted to be parents and so Ms. D. agreed to use Mr. R.'s sperm in assisted conception to help the men have a baby. The agreement included a second assisted conception of Ms. D. so that she and her partner could also have a child. In May 2003 the first baby ('S.') was born and lived with the two men. In 2004 Ms. D. used Mr. R.'s sperm to have a second baby ('N.') who lives with the two women.

In June 2006 Mr. H. and Mr. R. broke up. Mr. R. and Ms. D. refused to allow Mr. H. any contact with S.. In February 2007 the Court of Appeal in *D.W.H. v. D.J.R.* (2007), 280 D.L.R. (4th) 90 granted Mr. H. reasonable access for a period of three hours twice per week. Mr. R. was very unhappy with the order and felt that the Court had overturned the decision of S.'s parents (Mr. R. and Ms. D.) for what it perceived as right. Mr. H. began visitation of S., but Mr. R. sought further counsel and eventually decided to hire an expert child psychologist to do an assessment of Mr. H. and S.'s relationship.

At the first access visit Mr. H. was excited to see S. after having not seen her for 7 months. He brought his new partner to the meeting for moral support, and gave Mr. R. an outline of future visits he hoped to work toward. However Mr. R. and Ms. D. were upset at having to hand S. over against their wishes, and did not like having Mr. H.'s new partner there or the suggestion of increased visits in the future. By the second visit Mr. R. had consulted a lawyer who suggested that he discontinue visitation until the lawyer contacted Mr. H's lawyer to work out the details of visitation. Mr. H. did not find out about the cancellation of the second visit until S. did not arrive.

Mr. H. consulted a lawyer and they returned to the Court of Appeal for more direction on visitation rights. The Court of Appeal set out express directions including times and places for

drop-off and pick-up (as reported in *D.W.H. v. D.J.R.,* 2009 ABQB 438, para 47). After this order, Mr. R. became completely inflexible. For instance, on one occasion Mr. H. asked Mr. R. if he could pick S. up at his workplace because of scheduling difficulties. Mr. R. would not agree to this change and instead tried to send the police to get S. from Mr. H.'s workplace. When the police did not arrive Mr. R. had to pick up S. as was originally requested.

The psychologist who had been hired by Mr. R. to do an assessment of Mr. H. finished her report in November 2007. Dr. Pezzot-Pearce recommended that Mr. H. have no further contact with S.. She believed that S. had a mother, Ms. D., and a father, Mr. R. that basically operated as a 'normal nuclear family' and therefore that Ms. D. and Mr. R.'s opinion should be paramount. By court order dated November 22, 2007 the contact between Mr. H. and S. was completely discontinued (as noted in *D.W.H. v. D.J.R.,* 2009 ABQB 438, para 55).

Mr. H. made the present application to the Court of Queen's Bench for contact under section 35 of the *Family Law Act*. The Court of Appeal case, *D.W.H. v. D.J.R.* (2007), 280 D.L.R. (4th) 90, had not considered whether Mr. R. or Ms. D met the definitions of parent or guardian under the *Family Law Act*. It examined the nature of the relationship between Mr. H. and the child S. and found that "…the uncontested evidence supports the conclusion that [Mr. H.] stood in the place of a parent to the child" (at para. 18). However, at the Court of Queen's Bench Madam Justice K.M. Eidsvik considered the law governing parents, surrogacy, and "loco parentis" (standing in the place of a parent) to determine the rights of Mr. H..

Under section 35 of the *Family Law Act* three conditions must be made out for a contact order to be granted:

> (a) contact between the child and the applicant is in the best interests of the child,
> (b) the child's physical, psychological or emotional health may be jeopardized if contact between the child and the applicant is denied, and
> (c) the guardians' denial of contact between the child and the applicant is unreasonable.

The Court began by defining the legal status of not only Mr. H., but Mr. R. and Ms. D. regarding S.. Mr. R. was registered as the father under the *Vital Statistics Act*, R.S.A. 2000, c. V-4, but had not applied for guardianship, adoption, or a declaration of parentage. Madam Justice Eidsvik examined section 13 ("Assisted Conception") of the *Family Law Act* which states:

> 13(3) Subject to the exceptions in the regulations, **a male person whose sperm** is used in an assisted conception involving an egg of a female person who is neither his spouse nor a person with whom he is in a relationship of interdependence of some permanence **is not the father** of the resulting child and acquires no parental or guardianship rights or responsibilities of any kind as a result of the use of his sperm. (emphasis in original)

Therefore, Madam Justice Eidsvik concluded that Mr. R's sperm was used in the assisted conception but that he was not legal father of S.. She noted however that Mr. R. and Mr. H. did

have parental rights and obligations under section 48 of the *Family Law Act* (at para. 79). The only person that was recognized as a legal parent under the legislation was the mother, Ms. D..

Madam Justice Eidsvik found that there was no evidence to the contrary that it was in S.'s best interests for Mr. H. to have access rights. The report by Dr. Pezzot-Pearce, the psychologist, was based on a faulty paradigm that Mr. R. and Ms. D. were basically a 'normal nuclear family' (at para. 91). However, based on the facts of the case it was shown that both Mr. R. and Mr. H. had planned for and taken care of S. before their breakup. S. called them Daddy and Papa and lived with them full-time visiting Ms. D. only once or twice a week. Mr. R. and Ms. D. had originally acknowledged and promoted Mr. H. as a father and this was shown through letters between the couples, as well as in their commitment to shared parenting during the relationship of Mr. R. and Mr. H.. On this basis, the Court allowed Mr. H.'s application for reasonable and generous access.

The difficulty that Madam Justice Eidsvik found in fitting a gay relationship into the family law legislation is indicative of a history of not accounting for gay, lesbian and bisexual relationships within family law. Since same-sex marriage became legal in Canada many have assumed that same-sex relationships enjoy the same legal rights as opposite sex parents. However, there are many ways to become a parent and this case is an example of how the law has not contemplated the structure of same-sex families. Madam Justice Eidsvik notes at para 81:

> It is of interest to note that had these relationships been heterosexual however there would have been more opportunity under *the Act* for a presumption of mother, father, or guardianship definition to apply. For instance, when there is a heterosexual relationship and the woman has an assisted conception with another male's sperm, if the male partner consented in advance of the conception to being a parent of the resulting child, then, under section 13(2)(b) he is the 'father' of that child, and of course the male sperm donor is not (because of section 13(3) [of the *Family Law Act*]).

Also under section 8 of the *Family Law Act* there is a rebuttable presumption that a male person is the biological father of a child if certain criteria are met, such as cohabiting with the mother for 12 months or registering the father's name under the *Vital Statistics Act*. However, in this case even though Ms. D. and Mr. R. registered him as a father, subsection 8(2) states:

> Where circumstances exist that give rise to a presumption under subsection (1) that more than one male person might be the father of a child, no presumption as to parentage may be made.

Therefore Mr. R. is not presumed to be the father of S. because Mr. H. is also claiming fatherhood. The law does not account for more complicated family arrangements, especially in cases where there is disagreement between the potential parents. For instance, in *A.A. v. B.B.* (2007), 278 D.L.R. (4th) 519 the Ontario Court of Appeal exercised its inherent *parens patriae* jurisdiction to allow three people to be recognized as parents. However, in that case all three parties were in agreement to share parenting among the two lesbian moms and one dad.

In the words of Madam Justice Eidsvik at para 82:

> The facts in this case however highlight, in my view, how the lack of clarity and applicability of *the Act* to gay and lesbian parental units can injure children in that here, it appears that the children S. and N. have no legal father presumed under *the Act*…

Same-sex families have been fighting for decades to be recognized and given the same rights and responsibilities as families headed by heterosexual partners. When same-sex marriage came to be there was a feeling that gay, lesbian and bisexual families with two moms or two dads had jumped the largest hurdle for rights in the family law context. However, this case demonstrates that this perception is untrue. Lesbian and gay parents are still at risk of losing children they have spent years raising. Children are at risk of losing much needed support of a gay or lesbian ex-partner who should have the responsibility of providing support. This case highlights the need for a more thorough review that takes into consideration same-sex headed families. In addition, further education is needed to raise awareness of psychologists and courts to help them wade through the differences between a family with two parents and situations where two couples have the responsibility of one child.