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# Non-biological father from separated same-sex couple declared a legal parent

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**Cases Considered:**
*D.W.H. v D.J.R.*, 2011 ABQB 608

## Background

Mr. H. and Mr. R. lived together as partners and planned to have a baby through a surrogate mother. Mr. R's sperm was used to conceive the baby, S, with Ms. D as the surrogate mother. Ms. D lived with the two fathers and Mr. R when the baby was first born. After that, the baby lived with the two male partners and visited the surrogate mother once or twice a week. The couple separated when S was 3 years old and Mr. H. applied for access. Madame Justice Eidsvik in *D.W.H. v D.J.R.*, 2009 ABQB 438 found that the child had a mother (who was the surrogate), but no father who could be recognized in law (*see* my previous post "Gay fathers not seen as a parental unit under the *Family Law* Act'). Mr. H was given access until November 2007 when, based on a parenting assessment, contact was discontinued. Mr. H.'s relationship with S has since almost completely ceased. Mr. H. applied for guardianship but his application was opposed.

Mr. H. made a claim for advance or interim costs but was refused (see here). In the present application, Mr. H. makes a section 15 *Charter of Rights and Freedoms* challenge to the validity of relevant sections of the *Family Law Act* SA 2003, c F-4.5 ("*FLA*"), and *Vital Statistics Act* RSA 2000 c V-4 ("*VSA*"). S is presently 8 years old. Mr. R. successfully applied to become the child's guardian in November 2010. Ms. D. is the sole legal parent.

## Present Application

Mr. H. sought an Order declaring that sections 8, 12 and 13 of the *FLA* violated his *Charter* rights. He argued for a ruling that a gay man, who intended to be a parent when he and his male partner planned for a baby, would be recognized as a parent when the baby was born. In addition Mr. H. sought an Order that the *VSA* violated his *Charter* rights because a non-biological gay male who intended to be a parent would not be recognized when he registered his name for the baby's birth certificate. Mr. H. sought damages against the Province of Alberta and costs on a retroactive basis. Mr. R. and Ms. D. responded to the application. The Minister of Justice and Attorney General of Alberta intervened.

The *FLA* has been amended since the filing of Mr. H.'s application (*Family Law Statutes Amendment Act*, SA 2010, c16, Royal Assent December 2, 2010) and includes some amendments to the presumption of parentage ("*Amended Act*"). Madame Justice Bensler

however considered the current case based on whether Mr. H.'s *Charter* rights were infringed by the original *FLA* provisions.

**Arguments**

Mr. H. argued that, even though his genetic material was not used in the conception, he had intended on being a father and was involved as a spouse of the biological father prior to planning conception, and up until after the birth. Justice Eidsvik found that Mr. R. had planned for Mr. H.'s role to be that of a co-parent and father.

The Minister argued that there was not a *Charter* violation because "…when compared to any couple where neither party can carry a child, the Applicant [was] treated no differently under the *FLA*" [para 38]. It argued that adoption is the method whereby non-biological parents become legally recognized. Where assisted conception is used the *FLA* does not make parents by operation of law simply because of an intent to parent. Instead, the Minister argued, "…there must be an appropriate biological connection coupled with an intention to parent." [para 43-44]

**Did the legislation offend Mr. H's Charter rights?**

Under section 13 of the *FLA* a person becomes a male parent if he has a spousal relationship with the birth mother. This creates an unfair disadvantage to gay male couples who intend on being parents, because neither of them will be in a spousal relationship with a birth mother.

Surrogacy did not apply in this case, but a comparison to section 12 of the *FLA* is useful. Under section 12, a woman who carries a baby as a surrogate can only cease to be a legal mother of the child by consenting through an adoption order after the birth of the child. Similarly, in section 13, the rights of the birth mother are enshrined, and the only way for the birth mother to give up her legal rights is through the adoptive process. Mr. H. failed to show that automatic relinquishment by the birth mother to an intended parent offended his section 15 *Charter* rights.

**Is it discriminatory that the FLA does not recognize Mr. H. as a parent in addition to the birth mother?**

The Court found that the *FLA* did discriminate against gay male couples. When a gay male's genetic material is used in conception, neither the biological father nor his spouse are considered to be a parent under the *FLA.* A heterosexual man who was in a relationship with Ms. D., during conception, would be considered to be S.'s father. Section 13(2)(b) of the *FLA* allows both male and female individuals to be deemed parents if they are in a spousal relationship with the biological mother of the child. Gay males will never be in a spousal relationship with the birth mother and so will always be excluded from recognition under this section.

The Court said:

> At the end of the day, I find that s.13(2) discriminates against gay males in that it fails to confer a benefit (recognized paternity) and forces gay male parents to endure an extended and protracted legal process in order to have their guardianship and parentage recognized. (para 92)

*Is the law saved under section 1 of the Charter?*

The law addresses a pressing and substantial objective. However, there was not a rational connection between the law and the goal of ensuring the welfare of children. S. lived with Mr. R. and Mr. H., but Ms. D. was later found to be the sole parent and legal guardian. The *FLA* is under-inclusive when same-sex male parents are involved. In addition, the Intervener did not make a convincing argument against a three-parent model.

The Court went on to say that even if there was a rational connection, the law would fail on the minimal impairment and proportionality tests. Mr. H.'s rights were only recognized after he went to the Court of Appeal.

> …the act of becoming a parent and being recognized as such plays a major role in defining one's identity and sense of self. It is difficult to accept an argument that legislation which restricts one's status in this regard to that of guardian or which limits one's role and involvement in a child's life to an exercise of custody and access is minimally impairing. (para 110)

The government failed to demonstrate that it had minimally impaired the rights of same-sex couples, or that there was proportionality between the importance of the objective and the injurious effects.

**Remedy**

Mr. H. sought:

a. a declaration of parentage under the *FLA*;
b. changes to the *VSA* so that the birth registration recognized gay males as parents; and
c. damages under the *Charter* to address the loss of Mr. H.'s relationship with S..

The Court found that reading-in to section 13 so as to acknowledge Mr. H's parental status would be unacceptable. The Court would have declared section 13 to be invalid, but it had already been repealed by the *Amended Act*.

Regarding damages, for Mr. H.'s court applications and the loss of relationship with S., the Court noted that Mr. H. had obtained a contact order in 2009 but had not increased his access to S. at that time. Mr. H. did not show that there was bad faith or negligence on the part of the Legislature, and therefore damages were not appropriate in this case.

Mr. H. requested a declaration of parentage as the legal father of the child S.. The Court said that both Mr. R., who had obtained guardianship, and Mr. H. were in a legal gap created by the lacking provisions in the *FLA*. Mr. H. was a primary caregiver of S. for the first three years of her life. It is contrary to the best interests of the child to limit recognition so that Ms. D. is the only legal parent. There are no other means to correct this legislative gap, therefore the Court used its inherent *parens patriae* jurisdiction to declare Mr. H. to be a legal parent of S.. However, the Court made note that S. had resided with Mr. R. for many years. Mr. R. is her primary caregiver, and has guardianship. The declaration of parentage did not alter the parenting and guardianship arrangements that are in place. Mr. H. is applying for guardianship rights through the Courts. The *Amended Act* states in section 9 that a child may not have more than 2

parents. This means that Mr. R.'s only means of becoming a father is to challenge the constitutionality of the *Amended Act*.

Regarding Mr. H.'s application to make changes to the *VSA*, he did not adequately address this in argument and therefore failed to demonstrate an infringement. The Court awarded costs on a party-and-party basis.