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Court of Appeal Reaffirms Gay, Non-bio Dad's Status as Legal Parent

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Case commented on:

DWH v DJR, 2013 ABCA 240.

This case began to wind its way through the courts when Mr. H. and Mr. R. split up. Mr. H. and Mr. R. had been living together as partners and they had arranged to have a baby through a friend, Ms. D, using Mr. R.'s sperm. In exchange they agreed to give Ms. D. sperm for her to have a second baby that she and her partner would raise. Ms. D. gave birth to baby S. and for a short period of time Ms. D. lived with the two men and baby S. Baby S. lived with Mr. H. and Mr. R. for three years until, in June 2006, the couple split up. S. called Mr. H. and Mr. R. "Papa" and "Daddy" respectively. After they split up S. lived with Mr. R.

The line of cases leading up to this appeal address complex issues of surrogacy and assisted conception, coupled with the sometimes murky area of law that recognizes the rights of same-sex couples (see para 16 of the ABCA decision). At the core of these cases is the interpretation of the laws that determine the legal parents of a child, when it is not clear and no other legal agreement has been reached. In this case, it was declared that S. had three parents, Ms. D., Mr. R. and Mr. H. However, this determination was made using the court's *parens patriae* jurisdiction. The case did not determine how current legislation would be applied to resolve this kind of fact scenario. Although the case only indirectly addressed the issue of a third parent, it does open the door in Alberta for a court to use its *parens patriae* jurisdiction to permit a child to have three parents when it is in the best interests of that child. A previous case that addressed the issue of three parents, in an Ontario context, was *AA v BB*, 2007 ONCA 2. However, the courts in the case of *DWH v DJR* presumed that Mr. H. may be the third parent without actually coming to a final conclusion as to whether Mr. R. is a legal parent.

Notably, this line of cases has focused on Mr. H.'s status as a legal parent. It has kept separate the issue of custody, access, parenting and support. Whether Mr. H. will be awarded access as well as being a legal parent is the topic of future litigation.

History

In 2009, Eidsvik, J. found that S. had a mother, Ms. D., but no father who could be recognized in law (*DWH v DJR*, 2009 ABQB 438). In 2011, Bensler J. used the court's *parens patriae* jurisdiction to declare that Mr. H. was a legal parent of S (*DWH v DJR*, 2011 ABQB 608 ["2011 Decision"]). For more analysis of these decisions see my previous posts: "Gay fathers not seen as a parental unit under the Family Law Act" and "Non-biological father from separated same-sex couple declared a legal parent".

After the decision in 2011 Mr. H. was seen as a legal parent but did not have custody or access to S. Mr. R. was not seen as a legal parent, but was the primary caregiver for S. Ms. D. was a legal parent, but S. lived with Mr. R., who had also been declared a guardian of S. One issue that has been clear is that the declaration of Mr. H. as a legal parent did not change the parenting and access arrangements that were in place at the time. Later, Mr. H. also made a claim for advance or interim costs, but was refused (see here).

On December 19, 2011 Bensler, J. released a set of supplemental reasons to the 2011 Decision (*DWH v DJR*, 2011 ABQB 791 ["Supplemental Reasons"]). The Minister of Justice and Attorney General, an intervenor in the case, had advised Bensler, J. that the *Domestic Relations Act* (RSA 2000, c. D-14 ["*DRA*"]) had been in force when S. was born. The chambers justice considered Mr. H.'s *Charter* application based on the *DRA* and reviewed the question of granting a declaration of parentage and guardianship. The *DRA* provided a section that recognized Mr. R. as a legal parent of S.:

> 78(1) For all purposes of the law of Alberta, unless the contrary is proven on a balance of probabilities, there is a legal presumption that a person is the father of a child in any of the following circumstances:
>
> > e) the person is registered as the father of the child at the joint request of himself or herself and the mother of the child under the *Vital Statistics Act* or under similar legislation in a province or territory other than Alberta.

This meant that S. already had two parents, Ms. D. and Mr. R. However, Bensler, J. used her *parens patriae* jurisdiction to recognize Mr. H. as a legal parent to S. as well. Bensler, J. also named Mr. H. as a legal guardian of S.

As of the time of the lower court's decision, S. has three legal parents, Mr. R., Ms. D., and Mr. H.; however the custody and access arrangements of S. remained the same.

Present Application

Mr. R. argued three grounds of appeal (para 38):

> First, he submits that the chambers justice erred in declaring Mr. H. to be a parent and guardian of S. because the originating notice of motion filed by Mr. H. on October 28, 2010, does not seek such declarations. Second, the appellant argues that the chambers justice erred in the exercise [of] her *parens patriae* jurisdiction in three ways: a) the welfare of a child must be "at risk" before a court can exercise the jurisdiction to fill a legislative gap; b) the chambers justice exercised the jurisdiction for the benefit of Mr. H., and; c) there was not enough evidence before the chambers justice for her to make a determination regarding S.'s best interests. The appellant's third ground of appeal contends that the chambers justice contravened section 9(7) of the current version of the *Family Law Act* creating a situation in which S. has three parents.

Mr. R. did not dispute the findings that the *DRA* and *Family Law Act* violated section 15 of the *Charter*.

Picard, J.A. and O'Ferrall, J.A., for the majority, dismissed the appeal. Bielby, J.A. wrote a dissent and allowed the appeal in part.

Issue One:

The originating motion pertaining to the 2011 Decision did not ask for a declaration of parentage or guardianship. It expressly raised *Charter* challenges to the legislation. The majority noted that it is not appropriate to decide on an issue that has not been argued in the notice of motion. This could create unfairness to Mr. R. if he is unable to present evidence on a key issue that forms the final decision (at para 42).

However, the majority found that Mr. H. had indeed made it clear that he was seeking legal recognition as a parent. Bensler, J. said, in the Supplemental Reasons, at paragraph 34:

> The Applicant's Notice of Motion clearly details the grounds of his *Charter* claim, stating that the legislation fails to provide "parental presumptions for intended gay male fathers" and "does not make provisions for the familial structure of a gay male family or provide a remedy to accept these gay male parent sets." His claim clearly sought recognition as a parent, which ultimately was the remedy granted.

The majority found further that Mr. H. had made two other applications to the Court that requested guardianship, custody and parentage. Therefore, Mr. R. must have been aware of Mr. H.'s intention to apply to become a legal parent (at para 44).

The majority found that had Mr. R. opposed the declaration of parentage his arguments would have likely failed (at paras 47-48). Two previous decisions spoke about the committed nature of Mr. H.'s relationship to S. and how he had been a dedicated father when she was little. The majority found that Mr. R. would not have been able to disprove that S. would benefit from Mr. H. gaining legal status as a parent. In addition, Mr. R. would not have been able to prove that appointing Mr. H. as a guardian was not in the best interests of S.

The majority noted that Mr. R. did have notice, from the 2011 Decision reasons, that the chambers justice considered Mr. H's request to be for legal parentage. However, Mr. R. did not attempt to submit more information when the justice was writing Supplemental Reasons (at para 53).

Bensler, J. ensured that the custody and access arrangements for S. were not altered by her decision and therefore Mr. R.'s rights regarding S. had not changed (at para 54). Mr. R's appeal failed on this ground.

Issue Two:

Mr. R. argued that the lower court erred in exercising its *parens patriae* jurisdiction.

The lower court used its *parens patriae* jurisdiction in the 2011 Decision and Supplemental Reasons as a *Charter* remedy. The law says that the court may use its *parens patriae* jurisdiction in limited circumstances, "and [it] must be exercised for the benefit of the person for whom it is exercised, and not for others: *E (Mrs) v Eve*, [1986] 2 SCR 388 at 427e-g" (at para 58). It may be used to remedy a "legislative gap" when it would benefit the welfare of a child (*Beson v Director of Child Welfare (Nfld)*, [1982] 2 SCR 716; *Alberta (Child Welfare) v BD*, 1992 ABCA 98) (at para 59).

The majority ruled that the use of *parens patriae* jurisdiction in this case did benefit the best interests of S. (at paras 60-62). Mr. H. may have received some benefit from the ruling, but the chambers justice was clearly considering the best interests of S. in the decision. Regarding whether there was enough evidence before the chambers justice to make a decision on the best interests of S, the majority said that there were two other decisions that had not been appealed which had addressed the best interests of S. Mr. R.'s appeal on these grounds was dismissed.

Issue Three:

Mr. R. argued that the chambers justice had declared a third parent, which is contrary to section 9(7)(b) of the current *Family Law Act*, SA 2003, c F-4.5:

> 9(7) An application or declaration [of parentage] may not be made under this section if… (b) the declaration sought would result in the child having more than 2 parents.

Bensler, J. did not consider the new *Family Law Act*. In the 2011 Decision Bensler, J. applied the previous version of the *Family Law Act*, and in supplemental reasons she concurred that the *DRA* was the applicable legislation. Even if she had used the current version of the *Family Law Act*, the Court of Appeal majority's interpretation, without deciding the issue, was that Mr. R. would not have been deemed a legal parent. Therefore, Mr. H. would only have been a secondary parent to Ms. D., under the current *Family Law Act* (at paras 68-69).

The appeal was dismissed under all three grounds. The majority made special note that this decision did not affect any existing parenting, custody, access, or support arrangements (at para 70).

Bielby, J.A. (dissenting):

Bielby, J.A. wrote a dissenting opinion that would have allowed the appeal to the extent of overturning Mr. H.'s status as a legal parent and guardian of S. Bielby, J.A. would have permitted the pending *Charter* litigation to consider all of the evidence and make a decision in the best interests of S.

Bielby, J.A. noted that Mr. R. did not appear before the chambers justice to defend against Mr. H.'s application. He was not represented at the time. He did not believe, given the remedy sought, that he needed to attend. At the time of the application, resulting in the 2011 Decision, Mr. H. had already applied to a different judge for guardianship and parentage of S.

Bielby, J.A. stated:

> It is difficult to see how the best interests of the child can properly be determined, let alone trump, a fundamental right to be heard when the party who has had the child's exclusive day-to-day care for years has not been advised that the issue is to be decided, nor given the opportunity to tender evidence on the subject. Findings made in both a 2007 application and a 2009 trial which demonstrate that Mr. H was a dedicated father to the child before his separation from Mr. R, as observed in the majority decision, cannot justify depriving Mr. R of his right to be heard on this matter in 2011. (at para 12)

Bielby, J.A. noted that the majority was incorrect in assuming that Mr. R. could not have changed the decision had he made submissions on the issue to the chambers justice. The evidence that was given regarding Mr. H. did not lead to a foregone conclusion:

> … Mr. H has health issues, has allegedly made poor choices in his love life and was, for a short time, irrational and emotional following his separation from Mr. R. It is also clear that there is significant ongoing animosity between Mr. R and Mr. H that would impact on the child, should access with Mr. H recommence. (at para 14)

The majority said that the decision would not affect parenting arrangements, however this does not address the loss of Mr. R's input in the decision.

Bielby, J.A. addressed how complex the issues are arising from the *DWH v DJR* cases:

> In summary, the jurisprudential landscape arising from issues of assisted reproduction, surrogate parenting and same sex unions is sufficiently new and untried to allow me to safely conclude that Mr. H's success was a foregone conclusion, and to conclude that Mr. R would not have had anything relevant to say to the chambers judge on the issue of a declaration of parentage of the child. (at para 16)

Comments

The majority used Mr. H.'s other applications requesting guardianship, custody and parentage to demonstrate that Mr. R. must have been aware of Mr. H.'s intention to apply to become a legal parent (at para 44). Yet, as the dissenting justice points out, Mr. R. did not even attend the hearing for this application because he did not feel that there was anything at risk. Mr. H. had applied under another court process for parentage. The Queen's Bench application addressed general rights of gay male parents under the *Charter*, and not the specific rights of Mr. H. as a parent.

Mr. R. did not submit evidence as to why it would <u>not</u> be in S.'s best interest to have Mr. H. made a legal parent and guardian. The majority presumed that it would have been impossible for Mr. R. to discharge this burden, partly because there were existing decisions that had documented what was in S.'s best interest. And yet Bielby, J.A., in dissent, correctly points out that there was evidence regarding Mr. H.'s health, emotional status and love life that were not considered by the Court. In addition, Bielby, J.A. finds that Mr. R.'s right to be heard was overridden, despite the fact that he is the custodial parent.

A key issue that is not directly addressed or resolved in this line of cases is Mr. R.'s legal status as a parent to S. The cases make assumptions, at times, that Mr. R. is a legal parent but in the end make no final determination. Whether Mr. R. is a legal parent goes to the heart of whether a third parent is in S.'s best interest. Mr. R., who is the custodial parent of S., is left in a legal limbo, whereby a stranger to S., who has a hostile relationship with Mr. R., is given parental status.