D.J.E. v. P.L., 1999 N.W.T.S.C. No. 9

Date: 1999 10 28
Docket: AD 03595

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the *Adoption Act*, R.S.N.W.T., 1998, Chapter c.9 as amended;

AND IN THE MATTER of a Petition for the adoption of a female child, Birth Registration Number 91-05-031951 by D.J.E.

BETWEEN:

D.J.E.

Petitioner

-and-

P.L.

Respondent

MEMORANDUM OF JUDGMENT

[1] As this is an application for an adoption order, it was heard *in camera* as required by s. 73 of the *Adoption Act*, S.N.W.T. 1998, c. 9, as amended, and accordingly the individuals involved will be identified by their initials only.

[2] The Petitioner, D.J.E., wishes to adopt M., the daughter of his wife. P.L., who is M.'s biological father, does not oppose the adoption but seeks access to M. pursuant to s. 36(1) of the *Act*. For the reasons that follow, I have decided that access should not be granted.

[3] The evidence was put before me in the form of affidavits. The basic facts are not in dispute. In the summer of 1990, M.'s mother, K.E., had a brief relationship with P.L. while working for the summer in Alberta. As a result of that relationship she became pregnant. She returned home to Ontario early in the pregnancy. P.L. remained in Alberta. M. was born on April 18, 1991 and has resided with her mother since then.

[4] P.L. became aware of M. shortly after her birth. He says he learned of her birth when documents were sent to him from a government office in Ontario. K.E. says that she wrote to him about the birth. I cannot resolve the contradiction on the basis of affidavit evidence but find that it is not relevant to the decision I have to make.

[5] In 1992, K.E. obtained an order from the Ontario Court (Provincial Division) awarding her custody of M. with no order as to access. An interim order for payment of child support by P.L. was also made. K.E. says that she had not intended to seek child support but was required by Social Services to do so as a condition of financial assistance she was receiving. Since then, P.L. has paid child support for M. and he indicates that he wishes to continue to do so.

[6] In 1994, K.E. began dating the Petitioner, D.J.E. and they were married in June of 1998. K.E. says in her affidavit that M. began calling D.J.E. "Dad" within a couple of weeks after the wedding, without any prompting and of her own accord. In September of 1998, they moved to Yellowknife.

[7] P.L. still resides in Alberta. He and M. have never met. M. is not aware that P.L. is her father or that she has a father other than D.J.E.

[8] P.L. says that when, shortly after M.'s birth, he received confirmation through DNA testing that he is M.'s father, he wrote to K.E. saying that he would like to play a supportive role in M.'s life. He asked to have telephone contact with M. and in due course to write to her and eventually have direct contact. In her reply, which is attached to his affidavit, K.E. said that his letter came as a shock to her and that she was not ready to respond. She sent him a picture of M. and said that she would send more. K.E. says in her affidavit that she recalls P.L.'s letter as posing largely hypothetical questions along the lines of if he was ever in Ontario, would it be okay if he came to see M. It does not appear that P.L. pursued the request.

[9] From 1992 until the fall of 1998, P.L. would telephone K.E. from time to time, asking about M. He says he telephoned a few times a year. K.E. says that she received calls from P.L. or his mother only twice a year, at Christmas and at M.'s birthday. Both agree that in these calls, K.E. would give P.L. general information about M.

[10] P.L. says that although he asked on several occasions to speak to M., K.E. would make excuses that the child was unavailable or that she did not want her to be confused. On one occasion, she did permit him a short conversation with M. According to K.E., she specifically asked P.L. not to say who he was or that he is M.'s father so as not to confuse the child. M. was three years old at the time.

[11] P.L. has sent M. cards and gifts. He says that K.E. led him to believe that M. was aware of his existence. He and his mother received a number of thank you notes for gifts they had sent along with photographs of M. The notes are written by K.E. under her and M.'s names. In one instance she sent P.L. a father's day card from M.; it is dated June, 1994, when M. was three years old. In other instance, M. wrote on a card.

[12] K.E. denies that she led P.L. to think M. knows who he is. She says that M. is not aware of who sent the gifts and was either unaware of the thank you notes or could not read them and did not know who they were for.

[13] P.L. says that he was shocked when he learned from K.E. earlier this year that M. is completely unaware of his existence. He says he does not wish to disrupt the life M. has with K.E. and D.J.E. but he believes that M. should know who he is and that he cares for her.

[14] In opposing P.L.'s request for access, D.J.E. and K.E. argue that P.L. is a stranger to M. and that D.J.E., who has been part of her life since she was three years old, is the person she knows and loves as her father. K.E. feels that it is best for M. that she not be told about P.L. until she is mature enough to handle it and that before then, it may cause her confusion. They plan to tell M. the truth if she asks questions; otherwise they will tell her when she turns 18. If M. wishes to seek out P.L., K.E. and D.J.E. will support her in that decision.

[15] The family union report filed as part of the adoption proceedings and authored by an adoption worker notes that M. recognizes D.J.E. as her father and that there is a close family relationship. The worker observes that M. talked to him about how happy she is to have D.J.E. in her life. The report does not comment on the question of access.

[16] The relevant section of the *Adoption Act* for purposes of this decision is 36(1):

> In the case of a private adoption or a step-parent adoption, where the court considers that it is in the best interests of the child to do so, the court may, at the time of making the adoption order, make a further order granting a person who is a parent of the child before the adoption order is made access to the child after the adoption order is made on the terms and conditions that the court considers appropriate.

[17] "Best interests of the child" means that I must do what appears to me, on the evidence, to be in the best interests of M., not what would be fair to the adults involved.

[18] P.L.'s position is that access is in M.'s best interests because it is her right to know her biological father and develop a relationship with him. He proposes that if access is granted, it be effected in a gradual way, so that it will not be confusing for her. This would start with K.E. telling M. about P.L. and then move on to letter, then telephone and then in-person contact.

[19] K.E. and D.J.E. take the position that it would be confusing and possibly traumatic for M. to learn about P.L. now and be required to have a relationship with him. They say her best interests would be better served if this waits until her natural curiosity or her age make it appropriate.

[20] Counsel for P.L. argued that the same factors which s. 13(1) of the *Act* sets out for consideration by a court in deciding whether to dispense with a parent's consent to an adoption should be considered on the issue of access after adoption. Section 13(1) provides as follows:

> 13.(1) Where the consent of a parent is not produced at the hearing of a petition or where a parent has revoked his or her consent, the court may order notice of the petition to be served on the parent and the court may dispense with the consent of the parent in the following circumstances where the court considers that it is in the best interests of the child to do so:
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> (a) the parent has, with the knowledge that he or she is the parent of the child, demonstrated an intent to forego the rights and responsibilities of a parent in respect of the person of the child;
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> (b) the parent fails to appear at the time and place stated in the notice;
>
> (c) the parent appears and objects to giving consent on grounds that the court considers insufficient;
>
> (d) the court, for reasons that appear to be sufficient to the court, considers it necessary or desirable to dispense with the consent of the parent.

[21] As I understand this argument, it is that I should read s. 13(1) and s. 36(1) together such that where a parent has not demonstrated an intention to forego his or her rights and responsibilities, access should not be refused. P.L. relies on the fact that he has paid child support and has indicated an intention to continue to do so as evidence that he has not demonstrated an intention to forego his rights and responsibilities.

[22] In my view, s. 13(1) simply is not applicable because it applies only to the issue of consent. Section 36(1) is much broader. Many factors come into the assessment of the best interests of the child and whether a parent has demonstrated an intent to forego his or her rights and responsibilities in respect of the child is certainly a factor to be considered. But the fact that a parent has paid or is willing to pay child support will rarely, if ever, be determinative on the issue of best interests.

[23] Counsel for P.L. also relied on *Silk v. Silk*, [1985] M.J. No. 27 (Man. Q.B.), where the Court referred to the views of a social worker who testified in that case. Her evidence was that it is healthy for a child to know his or her natural parents and may cause serious problems if the child is denied or frustrated in that knowledge.

[24] The evidence of the social worker who testified in *Silk* is not evidence in this case. Although the Judge in *Silk* was clearly impressed by the social worker's evidence and accepted it, that ruling is not binding on me. Indeed, Kerans J.A., speaking for the Alberta Court of Appeal in a criminal case, *R. v. M. (T.E.)* (1996), 110 C.C.C. (3d) 179 at p. 185, said that, "... it is a dangerous practice to quote findings of fact made in other cases for other purposes, because they of course in the normal course do not bind the trier in the new case". See also *R. v. I. (R.R.)* (1996), 112 C.C.C. (3d) 367 (S.C.C.). I have to decide this case based on the evidence placed before me in this case, not on what a witness said in some other case.

[25] I have no difficulty, however, accepting as a common sense proposition that generally it will be of benefit to a child to know who his or her biological father is and, assuming the father to be of good character, to have a relationship with him. Each case will, however, depend on its own facts and the considerations may be quite different in a case where the child is aware of and has a relationship with, the biological father than in a case where those circumstances do not exist.

[26] Access is not a parental right; it is more properly viewed as the right of the child: *Young v. Young*, [1993] 4 S.C.R. 3. In that case, L'Heureux-Dubé J. said:

> Access rights exist in recognition of the fact that it is normally in the interests of the child to continue and foster the relationship developed with both parents prior to the divorce and separation. This being said, the right to access and the circumstances in which it takes place must be perceived from the vantage point of the child. Wherever the relationship to the non-custodial parent conflicts with the best interests of the child, the furtherance and protection of the child's best interests must take priority over the desires and interests of the parent.
>
> As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and helpful in that relationship so that it may survive to achieve its purpose. Accordingly, it is in the interests of the child, and arguably also in the interests of the access parent, to remove or mitigate the sources of ongoing conflict which threaten to damage or prevent the continuation of a meaningful relationship.

[27] Although in *Young v. Young*, the Supreme Court was dealing with access after divorce and not adoption, these comments offer some guidance on the purpose of access and the importance of it for the preservation of an existing relationship.

[28] Counsel for P.L. argues that in the absence of any evidence that it would be detrimental to M., access should be granted. He points out that K.E.'s affidavit says that M. is a happy, well-adjusted child and argues that no basis is shown for

K.E.'s opinion that to tell M. about P.L. and order access would be disruptive and upsetting to the child. He says that K.E. simply wants to prevent P.L. from having access, as she has in the past.

[29] I want to be cautious about reading more into the affidavits than what is clearly set out in them. Neither K.E. nor P.L. were cross-examined on their affidavits and I cannot resolve the issue as to whether K.E. intentionally led P.L. to believe that M. knew of his existence. In light of the various cards that K.E. sent, it probably was not unreasonable for P.L. to think that M. knew about him, even if that was not K.E.'s intention. But I would think that P.L. must have found it odd that over the course of six years (1992 to 1998), he was given the opportunity to speak to M. only once. Yet he did not pursue the issue of speaking to her or having any direct contact with her. I have some difficulty understanding why he did not pursue contact with the child and his affidavit does not provide an explanation.

[30] I have to consider K.E.'s actions in not allowing P.L. to speak to M. in the context of his failure to pursue contact with the child. It may well be that K.E. was simply trying to keep P.L. happy by giving him information about M. and M. happy by not introducing into her life a father who might have only a long distance relationship with her. K.E.'s affidavit does not indicate anger or vindictiveness towards P.L. and I can only conclude that she was doing what she thought best in the circumstances for all concerned. We do not know what K.E.'s response would have been had P.L. insisted on direct contact with M. because he did not pursue the matter beyond the telephone contacts with K.E. and the gifts he sent.

[31] Whether P.L. or K.E. should have done anything different is not relevant at this point.

[32] The fact is that M. does not know P.L. and has no relationship with him. He is a stranger to her. D.J.E. is the person she knows and recognizes as her father. This is not a case where the child lacks a father in her life or has been shown to lack anything, such as guidance or security, that P.L. might provide for her.

[33] I should note that there is nothing before me to suggest that P.L. is an unsuitable person or that he is not of good character. The problem in this case lies not with P.L. himself, but with the circumstances as they now exist.

[34] If P.L. was introduced to M. and allowed to have access, a number of things could happen. His involvement might turn out to be a positive thing. It might be simply a neutral factor. Or it could, as K.E. fears, be upsetting or even traumatic for M.

[35] M. is now eight years old and has always lived with K.E., who can be expected to know how M. might react. There is in this case no pre-existing relationship to help assess M.'s likely reaction to her biological father. I have to give serious consideration to K.E.'s opinion of how her daughter is likely to react if her

understanding of who her family and father are is changed. I do not think I should simply conclude, as urged by counsel for P.L., that because M. is a happy, well-adjusted child, she will handle the news about P.L. and access well. That would be speculation.

[36] I was not provided with expert evidence in this case as to how M. might deal with the introduction of P.L. into her life and I clearly should be wary of drawing conclusions about that. However, I can say that the evidence indicates to me that M. has a settled relationship with K.E. and D.J.E. as her family and that although D.J.E. has been in her life for some time, she has perhaps gone through some adjustment in her relationship with him and perception of his role in her life since his marriage to her mother, as suggested by the fact that it is only since the marriage that she has started referring to him as "Dad". It therefore seems logical to me that bringing another father into the picture may indeed result in some confusion or upset on her part, just as her mother fears.

[37] I am not convinced that it would be fair to M. or in her best interests to impose the further adjustments that she would have to make if P.L. is introduced into her life when she may not be ready for that. Although P.L. might be said to have had a form of access to M. through the information K.E. provided to him, M. does not know him and they have no relationship. Introducing him now would mean creating a new relationship.

[38] The onus is not on K.E. and D.J.E. to demonstrate that it will be harmful to M. if P.L. is introduced into her life. Again, quoting from *Young v. Young*: "The best interests of the child is not simply the right to be free of demonstrable harm. It is the positive right to the best possible arrangements in the circumstances of the parties".

[39] In my view, the onus lies on P.L., as the parent seeking access, to show that access is in M.'s best interests. He has not shown that. Although P.L.'s proposal of very gradual access is not in itself unreasonable, I cannot say that it would serve M.'s best interests better than would the proposal of K.E. and D.J.E. that they tell M. about her biological father when her own curiosity or her age make it appropriate to do so. I am satisfied on the basis of the affidavit material that K.E. and D.J.E. will follow through with their expressed intentions to tell M. about P.L. and his interest in her when the time comes.

[40] Although I have not referred to all the cases cited by counsel, I have reviewed them in coming to this decision. I simply note that in cases where access was granted there was at least some pre-existing relationship [*Belanger v. Bleakney*, [1995] A.J. No. 669 (Alta. Prov. Ct.)] or the child had already begun the search for her biological father [*Silk v. Silk*]. I would distinguish *Johnson-Steeves v. Lee*, [1997] A.J. No. 1057 (Alta. C.A.), where the Court said it is difficult to imagine

circumstances where a court would deny a right of access to a biological father of good character, who is able to make a positive contribution financially and emotionally, to the child's life, and who wishes to maintain a relationship with the child. That case did not involve access after adoption. It also refers to maintaining a relationship with the child and in the case itself, the biological father, who was the only father in the picture, did have contact with the child for the first year of the child's life and then immediately sought access through the court when the mother cut him off.

[41] For the foregoing reasons, I am not satisfied that it is in M.'s best interests that access be granted. That application is accordingly dismissed. Since P.L. has not opposed the adoption, his consent is dispensed with and, all other requirements under the *Adoption Act* being fulfilled, the adoption order will issue.

V. A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 28th day of October, 1999.

Counsel for the Petitioner: Leanne Dragon
Counsel for the Respondent: Kenneth Allison