

1997 CarswellAlta 426, 50 Alta. L.R. (3d) 340, [1997] 6 W.W.R. 608, 29 R.F.L. (4th) 126, 203 A.R. 192

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Johnson-Steeves v. Lee

Caroline Johnson-Steeves, Plaintiff and King Tak Lee, Defendant

Alberta Court of Queen's Bench

Kenny J.

Judgment: May 27, 1997

Docket: Calgary 9501-03160

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Counsel: *Diann P. Castle*, for plaintiff.

Michele H. Hollins, for defendant.

Subject: Family

Family Law --- Custody and access — Access — Factors to be considered — General principles

Mother asked friend to help her conceive child — Parties understood friend would see child from time to time — Mother refused access to friend when child was 10 months old — Mother applied for order denying friend access to child — Parties's arrangement was not legally binding paternity agreement — Was in child's best interest to have access to friend.

The mother had two children with her husband prior to their separation. The mother subsequently arranged to meet a friend in Las Vegas in order to ask him to help her conceive a third child. The friend was a doctor who lived in another province. The parties discussed conditions including that the friend would either donate sperm or father a child, would be a financial provider, and would not interfere in the health and welfare issues of the child. There was no discussion about specific terms of access or what role the friend would play in the child's life; however, the parties understood that the friend would see the child from time to time. A child was ultimately born and the parties entered into an agreement for child support. The friend visited the child regularly until he was 10 months old, at which time the mother refused to allow the friend access to him. The child was currently four and one half years of age. The mother applied for an order granting her permanent custody of the child, denying the friend access, and awarding child support. The mother argued that the parties had entered into a paternity agreement.

Held: Access to the child was granted.

The parties' arrangement did not constitute a legally binding paternity agreement. The friend had the desire and

ability to contribute positively to the child's well being and development and it was in the child's best interest to have access to him. The reintroduction of the child to the friend should be structured in a manner which would maximize the benefit to the child. In the event the parties are not able to reach an agreement, access should be defined or directions should be issued.

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11

s. 7 — considered

Domestic Relations Act, R.S.A. 1980, c. D-37

Generally — considered

Parentage and Maintenance Act, S.A. 1990, c. P-0.7

Generally — considered

s. 1(g) "father" — considered

s. 1(l) "parent" — considered

APPLICATION for order denying father access to child.

Kenny J.:

Introduction and the Parties

1 This is the story of Nigel Lee Johnson-Steeves and how he came to be. Nigel was born January 26, 1993 in Calgary and is currently 4 ¹/₂ years of age. He lives with his mother Caroline Johnson-Steeves and 2 brothers, ages 6 and 8, children from Ms. Johnson-Steeves' previous marriage.

2 Dr. Lee, age 44, is the biological father of Nigel. He is a medical doctor practising in Toronto and has lived in the Toronto area throughout this matter.

3 Ms. Johnson-Steeves, age 35, has a degree in social work and sociology however does not work in this field now due to medical difficulties suffered by her a number of years ago. Presently, she does some odd jobs for her parent's business for which she earns about \$200 a month and is otherwise supported by social assistance and child support from Dr. Lee for Nigel and from her ex-husband for the other two children.

The Positions of the Parties

4 Ms. Johnson-Steeves brings this application before the Court pursuant to the *Domestic Relations Act*, R.S.A. 1980, c. D-37 seeking permanent custody of Nigel, an order that Dr. Lee be denied access to Nigel, and an order for child support in an amount that the Court considers appropriate.

5 Dr. Lee defends the claim for "no access" and submits that it is in the best interests of Nigel that he be

granted access. He is also prepared to continue to pay support for Nigel, which he has been doing since prior to Nigel's birth. He leaves it to the Court to determine the appropriate amount of support on an ongoing basis.

6 The issues raised by the parties in this case are extremely interesting. Ms. Johnson-Steeves asserts that the parties entered into a paternity agreement which she submits is a binding contract and should be upheld by this court. That contract provided that Dr. Lee would act as a sperm donor so that Ms. Johnson-Steeves could conceive another child, that he would financially support the child, and that he would not interfere with issues concerning the health and welfare of the child. In the alternative, Ms. Johnson-Steeves says that if the court finds there is no contract, then the court must distinguish between a biological father who is not entitled to access as of right and a social father who would have rights of access. She avers that Dr. Lee is only a biological father and given the circumstances surrounding the conception and birth of Nigel, is not entitled to access. She says that to grant access would be to impose on her a family relationship which she specifically did not want, hence the agreement.

7 Dr. Lee argues there is no such paternity agreement as defined by the mother. Rather, he readily concedes that he agreed to father a child with Ms. Johnson-Steeves and did so. He agreed to financially support the child which he has been doing, and further he agreed not to interfere with health and welfare issues with respect to the child. He says there was no specific discussion with respect to access and never any intention that Nigel would grow up not knowing his dad. He submits Nigel has a right to know his father and that it is in Nigel's best interest that Dr. Lee be granted access to him.

Facts

8 The facts in this case are critical to the determination of the issues before me. Accordingly, it is necessary that I review the facts in some considerable detail. I will also, of course, make necessary findings of fact.

9 The parties met in Belleville, Ontario in 1981 where Dr. Lee was practising medicine and Ms. Johnson-Steeves was attending nursing school. They became friends. Shortly thereafter, Ms. Johnson-Steeves moved to Calgary. Between 1982 and about 1985, the parties wrote to each other occasionally and visited on two or three occasions. In about 1985 the parties lost contact with each other and had no further communication until late 1991 when Ms. Johnson-Steeves called Dr. Lee. Dr. Lee knew that she had a boyfriend before they lost contact, and in the telephone call in late 1991 he discovered that she had married, had two children from that marriage, and that the marriage had now broken down and she was separated. They agreed they should "touch base" and he could meet her children when he was on his way through Calgary to Whistler to ski in March of 1992.

10 Prior to the March visit, Ms. Johnson-Steeves called Dr. Lee again and suggested that he stop over for a few days and that they go with her parents to Las Vegas for 3 days before his trip to Whistler. She told him she needed a break because she was going through a very acrimonious divorce and custody battle with her husband. Dr. Lee thought it would be fun and agreed.

11 What Dr. Lee did not know until he arrived in Las Vegas was that this trip was contrived by Ms. Johnson-Steeves for the purpose of asking Dr. Lee to help her conceive a child. In her testimony Ms. Johnson-Steeves said that she always wanted another child, especially a girl as she already had two boys. She had also had long and extremely difficult pregnancies and deliveries with her first two children which she attributed to the size of her husband who was 6'3" tall. She felt like a failure because she was not able to have natural births and therefore wanted another child so that she could prove to herself that she could, to use her very words at trial, "do it right". She denies wanting to have another child just to stay on social assistance. Dr. Lee testified,

however, that one of the reasons she gave him as to why she wanted another child was that her oldest child had some medical problems and she wanted to spend more time with him. If she was pregnant, social services would give her another two years grace before making her go back to work.

12 When asked why she chose Dr. Lee to help her conceive a child, Ms. Johnson-Steeves said there were four reasons. First of all he was of much smaller stature than her husband with "small hands and feet". These features would increase her chances of carrying a smaller child which would allow for an easier delivery. He was also academically extremely bright. The second reason was that he "fit the financial mould". She did not want this child to be part of the welfare system. She knew she needed financial support and Dr. Lee had the financial means to care for the child. She even went so far as to enquire as to his income to satisfy herself that he had sufficient financial resources. The third reason for choosing Dr. Lee was that the child would be of mixed heritage and this would be "a nice way to bring the world together". Dr. Lee is of Chinese heritage while Ms. Johnson-Steeves is part caucasian and part Jamaican. The fourth reason was that he was not a stranger. Through their letter writing, she had checked out his personal life and determined that he was still single. It was important to her that he be free of other responsibilities.

13 There were of course other options available to Ms. Johnson-Steeves to have a child, however, she discounted them. When asked about using a sperm bank, she responded that there was a cost of \$500 for each attempt and she did not have the money. With this option she would also have the financial responsibility of raising the child and she knew that she could not do so without financial support. She also found the sperm bank too impersonal. She wanted Nigel to know and be aware of his origins.

14 Adoption was also not an alternative to her. Were she to adopt, she again would be solely financially responsible for the child and again she knew she did not have the financial ability to support another child. Adoption would also deprive her of the opportunity to carry and deliver a child naturally which she needed to do to prove to herself that she could.

15 I now go back to the meeting in Las Vegas. The evidence of the parties is consistent about much of the discussion there. Where it differs, I will refer to the evidence of each party separately.

16 The parties shared a room in Las Vegas but with two separate beds. The first evening, after dinner with Ms. Johnson-Steeves' parents, the parties retired to their room and their own beds and started talking. Ms. Johnson-Steeves talked about her regret at not having a larger family and with her marriage breakdown, she would be unable to have more children in that context. Dr. Lee expressed how envious he was that she had two wonderful children and his regret that his dedication to his work and the need for financial security had delayed his focus on a family. He had had two serious relationships but at the wrong time in his life. He wanted to be able to provide financially for a family before having one and now that he was able to do so, he had no relationship and no children. He talked about an uncle with lung cancer and a good friend with breast cancer and his realization that life can change so dramatically.

17 At this point, Ms. Johnson-Steeves says she asked him what he thought about being a sperm donor. The evidence of Dr. Lee is that she asked him to father her child. Needless to say, he was surprised by the request.

18 Ms. Johnson-Steeves wanted Dr. Lee to freeze some of his sperm, then send it to her and she would impregnate herself. The parties disagree on the details of this conversation however I find that Dr. Lee advised Ms. Johnson-Steeves that this could not take place as she envisioned without medical intervention. Dr. Lee says that this is the only time in the conversation that the term "donate sperm" came up.

19 They then discussed certain conditions. The first was that Dr. Lee would either donate sperm or father a child. In my view the term used is not determinative of the issue and therefore there is no need for me to prefer one version over the other. The second condition was that Dr. Lee would be a financial provider. Ms. Johnson-Steeves said that she had to have a way of ensuring her own financial security. The third condition was that Dr. Lee would not interfere in the health and welfare issues of the child. Specifically she says she wanted to raise the child her way and did not want interference from him on issues such as schooling, breast feeding and immunization.

20 Dr. Lee agrees in substance that these were the matters discussed. I find that these were the conditions discussed by the parties.

21 Ms. Johnson-Steeves says that they did not discuss "access" at all. She says she told Dr. Lee that he could see the child whenever he was passing through. Dr. Lee says that they specifically discussed the fact that he wanted to see the child and that her response was that of course he could see the child and that she would never deny kids the right to see their dad. I find that there was no discussion about specific terms of access at all or what role Dr. Lee would play in the child's life but rather both parties understood that Dr. Lee would see the child from time to time. In hindsight it appears that they had very different views as to what that contact would be but it was obviously not a significant concern at the time particularly to Ms. Johnson-Steeves. She was the one setting out the conditions and I am satisfied she would have certainly incorporated access had it been an issue with her.

22 After this discussion, the parties had sexual intercourse. Ms. Johnson-Steeves says that she did not want to have sexual intercourse with Dr. Lee but that "she had to do what she had to do to achieve her goal". They had sexual intercourse again the next night in Las Vegas. This was March 18 and 19, 1992. Dr. Lee returned to Calgary again for a week in April, 1992 and the parties had sexual intercourse each day of that visit. He returned again from June 10 to June 17, 1992 and, in contrast to the April visit, they engaged in sexual intercourse only on one occasion.

23 Dr. Lee says that after the April visit, and before his arrival in Calgary on the 10th of June, Ms. Johnson-Steeves phoned him to tell him she was pregnant. He was extremely excited. Ms. Johnson-Steeves denies telling him she was pregnant because she didn't know if she was by then. That is why she had sexual intercourse with him again in June. I do not accept her evidence in this regard. If she did not know she was pregnant then I find she would have continued to have sexual intercourse with Dr. Lee each day of the June visit, as occurred in April, to achieve her goal. She did not.

24 Dr. Lee returned again in July for another week to visit with Ms. Johnson-Steeves. In late August, early September the two of them went to Hawaii for a week. The trip did not go well. They ended up in several arguments and their relationship deteriorated somewhat after this trip. Dr. Lee returned again for another week in about December, 1992 to visit with Ms. Johnson-Steeves. Throughout the pregnancy, the parties talked on the telephone when Dr. Lee was not in Calgary. He also provided her with several cheques totalling over \$3,500 before the child was born to help her out financially.

25 Nigel was born on January 26, 1993. Dr. Lee was not listed by Ms. Johnson-Steeves on the birth registration as the father of Nigel. It was simply left blank. Ms. Johnson-Steeves' mother called Dr. Lee to advise him of the birth and offer her congratulations. Ms. Johnson-Steeves later sent Dr. Lee a picture of Nigel with the following written on the back:

2 days old-(Jan. 28/93).

Nigel Cole Lee Johnson Steeves

D.O.B. Tuesday January 26, 1993

Wt. 6 Ibs 14 oz.

Peter Lougheed Hospital, Calgary, Alberta, Canada

Time: 9:00 a.m.

Parents: Caroline Johnson Steeves & King Tak Lee

Length 19 $\frac{1}{2}$ inches

26 In February of 1993, Dr. Lee came out for a week to see the child. At that time he also entered into a maintenance agreement with Ms. Johnson-Steeves under the *Parentage and Maintenance Act* S.A. 1990, c. P-0.7, wherein he acknowledged that he was the father of Nigel and agreed to pay support for him in the sum of \$300 a month. Dr. Lee says that this is the amount that the parties had agreed to in Las Vegas. Ms. Johnson-Steeves told him she was getting \$1000 a month from social assistance for three of them and therefore \$300 a month would be the proportionate amount for Nigel. She also expected that Dr. Lee would provide her with other funds whenever she needed them in addition to the ongoing support. He did so, providing her with an additional \$3,000 over the next several months following Nigel's birth.

27 Ms. Johnson-Steeves' evidence is that the maintenance agreement was required by social assistance. They had indicated to her that they would take her off social assistance if she did not divulge the name of the birth father. There is disagreement between the parties as to how the sum of \$300 was arrived at but it is clear that was the amount they agreed upon in the maintenance agreement.

28 The parties ended up in further disagreements during this time. It was Dr. Lee's sense of the events over the last few visits that now that Ms. Johnson-Steeves had what she wanted, she wanted him out of her life completely but still wanted to be sure that he would provide financial support. He felt used and abused.

29 Dr. Lee came to Calgary for another week in August of 1993. This time he stayed in a guest suite at the residence of Ms. Johnson-Steeves' parents. He again spent time with the child each day of the visit.

30 In November of 1993, Dr. Lee made his last trip to Calgary to see Nigel. He saw him each day of the visit. The parties have different versions of what happened at that time which resulted in the end of any further contact between Dr. Lee and Nigel.

31 Dr. Lee testifies that Ms. Johnson-Steeves indicated to him that he was not paying the \$300 a month as he had agreed. He was, in fact, paying that money to the maintenance enforcement department as he was required to do however as Ms. Johnson-Steeves was on social assistance she did not see this money. It was deducted from the social assistance payments made to her. He had also given her extra money which she received directly. This was the \$3,000 she received between January, 1993 and September, 1993.

32 Dr. Lee says that Ms. Johnson-Steeves told him that if he was not going to provide for Nigel, he could

not see him again. Once he returned to Toronto he called every few weeks asking to see Nigel and always got "no" for an answer. She told him that she couldn't deal with him at the same time that she was in acrimonious proceedings with her husband and asked him to call back in June of 1994 when those proceedings were concluded. When he did, she again told him that he couldn't see Nigel if he didn't pay her the money directly. He tried to explain to her that he had no choice but to pay it to maintenance enforcement but this made no difference to her. Dr. Lee then commenced legal proceedings in order to get access to his son and has been involved in these proceedings ever since.

33 Ms. Johnson-Steeves' evidence is that when Dr. Lee phoned to come and visit in November, her concern was getting money from him. She states that she had a great deal of trouble getting money from him and asked him to wire some to her or send it in the mail. His response was that he would bring it when he came out to see Nigel. When he arrived, Ms. Johnson-Steeves said she asked him several times for money but he didn't give her any. She confirms that after that visit, Dr. Lee called several times to arrange to come out and see Nigel again but her response was that if she didn't see some money from him he was not welcome to come out. In her view he had broken the agreement by failing to provide the financial support she requested. She says she expected him to provide her with this money over and above the \$300 a month without any problems or questions.

34 When asked why she did not want Dr. Lee to have any access to Nigel Ms. Johnson-Steeves said that she had given it a lot of thought and did not want Nigel to go through the same thing that her other two boys had to go through which was the requirement to see their dad every week. She found this stressful given the difficult legal proceedings involved with her divorce. She would rather that they did not have to go to visit their dad but knew that it could not be helped as there is a court order in place. She says it upsets Nigel to be without his brothers when they visit with their dad. Although it appears that Ms. Johnson-Steeves' ex-husband has offered to take Nigel with them, she does not want Nigel to go with him as, in her view, he is not a good role model.

35 Ms. Johnson-Steeves believes that Nigel has a family and to set up visitation with Dr. Lee would break up her family. She feels Nigel lacks nothing, has plenty of role models in his life, has extended family in the area and has the family *she* chose for him. In her view, Dr. Lee can add nothing to Nigel's life and in fact the visitation would simply disrupt her life and Nigel's life. She does not want Nigel put in the same situation as her own children being moved back and forth between their parents. She is worried that she would lose control over him and be unable to protect him.

36 I heard evidence from Ms. Johnson-Steeves' parents and other friends and relatives. They all appear to be wonderful and supportive people. Her parents in particular are very involved in Ms. Johnson-Steeves' life and that of her children, their grandchildren. In fact, it appears that they provide a great deal of not only emotional support but also substantial financial support to the family.

37 Ms. Johnson-Steeves is of the view that Dr. Lee has a temper, a reason which renders him unsuitable as a parent to Nigel. Dr. McElheran, who I qualified as an expert in the area of personality assessments, conducted an assessment on Dr. Lee. He found Dr. Lee to be organized, controlled, very intelligent, practical and with high ego strength, moral values and loyalty. He showed no aggressive drive or hostility. There was nothing in the testing that concerned Dr. McElheran at all with respect to the issues at this trial. I accept his evidence in that regard.

38 I heard many complaints by Ms. Johnson-Steeves about Dr. Lee's behaviour and I heard his explanation about their disagreements. On the whole of the evidence in this area, I find their disagreements to be no different

than those most of the population engage in and certainly nothing that would concern this Court. The difficulty is that Ms. Johnson-Steeves wants complete control over all aspects of her life and if someone disagrees with her she considers that they are simply trying to make her life difficult. She appears to take no responsibility for any of the difficulties in her life.

39 Dr. Kneier also gave evidence at this trial. He was qualified as an expert in the area of child psychology. Dr. Kneier had never met either of the parties or Nigel. The purpose of his testimony was to provide information to the Court about access issues in general and how they might apply to a case such as this. He opined that fathers are good for children and having a father is "good news not bad news". This was in response to Ms. Johnson-Steeves' concern that for Nigel to meet his father after all this time would cause him psychological trauma. It should be noted that the reason Dr. Lee has not seen the child since he was 10 months old has nothing to do with his lack of effort, but rather the refusal of Ms. Johnson-Steeves to allow him access, resulting in these proceedings.

40 It is Dr. Kneier's view that although children can, and often do, achieve a healthy development without a father, provided they have a good relationship with their mother and reasonable socioeconomic circumstances, it is better for children to have a relationship with their father than not to have one. He says even a limited relationship is better than none at all. The only time no relationship is better is when there is a "bad or damaging or inadequate father".

41 Dr. Kneier opined that a good relationship by a boy with his father helps to develop intelligence and drive, improves academic achievement and helps develop independence, empathy and social adequacy with peers. His view on the timing of any reintroduction is "the sooner, the better". He sees no benefit from delay. Where conflict exists, as appears to be the case here, Dr. Kneier believes that there are mechanisms available to address those conflicts as long as the parents focus on the child.

42 In a nutshell, I took from Dr. Kneier's evidence that it is in children's best interests to have the influence of a "good or adequate" father than not to have that relationship at all. Although a child can develop normally in a one parent household, they do better with the influence of both parents. Dr. Kneier says fathers are important to young boys, they yearn for a father and a child may wonder why he has no father when other people do. A child would be happy, curious, and interested to know the man who was their dad. As he said, "It's good news to have a dad".

Issues and Decision

43 I now turn to the issues before me.

1) Is there a paternity agreement between the parties respecting the child Nigel?

44 I find on the evidence before me that there was no paternity contract with respect to the conception of the child. What I do find, however, is that there was a discussion between Ms. Johnson-Steeves and Dr. Lee about conceiving a child. Ms. Johnson-Steeves wanted another child and Dr. Lee was prepared to play a role in that conception. It is clear from the evidence that they each had their own reasons for participating in this plan. Ms. Johnson-Steeves attached certain conditions to the conception. I find those conditions to be that Dr. Lee would assist Ms. Johnson-Steeves in conceiving a child, that he would provide financial support for that child and that he would not interfere in health and welfare decisions affecting the child. I find that there was no specific discussion with respect to access to the child nor what Dr. Lee's role would be in the life of the child. It is clear,

however, that they both were aware, at the time of this discussion, that Dr. Lee would be seeing the child. The form of that visitation was not discussed and it appears now that they each had very different perceptions as to how that would take place.

45 These are two people who intended to and did in fact conceive a child through sexual intercourse. There were discussions about certain things that Ms. Johnson-Steeves wanted in this arrangement. Dr. Lee agreed with some of those requests. That arrangement in my view does not constitute a legally binding paternity agreement.

2) In the event that I find no contract, as I have found, I am then asked by Ms. Johnson-Steeves to distinguish between a biological father and a social father.

46 She says that biological fathers do not have an entitlement to access but that social fathers do. In making this argument Ms. Johnson-Steeves says that there are many cases where the Courts have allowed an application by a non-biological father to be declared a father. This may arise, for example, in situations of artificial insemination or where a man has developed a relationship with the child. I agree that social fathers are sometimes declared to be fathers of children even if they are not the biological father. That has no bearing on this situation, however, as Ms. Johnson-Steeves acknowledges that Dr. Lee is the biological father of the child. I find he is also the parent to this child. Under the *Parentage and Maintenance Act*, a father is defined as the biological father of the child. "Parent" under that same statute means a mother or father. A parent may enter into an agreement that provides for maintenance for the child. Dr. Lee and Ms. Johnson-Steeves entered into such an agreement.

47 Under the *Domestic Relations Act*, a mother or father may apply to the court for an order regarding the custody of the child and the right of access to the child of either parent. That is the application the parties have brought herein. Dr. Lee is clearly the father and, I find, a parent to this child. Ms. Johnson-Steeves says, however, that alone is not enough to entitle him to access to the child. I agree. I must determine whether or not it is in Nigel's best interest to have access with his father, Dr. Lee.

48 Ms. Johnson-Steeves submits that the parties had an agreement that Dr. Lee would not be a social father to Nigel and that where there is not a relationship between the parties and no intended relationship between the parties then it is not in the child's best interest to create a social father from a biological father. She says that she intended that Nigel would not have a father parent, and has created her "family" with this in mind. In Ms. Johnson-Steeves' perception, Dr. Lee is simply a sperm donor, Nigel has no "father", Nigel's family consists of she as mother and her two children only and Dr. Lee has no role to play in their "family". By allowing access, Ms. Johnson-Steeves says that this court would be forcing on her a family structure that she did not choose.

49 All of the above focuses on Ms. Johnson-Steeves and what *she* wants. It was clear throughout the trial of this matter that she was annoyed at all of the legal proceedings she was involved in with her ex-husband and the stress and turmoil that it caused her. She also finds it frustrating that she now must continue to deal with her ex-husband who has access to their children and a person for whom she clearly has no respect. This is one of the reasons that she chose to proceed the way that she did with respect to the conception of Nigel. She wanted another child but did not want the father around to disrupt her life. What struck me throughout the trial was how little was said about what would be in Nigel's best interest and how much was said about the lifestyle Ms. Johnson-Steeves wanted for herself and her children. I find that her attitude was totally selfish. Her primary concern was herself rather than the true subject of these proceedings, Nigel. That is exemplified by her desire to have all of the advantages of Dr. Lee and none of the corresponding disadvantages.

50 Ms. Johnson-Steeves argues that the doctrine of equitable estoppel used in American Courts can be used as a remedy where the biological father is seeking to become a social father. Her position, as I understand it, is that Dr. Lee agreed not to be a social father and that since it has now been so long since he has seen the child, he is a stranger to the child. He should not now be able to come forward to seek access. Such access she says would damage the psychological welfare of Nigel by introducing a stranger into their family and disrupting Nigel's view of what his family is. I do not accept that argument. Dr. Lee has done nothing that would estop him from seeing Nigel. Dr. Kneier says that it is good, not bad for children to have a father. Nigel is now 4 ¹/₂ years of age and although he does not know Dr. Lee, that alone is no reason to refuse access. The lapse of time has been created by Ms. Johnson-Steeves' refusal to allow access. Dr. Lee has diligently been pursuing this matter through the court process since access was refused.

51 Ms. Johnson-Steeves also raises constitutional issues for this court to consider. Section 7 of the Charter grants the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. She argues that deciding that a child will not have a father and will be raised in a single parent family is a liberty interest protected by the Charter. If this court grants access, it will infringe on Ms. Johnson-Steeves' right to liberty. I do not accept this argument.

52 The duty of this court is to determine what is in Nigel's best interest. Although he was conceived under circumstances that many would consider unusual and perhaps distasteful, he was conceived and delivered with the intent of bringing him into this world. He lives with his mother and two brothers in Calgary with a large extended family and network of friends. He has a father who chose to have him, who provided financial support for his mother during her pregnancy, who came to visit him regularly after the birth, who has since continuously provided financial support for him and who has expressed by his words and his deeds an overwhelming desire to be a part of this child's life. Ms. Johnson-Steeves asks this Court to redefine the term "family". She says the notion that a family consists of a mother, father and children, as long defined by our law, is antiquated and does not reflect current realities. Ms. Johnson-Steeves says that Dr. Lee is only a sperm donor and not a father. It was her choice to create a family unit without a father and she did so. She argues any access will create a family that was not intended and will violate Nigel's understanding of his family unit. This, she says, is not in Nigel's best interests. She intends to tell Nigel that Dr. Lee is a special friend who contributed the genetic material to create him.

53 Families change, however, most do by circumstance, not choice. Those of us who work in the "legal arena" see this more often than most and often wonder if there are any happy families left, but there are hundreds of thousands of content families in all shapes and forms, with and without fathers, mothers, or both. I am of the view, however, that society and biology have not yet reached the point where we have dispensed with fathers or mothers completely. They form an integral part of each child's life whether or not they reside with their children.

54 Nigel has a father and Ms. Johnson-Steeves' desire that it not be so, does not make it so. Ms. Johnson-Steeves' interest in arranging her world as she would like to see it does not mean that it is also in Nigel's best interest. Nigel knows or will come to know that he has a father and mother as all children do. It is Nigel's right of access to his father and not his mother's right to bargain away. At this stage, it does not matter to Nigel whether he was conceived by artificial insemination, during a one night stand, or during a long term relationship or marriage. What he does know is that he has a father and a mother. The fact that his father does not live with Nigel does not make Dr. Lee any less a father.

55 I have heard evidence about Dr. Lee's background and extended family. In my view he has the desire and ability to contribute positively to Nigel's well being and development. Dr. Lee has no intention at this time of interfering with the day to day rearing of Nigel or the health and welfare issues surrounding Nigel. What he does want is access so that he can contribute as only he can to Nigel's life. I find that it is in Nigel's best interest for Dr. Lee to have access to him. This in no way detracts from the mother's primary role in Nigel's life or the roles played by so many other members of the extended family. What it does do is recognize that a good and decent parent, and without hesitation I so categorize Dr. Lee, can enhance this child's life. Indeed, to the extent that only such a father could do.

Access Arrangements

56 As Dr. Lee has not seen Nigel for some time, I want to ensure that the reintroduction of Nigel to his father is structured in a manner which will maximize the benefit to Nigel. Consideration will have to be given as well to the relationship between Dr. Lee and Ms. Johnson-Steeves so that any differences between the two of them are minimized and do not interfere with the best interests of Nigel in creating a relationship with his father. I am satisfied that these issues can be addressed with the assistance of Dr. Kneier or someone like him who can assist the parties in setting up the appropriate arrangements. Counsel are to follow up in instituting the appropriate arrangements forthwith so that no further delay is encountered by Dr. Lee in seeing his son. Counsel may speak to me if they have any difficulties in this area and if necessary, I will define access, or at the very least, issue directions on access.

Maintenance

57 Dr. Lee will continue to pay support for Nigel. I will determine the appropriate quantum in due course. First however I would like to give counsel an opportunity to address that issue more fully in light of my determination on the substantive issue in this litigation. This is an unusual situation, and the maintenance arrangements must take into consideration a number of factors. I am also considering directing that part of the maintenance be placed into a trust fund to be used for the education and extracurricular activities of Nigel. I would like to hear from counsel on such an arrangement.

Costs

58 Costs may be spoken to by counsel upon further attendance before me.

Order accordingly.

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