1997 CarswellAlta 961, 54 Alta. L.R. (3d) 218, 33 R.F.L. (4th) 278, 48 C.R.R. (2d) 327, 209 A.R. 292, 160 W.A.C. 292, [1998] 3 W.W.R. 410, [1997] A.J. No. 1057

Johnson-Steeves v. Lee

Caroline Johnson-Steeves, Appellant and King Tak Lee, Respondent

Alberta Court of Appeal

McFadyen, O'Leary, Hunt JJ.A.

Heard: October 10, 1997
Judgment: November 7, 1997
Docket: Calgary Appeal 17268

Proceedings: affirming (1997), 50 Alta. L.R. (3d) 340 (Q.B.)

Counsel: *D.P.* ***Castle***, for the Appellant.

M. Hollins, for the Respondent.

Subject: Family

Family law --- Children born outside marriage — Custody and access — Access

Father agreed to help mother conceive child, provided financial support during pregnancy, and paid monthly child support pursuant to agreement — Mother later refused father access and father commenced successful action for access — Mother appealed from findings that father had parental standing to claim access and that access in child's best interests — Appeal dismissed — Father not merely biological parent — Finding that access in child's best interests correct and supported by evidence.

Family law --- Children born outside marriage — Effect of Charter of Rights and Freedoms

Father agreed to help mother conceive child, provided financial support during pregnancy, and paid monthly child support pursuant to agreement — Mother later refused father access and father commenced successful action for access — Mother appealed from award of access on basis that trial judge erred in finding that s. 7 of Charter did not protect mother's right to choose family model in which to raise child — Appeal dismissed — Questionable whether Charter applying to purely private dispute — Section 7 could be construed as creating right for custodial parent to decide on family model excluding other parent child's life, especially where, as in case at bar, such model inconsistent with child's best interests — Canadian Charter of Rights and Freedoms, s. 7.

Family law --- Children born outside marriage — Custody and access — Miscellaneous issues

Father agreed to help mother conceive child, provided financial support during pregnancy, and paid monthly child support pursuant to agreement — Mother later refused father access and father commenced successful action for access — Mother appealed from award of access on basis that trial judge erred in finding that doctrine of equitable estoppel did not prevent father from claiming access — Appeal dismissed — Finding that father had not agreed to limit access and had done nothing to estop claim supported by evidence — Doctrine of equitable estoppel having no application where, as in case at bar, it would be inconsistent with child's best interests.

The mother asked the father, who was a friend of hers, to help conceive a child. He agreed, indicating that he would provide financial support but would not interfere with such matters as the child's education and health care. Throughout the pregnancy, the father communicated with the mother regularly and provided more than $3,500 in financial aid. When the child was born, the father signed a maintenance agreement which required payment of specified monthly support. In the months after the birth, he provided $3,000 more than the agreed sum. In the 10 months following, he had three one-week stays in Calgary and visited the child on each occasion. After the last visit, the mother refused further access and the father commenced access proceedings. Seeking an order denying access, the mother contended the father was simply a biological father and as such lacked standing as a parent to claim it.

She also alleged that an order granting the father access would violate her rights under s. 7 of the *Charter* and that the father, by his conduct, was estopped from claiming access. The trial judge found that the parties had understood that the father would continue to see the child and that they had never agreed to limit access. Rejecting the mother's claims, she found the father to have parental standing and awarded him access in the child's best interests.

The mother appealed on the ground that the trial judge erred in applying the best interests test by giving too much weight to the evidence of the father's expert, Dr. K, and insufficient weight to the reality of the child. She also contended that the trial judge erred in finding that s. 7 of the *Charter* did not protect her liberty to decide on an appropriate family model in which to raise the child and in finding that the doctrine of equitable estoppel did not preclude the father from seeking access.

Held: The appeal was dismissed.

The case should be decided on the evidence at trial and the findings of the trial judge, who correctly found that the father was a parent of the child.

After a careful assessment of the evidence relating to the child's situation and the respondent's background, the trial judge found that access was in the child's best interests. Her conclusion was based in part on Dr. K's evidence indicating that it is generally better that a child have a relationship with his or her father provided the father is not bad or inadequate. It was also based on the evidence of Dr. M, who had conducted a personality assessment of the father and expressed no concerns with respect to the matters in issue. The only evidence adduced to demonstrate that access would not be in the child's best interests was that of the mother. The trial judge's finding was supported by the evidence and was correct.

It was questionable whether the *Charter* applied to such an essentially private dispute. Section 7 could not, in any event, be construed as creating a right for the custodial parent to decide on a family model excluding the other parent from the child's life, especially where, as in the case at bar, such a model would be inconsistent with the child's best interests. If s. 7 protects parents' rights, it protects the rights of both parents.

As to estoppel, the trial judge found that the father made no agreement and had done nothing which would estop him from seeing the child. That finding was supported by the evidence. The father was not a mere biological parent. At all times before and after the child's birth, he maintained an interest in the child and showed a willingness to meet his financial and other obligations to the child. If he and the child failed to develop the emotional bond typical of child-parent relationships, it was not his fault. The mother had prevented access. If the doctrine of equitable estoppel applied in access disputes, it could not succeed in the case at bar, as it could be employed only where it was consistent with the child's best interests.

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

Generally — referred to

s. 7 — referred to

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

Pt. 8 — pursuant to

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

Generally — pursuant to

APPEAL by mother from judgment reported at (1997), 50 Alta. L.R. (3d) 340 (Q.B.), dismissing mother's claim for order denying father access to biological son, declaring father parent of child and granting father access.

***Per curiam*:**

1 The appellant appeals from a judgment that dismissed her claim for an order denying the respondent access to his biological son, and that declared the respondent to be the father and parent of the child pursuant to Part 8 of the *Domestic Relations Act* and granted access to the respondent.

Facts

2 The facts are set out in detail in the reasons for judgment of the learned Trial Judge. We do not repeat them here. A brief summary will suffice.

3 The parties met and became friends in 1981 in Belleville, Ontario, while the respondent Lee was practising medicine and the appellant Johnson-Steeve was attending nursing school. Shortly thereafter the appellant moved to Calgary but the parties exchanged occasional letters and visits until 1985 when contact ceased. Late in 1991, the appellant telephoned the respondent. During this intervening period, the appellant had married, had two children and had separated from her husband.

4 The respondent had planned to go to Whistler in March, 1992 and agreed to stop in Calgary to meet the appellant's children. At the suggestion of the appellant, he agreed to accompany her, her step-father and mother on a three day trip to Las Vegas. While in Las Vegas, the appellant and the respondent shared a room with two beds.

5 During their stay in Las Vegas, the appellant indicated that she wished to have more children, and the respondent advised her that he was envious that the appellant had two wonderful children and regretted not having any children of his own. The appellant asked the respondent to help her conceive a child. She proposed, as one possibility, frozen sperm donation. The trial judge found that the parties discussed neither specific terms of access nor the exact role that the respondent would play in the child's life, but that both parties understood that the respondent would be seeing the child. Otherwise, the appellant agreed that (1) the respondent would donate sperm or would father the child; (2) the respondent would provide financial support for the child; and (3) the respondent would not interfere in the health and welfare issues of the child, specifically issues of schooling, breast feeding and immunization.

6 After this discussion, the parties had sexual intercourse. In April of 1992, the respondent visited Calgary for about one week during which the parties continued their relationship. A child was conceived during this visit. The respondent visited the appellant in July for one week. Late in August, the parties went to Hawaii together for one week so that the appellant could get some rest and relaxation. The holiday was the respondent's idea and he paid for it.

7 Their relationship deteriorated during this trip. However, throughout the appellant's pregnancy, the parties continued to communicate by telephone. The respondent visited the appellant in Calgary for one week in December 1992 and financially assisted the appellant by providing cheques totalling in excess of $3,500 before the child was born.

8 Nigel was born January 26, 1993. The respondent was not listed on the birth registration. The appellant's mother advised the respondent of the birth. Subsequently, the appellant sent the respondent a picture of the child with a note on the back disclosing among other facts: "Parents: Caroline Johnson Steeves & King Tak Lee".

9 In February 1993, the respondent spent a week in Calgary seeing the child. He entered into a maintenance agreement with the appellant under the *Parentage and Maintenance Act* acknowledging that he was the child's father and agreeing to pay support in the amount of $300 per month. The appellant asked the respondent to sign the maintenance agreement because Social Services had threatened to terminate her social assistance benefits if she did not divulge the name of the father.

10 The appellant expected additional funds in excess of the $300 monthly maintenance as required for the ongoing support of the child. In the several months following the birth of the child, the respondent provided an additional $3000.00 to the appellant.

11 The respondent came to Calgary for a week in August 1993 and saw Nigel each day. He did so again in November 1993, for the last time. The appellant refused to let him see Nigel after that visit.

12 The respondent promptly commenced and pursued his court action seeking access. He continues to pay maintenance through Maintenance Enforcement.

13 The learned Trial Judge accepted that the appellant has surrounded Nigel with extended family and friends who are emotionally supportive to him. The Trial Judge accepted the evidence of Dr. Kneier as an expert in child psychology that showed it is in the best interests of a child to have contact with his/her father. She also found that the respondent is a person of good character who, as Nigel's father, wants to and is able to make a valuable emotional and financial contribution to Nigel's life.

Grounds of Appeal

14 The appellant submits that the learned Trial Judge erred:

(1) In finding that s.7 of the *Canadian Charter of Rights and Freedoms* did not protect the appellant's liberty in deciding what type of family she would create in which to raise Nigel;

(2) In finding that the doctrine of equitable estoppel did not preclude the respondent from bringing an application for access; and

(3) In the application of the best interests test by giving too much weight to the expert opinion given of Dr. Kneier and insufficient or no weight to the present reality of the child.

Analysis

15 This is not a sperm donor case. This Court will decide on the law relating to custody and access issues in sperm donation cases if and when it has such a case before it. This case must be decided on the evidence presented at trial and the factual findings of the Trial Judge, who correctly decided that the respondent was a parent of the child.

16 The child, Nigel, was conceived in the course of a short-term intimate relationship between his biological parents, both of whom wished to have a child. Nigel has two parents, a mother and a father, both of whom wish to be involved in Nigel's life. The respondent agreed to and has contributed financially to the support of the child, and wishes to be involved in Nigel's life. The respondent is not an anonymous faceless figure who has donated sperm by whatever means and shown no other interest in the child. While the respondent agreed not to interfere with the appellant's decisions in health and other issues relating to the child, the respondent did not agree that he would have no role to play in his child's life. On the facts of this case, the most glaring inconsistency with simple sperm donation is the respondent's agreement to financially support the child. The suggestion that the respondent agreed to provide financial support for the child without having any opportunity to develop a relationship with the child is incomprehensible to us. As the Trial Judge pointed out, the appellant wished to have all of the advantages of the respondent with none of the corresponding disadvantages.

17 After a careful assessment of the evidence relating to Nigel's current situation and the respondent's background and extended family, the Trial Judge found that it was in Nigel's best interests that the respondent have access to him. This conclusion was, in part, based on the expert evidence of Dr. Kneier who stated that, generally, it is better that a child have a relationship with his/her father as long as the father is not a "bad or damaging or inadequate father". The Trial Judge also accepted the evidence of Dr. McElheran who had conducted a personality assessment of the respondent that indicated there were no concerns in respect of the issues at trial. No evidence, other than that of the appellant, was adduced during the trial which demonstrates that it would not be in Nigel's best interest to have a relationship with the respondent. The Trial Judge's finding is supported by the evidence and we agree with it. 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.

18 The learned Trial Judge found that the parties did not make any agreement limiting or denying access to the respondent. Both parties understood that the respondent would continue seeing the child. Her finding in this

respect is supported by the evidence. The issue of access, left undefined by the parties, was determined by the Trial Judge. We need not and do not decide the public policy implications of any such agreement between parents of a child, and whether such an agreement would be enforced by Alberta courts.

19 We turn to the other specific grounds of appeal in this case. The appellant submits that s. 7 of the *Canadian Charter of Rights and Freedoms* protects her right to decide what type of family she would create in which to raise her child. We doubt that the Charter is applicable to this dispute between two private individuals, where there is no suggestion of state intervention. However, assuming without deciding that s. 7 applies to such actions, we reject the suggestion that s. 7 creates a right for the custodial parent to decide on a family model which excludes the other parent from the life of their child, especially where such a model is inconsistent with the best interests of the child, as found by the Trial Judge in this case. If s. 7 protects the rights of parents, it protects the rights of both parents.

20 The appellant also argues that the respondent is estopped from claiming any right to access. The learned Trial Judge found that the respondent made no agreement and had done nothing which would estop him from seeing Nigel. Her finding is supported by the evidence. The appellant urges upon us a theory recognizing a distinction between a purely biological parent and a social parent, and rights to be accorded to each. We need not consider whether such a distinction should be adopted in this province. As found by the Trial Judge, the respondent cannot be described as a mere biological parent or "sperm donor". At all times before and after the birth of the child, the respondent maintained an interest in the child, and exhibited a willingness to fulfil his financial and other obligations to the child. If he and the child have not had the opportunity to establish the type of emotional attachment often found in child-parent relationship, that is through no fault of his. The appellant prevented him from seeing the child. In any event, if the doctrine of equitable estoppel applies in child custody and access disputes, it cannot succeed here as it can only be employed where it is consistent with the best interests of the child. The Trial Judge reached the opposite conclusion.

Conclusion

21 The Trial Judge found that it is in the best interests of Nigel to have a relationship with his father and she found that the respondent had done nothing that would estop him from seeking access. The trial judge applied the proper test and made no palpable and overriding error in doing so. Accordingly, the appeal is dismissed.

Appeal dismissed.

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