__ CV 05127

__ IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

__ JUDY MARIE KUDLAK

__ Applicant

- and -

__ DES CLARKE

__ Respondent

__ REASONS FOR JUDGMENT

1 The applicant is the mother of a 2Â« year old girl and seeks from this Court an order pursuant to the Domestic Relations Act, R.S.N.W.T. 1988 c. D-8 granting her legal custody of the child and requiring the named respondent to make maintenance payments to her for the child. She says that the named respondent is the child's father. In a sworn affidavit filed with the court, the respondent denies that he is the child's father.

2 On three separate occasions the application was before a chambers judge, only to be adjourned on each of those dates. Initially, the respondent was represented by counsel. He no longer has legal representation. On the most recent chambers date in Yellowknife, March 25, 1996, the respondent (who lives in Inuvik) did not appear, although duly served with notice of the chambers application.

3 There is a threshold issue which must be addressed, and that is simply the jurisdiction of the Court to entertain this application in the face of a dispute as to paternity. This was raised by the presiding judge in chambers in January. The applicant's counsel has now filed written submissions on this initial issue.

4 A determination of the jurisdictional issue requires the Court to once again negotiate its way through what one judge in this jurisdiction has described as the thick tangled "jungle" of child welfare or family-law legislation in these Territories and what yet another terms a "Serbonian bog". L.F. v. A.J.M., [1989] N.W.T.R. 193 at p. 204, Rebus v. McLellan, [1994] N.W.T.R. 1 at p.10.

5 The Domestic Relations Act, first enacted many decades ago, primarily addresses problems flowing from the breakdown of a marriage or common-law relationship. It authorizes a court to grant relief such as a judgment of judicial separation (Part I), an order for alimony (Part II), and orders for guardianship of, custody of, and access to, children of the marriage/relationship (Part III). Child maintenance is dealt with as incidental to a custody order under Part III. The Supreme Court is given jurisdiction to hear applications under the entire statute whereas the Territorial Court is given jurisdiction to hear Part III applications only. Issues of paternity or parentage are not addressed in this statute.

6 The Maintenance Act, R.S.N.W.T. 1988, c. M-1 provides that family members, e.g. a parent, are responsible for maintenance of their dependants, e.g. a child.

An application may be made on behalf of a child, in a summary way, for a maintenance order to compel the performance of this obligation by his/her parent. The summary application is to be made before a justice of the peace or a Territorial Court judge. Issues of paternity or parentage are not addressed in this statute.

7 The Child Welfare Act, R.S.N.W.T. 1988, c. C-6 is concerned with various matters affecting the welfare of children including:

> a) the state's apprehension of children in need of protection (Part II);
> b) adoption proceedings (Part V);
> c) contribution proceedings providing for a court order compelling a male person to pay maintenance for the child of an unmarried woman (Part III). In such proceedings the court is directed to consider the issue of paternity, and determine, at a minimum, whether the male person probably is the child's father;
> d) declarations and determinations of parentage, including paternity (Part IV).

8 In this latter statute, the legislature directed that adoption proceedings (Part V) be held in Supreme Court. Under Part II, Protection of Children, the statute provides that applications for temporary wardship are to be brought before a justice of the peace or Territorial Court judge, whereas applications for permanent wardship must be heard by either a Territorial Court judge or a Supreme Court judge. In Part III, Contribution Proceedings, and Part IV, Children and Parentage, jurisdiction in the first instance is given to a justice of the peace or Territorial Court judge, and thereafter a right of appeal to the Supreme Court.

9 Under Part III an application for a Contribution Order against a male person is subject to a limitation period (with some exceptions) of two years from the date of birth of the child. There is no limitation period in Part IV which affects an application for a declaratory order that a male person is the father of a child.

10 In L.F. v. A.J.M., supra, it was held that the two-year limitation period in Part III of the Child Welfare Act is not relevant to applications for child maintenance pursuant to either the Domestic Relations Act or the Maintenance Act. In that case, de Weerdt J also ruled, albeit in obiter, that any determination of paternity must be made pursuant to the provisions of Part IV (Children and Parentage) of the Child Welfare Act, even though the application for child maintenance is made under the Domestic Relations Act or the Maintenance Act. This latter ruling is, of course, simply consistent with a specific provision to that effect in s.54 of the Judicature Act, R.S.N.W.T. 1988 c. J-1:

> 54. For all purposes, any distinction at common law between the status of a child born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing from the relationship shall be determined in accordance with Part IV of the Child Welfare Act.

11 In the present case, the mother makes application for child maintenance pursuant to Part III of the Domestic Relations Act. As stated earlier, she had the option of bringing her application to Territorial Court or Supreme Court. She and her counsel chose the Supreme Court. When notice of the application was served upon the named respondent, it was immediately met with a denial of paternity. It was at that moment that consideration should have been given to bringing the application, instead, in the Territorial Court, as it is this latter court that has jurisdiction in the first instance to determine matters of paternity, pursuant to s.79 of the Child Welfare Act and s.54 of the

Judicature Act.

12 A virtually identical situation arose several months ago in Gould v. Hamilton, [1995] N.W.T.J. No. 75. My colleague, Vertes J, ruled that this Court does not have jurisdiction in these circumstances:

> "In the case before me, paternity is disputed. There is evidence as to probable paternity. But, the jurisdiction to make a declaration of paternity is given expressly to the lower courts. If paternity was not disputed, this Court could, as an incidental prerequisite to a custody and maintenance order under the Domestic Relations Act, make a finding as to paternity. Since it is an issue, however, then it must be decided in the forum authorized by legislation to do so".
>
> at p.6

13 The applicant's counsel seeks to distinguish Gould but, with respect, to no avail. He points out that neither the respondent nor his former solicitor raised any objection to the jurisdiction of the court nor to paternity being determined as incidental to the application for child maintenance (jurisdiction was raised by the parties in Gould). He also submits that by the conduct of the respondent and his counsel in filing an affidavit in this Court and in attending in chambers on at least one of the scheduled dates (on which occasion the matter was simply adjourned on consent), the respondent has attorned to, or agreed to, the jurisdiction of the Supreme Court. I find that there is insufficient merit in either of these submissions to overcome the jurisdictional difficulty or the clear ratio of the Gould decision.

14 In a sworn affidavit filed in this Court, the applicant states that by agreement between the parties and their respective counsel, arrangements were made for DNA paternity testing by a professional laboratory service. She states in her affidavit that she and the child attended at the appointed hour to provide blood samples, but the respondent did not. It is submitted on her behalf that from the respondent's non-attendance, the court should conclude that the respondent's denial of paternity is frivolous and that the court should draw an inference re paternity adverse to the respondent. With respect, these are submissions to be made before the trier of fact who has jurisdiction to determine paternity. These are not submissions which assist the applicant on the threshold issue of jurisdiction.

15 Counsel for the applicant also relies on case authority from other jurisdictions which are contrary to the result in Gould.

16 In Re B and B (1977) 80 D.L.R. (3d) 266 (Ont. C.A., leave to appeal to S.C.C. refused) the mother obtained a child maintenance order in provincial court pursuant to an Ontario statute entitled Deserted Wives' & Children's Maintenance Act (in general terms equivalent to our present Domestic Relations Act). In that proceeding the respondent had denied he was the father of the child, but the provincial court judge held against him on the point. On appeal it was held that as the child had been born out of wedlock, the application should have been brought under those provisions of Ontario's Child Welfare Act which specifically deal with contribution proceedings and the making of affiliation orders (similar to the present Part III of our Child Welfare Act). On further appeal to the Ontario Court of Appeal, the original order of the provincial court judge was restored. In delivering the judgment on behalf of the Court of Appeal, Zuber J.A. stated:

> It is apparent that Part III of the Child Welfare Act creates a summary procedure whereby the father of the child born out of wedlock may be compelled to support such child; and if paternity is an issue, the legislation provides for a determination of that issue by means of an affiliation order. The question that will arise,

> however, is whether or not this is the only manner in which paternity can be determined...
>
> ...
> The suggestion that the mere fact that D.B. denied paternity placed the issue beyond the perimeter of the Deserted Wives' & Children's Maintenance Act is simply not tenable. If the applicability of a particular statute depends upon a certain set of facts, the Judge or tribunal dealing with the matter must necessarily inquire into those facts and make findings, otherwise the question could never be resolved. at p. 269-271
> (emphasis added)

17 Subsequent to Re B and B. the Ontario legislation underwent substantial reform; however, in Sayer v. Rollin (1980) 16 R.F.L. (2d) 289 (Ont. C.A.), the same court came to the same conclusion under the new legislation. In that case the unmarried mother obtained an order for child maintenance from a provincial court judge against the alleged father pursuant to the provisions of the Family Law Reform Act of Ontario (very roughly equivalent to the provisions of our present Maintenance Act). The provincial court judge held that he had jurisdiction to make a support order and that the issue of parentage was simply a material fact upon which this obligation depended. He characterized paternity as "a finding made on the way to making a support order". This was his view notwithstanding provisions contained in Ontario's (then) new Children's Law Reform Act which are markedly similar to the provisions in s.79 of Part IV (Children and Parentage) of the present N.W.T. Child Welfare Act, (although the Ontario provisions grant jurisdiction to the superior court whereas the N.W.T. provisions grant jurisdiction to the lower courts), viz:

> 3. The court having jurisdiction for the purposes of sections 4 to 7 shall be the Unified Family Court in the Judicial District of Hamilton-Wentworth and the Supreme Court in the other parts of Ontario.
>
> 4. (1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.
>
> ...
> (4) ... an order made under this section shall be recognized for all purposes.
> Children's Law Reform Act, 1977 (Ont.), ch.41

18 Zuber, J.A. again delivered the judgment of the Ontario Court of Appeal in Sayer, which upheld the provincial court judge's jurisdiction. At p.292 he stated:

> ... It is apparent that the courts referred to in s.3 are the only courts which have jurisdiction to make the kind of declaration of paternity or maternity dealt with in ss.4-7 Ã„ that is, a declaration in the nature of a judgment in rem Ã„ to be recognized for all purposes. Section 3, however, does not deprive other courts in this province of jurisdiction to determine parentage when that determination is a material part of a dispute which is otherwise within the jurisdiction of such other court. The Family Law Reform Act conferred jurisdiction on Michel Prov. J. to deal with the support of children born outside of marriage. It follows that the determination of parentage is a necessary and material step in the

establishment of the obligation to support.

19 Sayer v. Rollin has been followed in subsequent Ontario cases, not without creating some difficulty. In each of Raft v. Shortt (1986) 2 R.F.L. (3d) 243 and MacDonald v. Lange (1986) 3 R.F.L. (3d) 288, the applicant mother sought a child maintenance order pursuant to the Family Law Reform Act and in each case the presiding provincial court judge made a determination of paternity "incidental to the child support issue" (pursuant to Sayer). In MacDonald v. Lange the provincial court judge ruled that the mother had not established paternity and accordingly dismissed the request for child support. After the expiration of the appeal period, the mother was permitted to apply to the Supreme Court of Ontario for a declaration of paternity pursuant to s.4 of the Children's Law Reform Act, notwithstanding the earlier determination of paternity in the provincial court proceedings.

20 In Raft v. Shortt the presiding provincial court judge determined that Mr. Raft was the child's father and ordered him to pay child support. Subsequently, he was permitted to apply to the Supreme Court for a declaration of paternity under the Children's Law Reform Act. In the Supreme Court proceedings it was determined that Mr. Raft was indeed not the father. He then returned to the provincial court judge where that judge's earlier decision ordering child support was declared void ab initio (there being no jurisdiction of course, absent paternity). See Raft v. Shortt and Ministry of Community & Social Services (1988) 17 R.F.L. (3d) 170. In my respectful view that resulting scenario is both undesirable and avoidable.

21 In Alberta, the legislation is similar to that of Ontario inasmuch as jurisdiction to determine paternity is expressly granted to the superior court (Queen's Bench) whereas the Provincial Court (Family Division) has jurisdiction to make custody and access orders when there is a dispute between the child's parents. The Alberta Court of Appeal held in Re D and P (1984) 11 D.L.R. (4th) 321 that in a custody/access dispute, the Provincial Court (Family Division) could make "prerequisite decisions about paternity and status". Kerans J.A. at p.332.

22 However, in O'Neill v. Drummond (1986) 50 R.F.L. (2d) 310 Lutz J. was of the view that Re D and P (sub. nom. W.D. v. G.P.) was only applicable where paternity was not an issue. At p.314 he states:

> ... Where paternity is not in issue but is a preliminary fact finding, Kerans, J.A. in W.D. v. G.P. held that the Provincial Court (Family Division) had jurisdiction to make the requisite finding. But where paternity is in issue, it would be an unwarranted extension of W.D. v. G.P. to impute jurisdiction to conduct paternity hearings to that court.

23 O'Neill v. Drummond has been followed in Alberta (see, e.g. Valiquette v. Jabs (1986) 72 A.R. 133), and was referred to with approval in Gould v. Hamilton, supra.

24 In all of the circumstances of the present case, in particular the specific provisions enacted by the legislature, I prefer the O'Neill v. Drummond approach to that of Sayer v. Rollin and subsequent Ontario cases.

25 As mentioned earlier in these reasons, the legislature granted jurisdiction on matters of paternity to the lower courts when it enacted Part IV of the Child Welfare Act:

> CHILDREN AND PARENTAGE
>
> STATUS OF CHILDREN
>
> 77. (1) In this Part, "child" includes a child born within or outside marriage and a child adopted under Part V.

> (2) Subject to subsection (3) and sections 79 and 82, for all purposes a person is the child of his or her natural parents, and his or her status as their child is independent of whether he or she is born within or outside marriage.
>
> (3) An adopted child in respect of which Part V applies is the child of the adopting parents as if they were the natural parents.
>
> (4) The parent and child relationships as determined under subsections (2) and (3) and sections 79 and 82 shall be followed in the determination of other kindred relationships flowing from the parent and child relationship.
>
> (5) Any distinction at common law between the status of a child born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing from the parent and child relationship shall be determined in accordance with this section and sections 79 and 82.
>
> ...
>
> 79. (1) Any person having an interest may apply to a justice for a declaratory order that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.
>
> ...
>
> (6) Subject to sections 80 and 81, an order made under this section shall be recognized for all purposes.
>
> (emphasis added)

26 Further expression of the legislature's intent in this regard was provided by including a specific provision in the Judicature Act:

> the status of a child born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined in accordance with Part IV of the Child Welfare Act. (emphasis added)

27 There is another strong reason to refrain from following the Ontario case authorities. Whereas in Ontario it is the superior court that is given jurisdiction to make declarations as to paternity, in the Northwest Territories it is the lower courts. If this Court were to proceed and make a finding that Mr. Clarke is the father of Ms. Kudlak's child, incidental to making a child maintenance order against him (despite his denial of paternity), as requested by Ms. Kudlak, it would be open to Mr. Clarke to make an application in the lower courts under Part IV of the Child Welfare Act for an order declaring that he is not the child's father and in effect overriding this Court's decision. In my view, such a step is foreseeable but both undesirable and inappropriate.

28 For these reasons I rule that in the circumstances of this case, i.e. where paternity is in dispute, this Court has no jurisdiction to hear the mother's application as presented.

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
April 15, 1996

Counsel for the Applicant: Hugh R. Latimer

No one appearing for Respondent