Date: 1999 05 11
Docket: CV 08146

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES
IN THE MATTER OF the Childrens' Law Act
S.N.W.T. 1997, c.14

BETWEEN:

HENRY TENBY

Applicant

-and-

LAURA HAWKE

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by the biological father of Felix Kenneth Kalich Hawke for an order or declaration pursuant to s. 5 of the *Children's Law Act*, S.N.W.T. 1997, c.14, that he is the father of Felix and for interim access to Felix, who turned one year old on April 30 last, pending trial.

[2] The Applicant lives in Vancouver. Felix lives in Yellowknife with his mother (the Respondent) and her husband. The interim access sought is as follows: four one-week visits each year, with the first visit to consist only of one hour per day for the first few days and then overnight, with the remaining visits not to be so restricted. On an interim basis, the Applicant is content that all access visits take place in Yellowknife. The Respondent is opposed to any access being granted.

[3] The parties had a sexual relationship during a time when the Respondent was living separate from her (then common-law) husband, Mr. Hawke. They continued this relationship after she had reconciled with her husband and after the Applicant had left the Northwest Territories. When the Respondent became pregnant, she was uncertain which

of the two men was the father but alerted the Applicant to the pregnancy because she wanted medical information from him.

[4] During the pregnancy and the birth of Felix, Mr. Hawke did the things one might expect of a prospective father. Approximately three weeks after the birth of Felix, the Respondent informed Mr. Hawke of the possibility that the Applicant might be Felix's father. She and Mr. Hawke married one month after the birth and Mr. Hawke has acted as Felix's father. He wishes to adopt Felix and proceedings are underway for that purpose.

[5] The Applicant has not seen Felix since he was born. It is clear that the Respondent has refused any contact at all. She claims that the Applicant has shown no or insufficient interest in the child. He did, however, write to her two weeks after the birth asking that the matter of Felix's biological father be resolved through DNA testing and that they discuss what is best for Felix when the answer is received.

[6] DNA test results which excluded Mr. Hawke as the father were made available in September of 1998. The Applicant then arranged testing to determine whether he was the father and in early November of 1998 received confirmation that the probability of his being the father is 99.97%. In January of 1999 there was correspondence between counsel for the parties in which it was advised that the Respondent was not prepared to involve the Applicant beyond providing him with annual updates as to Felix's progress. The Applicant filed the within application for joint custody, access and a determination of child support in early March.

[7] The Respondent takes the position that she and Mr. Hawke have created a loving and secure household for Felix. This is not disputed by the Applicant. The Respondent says that it is her intention to tell Felix about his biological father in due course and that she and Mr. Hawke have decided that if Felix wishes to contact the Applicant, they would facilitate that when it is psychologically and developmentally appropriate for him to do so. At the same time, the Respondent appears to believe that the Applicant is acting in a vindictive, self-absorbed manner and not considering what is in the best interests of the child. She says that, "The Applicant has little or nothing to offer Felix that he does not already receive". It is clear to me, at least on the affidavit evidence, that the Respondent does not want the Applicant in Felix's life.

[8] Although counsel for the Respondent admitted that the Applicant is the biological father of the child, he argued that his status as such does not necessarily mean that he

should be recognized in law as the father. He relied in that regard on the wording of s. 5(1) of the *Children's Law Act*:

> 5. (1) Any interested person may apply to a court for a declaratory order that a male person is or is not recognized in law to be the father of a child.

Section 5(2) provides:

> 5. (2) Where the court finds on the balance of probabilities that a male person is or is not the father of a child, the court may make a declaratory order to that effect.

Subsections 2(1) and (2) provide as follows:

> 2. (1) Subject to subsection (2), 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 of marriage.
>
> (2) Where an adoption order has been made under the *Child Welfare Act*, the child is the child of the adoptive parents as if they were the natural parents.

[9] Although the *Act* does not define natural parents, the plain meaning in my view is biological parents (see *The Concise Oxford Dictionary*, Ninth Edition, Clarendon Press, Oxford, 1995, which gives as a definition of natural, "related genetically").

[10] The issue is then whether, and under what circumstances, pursuant to s. 5, a court may decline to declare that the natural father is the father of a child, in other words is recognized in law as the father. Section 5(2) uses the word "may", so clearly the Court has a discretion whether to make the declaration sought. Under what circumstances should a court decline to declare that a natural father is the father? Is the fact that there is another father figure in the picture determinative, significant, or merely a factor to be considered?

[11] A similar argument, that there is a distinction bearing on entitlement to access between a biological father and a "social" father, was made in *Johnson-Steeves v. Lee*, [1997] A.J. No. 1057 (Alta. C.A.). The Alberta Court of Appeal held that it need not consider whether such a distinction should be adopted in Alberta, mainly because on the evidence in that case the father could not be described as a mere biological parent or "sperm donor".

[12] In this case, counsel for the Respondent argues that the Applicant is nothing more than a sperm donor. Counsel for the Applicant argues that the parties had a loving relationship as a result of which, without planning, Felix was born and further that the Applicant has evidenced a desire to play a significant role in Felix's life.

[13] In my view, whether this is a proper case for the court to make or to refuse to make a declaration that the Applicant is the father of the child is not an issue to be decided on an interim application, but at trial, where the facts and law can be fully canvassed.

[14] For purposes of this interim application, I will simply accept that the Applicant is the biological father of the child without making any distinction between that and a social father.

[15] The test for access on an interim application is whether access is in the best interests of the child: s. 17(1) of the *Children's Law Act*.

[16] I also bear in mind that access is not a parental right; rather, it is more properly viewed as the right of the child: *Young v. Young*, [1993] 4 S.C.R. 3.

[17] In this case, the Applicant and the child do not have any relationship other than the biological one. I attribute no fault for that to the Applicant in view of the position taken by the Respondent. It is a circumstance, however, that is relevant to the best interests of the child.

[18] Section 17(2) of the *Act* sets out factors the Court shall consider in determining the best interests of the child. I have considered all the factors. I also consider that on an interim basis it is important to avoid any disruption to or confusion for the child.

[19] The evidence is that Felix is clingy and does not react well to strangers. The woman who provided child care for him when he was between six and ten and a half months old describes him as "very apprehensive, almost fearful" when in her care and exposed to new public situations and new people. For Felix's sake one hopes, of course, that this problem does not continue much longer. In the meantime, it suggests that this child may have difficulty dealing with any interaction with the Applicant and would most likely have great difficulty with overnight visits.

[20] The Applicant lives in Vancouver and his ability to visit Felix is therefore limited by distance, if not expense. It seems to me likely that just as Felix might become

comfortable with the Applicant, the Applicant would leave and they would have to start all over again the next time.

[21] I find myself asking what benefit there would be to Felix to see the Applicant on an interim basis, as short and far between as such visits would necessarily be by reason of the circumstances. At Felix's young age, he may well be confused about the Applicant's status, as he has, again by reason of the circumstances, come to recognize Mr. Hawke as his father. Or at this point the Applicant's involvement may simply be a neutral, rather than a beneficial, factor in Felix's life.

[22] I have reviewed the cases that counsel have filed. To some extent, this case is similar to *Michel v. Hanley*, [1988] S.J. No. 9 (Sask. Q.B.), where the father was virtually unknown to the two year old child, who had developed a father-son relationship with his mother's new partner. In that case, it was held that the evidence did not reveal any distinct benefit which would accrue to the child if access were granted. I note that *Michel v. Hanley* is also distinguishable in that there was evidence that the father seeking access had problems with alcohol and violence.

[23] In this case, none of the allegations made by the Respondent about the Applicant (such as his being emotional and somewhat immature) are sufficient in themselves to deny access. Any concern about different religious practices could be taken care of by appropriate terms in an order.

[24] I also bear in mind what the Alberta Court of Appeal said in *Johnson-Steeves v. Lee*:

> In fact, it is difficult to imagine circumstances in which the 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. It is even more difficult to imagine why any court would deprive the child of the benefits of such a relationship.

[25] In my view, having considered all of the above, the preferable way of dealing with this matter is to deny the application for interim access and direct the parties to set the matter for trial, where the issues can be more fully canvassed and a proper assessment made as to what is best for Felix. I see no reason why this matter cannot proceed expeditiously to trial.

[26] I wish it to be clear that my reason for denying access is based on the circumstances prevailing at this time and the fact that I am not persuaded that there would be any benefit in introducing the Applicant into the life of this young child at this time without a fuller assessment of how that would affect the child.

[27] For the foregoing reasons, the application for interim access is dismissed. The application for a declaration pursuant to s. 5 of the *Act* is adjourned to be dealt with at trial.

[28] In Chambers on April 16, 1999, I ordered that no further steps be taken in the adoption proceedings pending resolution of this matter and I confirm that order. Counsel are at liberty, however, to apply to consolidate the within action with the adoption proceedings.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT this
11th day of May, 1999

Counsel for the Applicant: Elaine Keenan-Bengts
Counsel for the Respondent: James Brydon