IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *F.X.B.* v. *M.S.B.*, 2007 YKSC 06

Date: 20070116
S.C. No. 05-D3819
Registry: Whitehorse

Between:

F.X.B.

Petitioner

And

M.S.B.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Sheri Hogeboom — Counsel for the Petitioner
Shayne Fairman — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a high conflict case. After several court applications in this Court and a decision in the Territorial Court of Yukon, the mother applied for paternity testing of the child and for a declaration whether F.X.B. was the father of the child. On June 1, 2006, I dismissed the mother's application for paternity testing and declared that F.X.B. is the father of the child.

BACKGROUND

[2] The mother and father met in Alaska in January 2005. They had a brief intimate relationship after which the father returned to the Yukon and the mother remained in Alaska where she worked.

[3] The mother learned she was pregnant in February 2005. She informed the father who was very excited about having a baby.

[4] They communicated constantly from March to June 2005, when the mother visited the father in Whitehorse.

[5] The mother visited again in July 2005. During this visit, the father questioned whether he was in fact the father of the unborn child. The mother assured him that he was the father.

[6] The mother did not raise the issue of paternity in court until her application filed on May 12, 2006. Prior to that application, the father was granted interim interim custody of the child and the mother granted supervised access. The mother was also ordered not to remove the child from the Yukon without the written consent of the father or an order of this Court.

[7] Both the mother and father have had difficulty with alcohol and the Director of Family and Children's Services applied for a three-month temporary care and custody order on December 1, 2005. The Territorial Court granted that order.

[8] The Director returned the child to the care of the father on March 23, 2006 and the child has remained in the father's care since then.

[9] I find the following undisputed facts:

1. The father was present at the birth of the child on September 24, 2005;

2. The father and mother were married in Whitehorse on October 8, 2005 and began to raise the child;
3. The Certificate of Live Birth from Alaska stated that F.X.B. was the father of the child;
4. The mother swore an Affidavit of Paternity on September 26, 2005, stating that F.X.B. was the father of the child;
5. The father certified that he was the natural father of the child in the Affidavit of Paternity;
6. The mother signed a Declaration that the child was the dependent of the father to obtain Yukon Health Care Insurance for the child;
7. The Territorial Court found F.X.B. to be the father of the child on December 1, 2005; and
8. The mother never raised the paternity issue in the Territorial Court.

[10] The evidence of the mother on paternity is that she was intimate with a friend on two occasions shortly before she met F.X.B. This is the only evidence she has presented to cast doubt about the paternity of F.X.B. The friend of M.S.B. has not filed an affidavit.

[11] F.X.B. acknowledges that he did question M.S.B. in July, 2005 about whether he was the father and requested a paternity test. M.S.B. assured him that he was the father. F.X.B. accepted this assurance and did not raise the matter again. The matter was not raised again by M.S.B. until she brought this application. Since March 23, 2006, the child has been in the care of F.X.B. He arranged for two months of paternity leave to care for the child.

[12] The issue is whether the mother should be granted the right to obtain blood tests to determine the paternity of the child and whether F.X.B. should be declared to be the father of the child.

ANALYSIS

[13] Section 9(1) of the *Children's Act* permits any person having an interest to apply for a declaratory order that a person is or is not in law the father.

[14] Certain presumptions of paternity are set out in section 12 of the *Children's Act* and the following are applicable in this case:

> "12(1) Unless the contrary is proven on the balance of the probabilities, a person shall be presumed to be the father of a child if the person
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> . . .
>
> (c) married the mother of the child after the birth of the child and acknowledges being the natural father;
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> . . .
>
> (e) and the mother of the child have acknowledged in writing that the person is the father of the child;
>
> (f) has been found or recognized in the person's lifetime by a court to be the father of the child."

[15] Section 9(3) of the *Children's Act* provides the procedure on an application for a declaratory order as to paternity:

> "9(3) If the court finds that a presumption of paternity exists under section 12, the court shall make a declaratory order confirming that the presumed paternity is recognized in law, unless the court finds on the balance of probabilities that the presumed father is not the father of the child."

[16] The *Children's Act* also sets out some guidelines on an application to obtain blood tests in sections 15 and 16. The court may give leave to obtain blood tests "subject to those terms and conditions the court thinks proper."

[17] There are no regulations respecting blood tests.

Leave to Obtain Blood Tests

[18] Counsel for the mother relies on the case of *J.S.D.* v. *W.L.V.*, [1995] B.C.J. No. 653 (B.C.C.A.). In that case, J.S.D. and her former husband had three children including J.J., whose birth registration showed the former husband as the father of J.J. In the subsequent divorce proceedings, no issue was raised as to J.J.'s paternity. Subsequently, the mother brought an application for DNA testing to determine if W.L.V. was the father of J.J. The former husband was not a party.

[19] The British Columbia Court of Appeal did not order the blood tests since the former husband was not a party. Rowles J., summarized the law in British Columbia, at the time, in paragraph 26 as follows:

> "In summary, while there is no specific legislation in this Province governing the obtaining of samples for DNA testing to determine biological paternity, it has been clear since Bauman v. Kovacs, supra, that an order may be made under Rule 30(1) requiring a person to provide the necessary samples for such testing, where biological paternity must be determined in order to resolve a disputed claim. Such an order is discretionary and, in the absence of guiding legislation, the principles which are to be applied in the exercise of that discretion must be derived from the developing case law. Those principles include recognition that DNA profiling provides evidence of a highly reliable kind when determining biological parentage and that the interests of justice will generally best be served by obtaining such evidence so that the truth may be ascertained."

[20] It is a fair question to consider whether the person seeking the blood tests must first establish that the applicant meets the threshold under s. 9(3) of the *Children's Act* of

proving on the balance of probabilities that someone other than the presumed father is the father of the child. I am in agreement with Charron J., as she then was, in *D.H.* v. *D.W.*, [1992] O.J. No. 1737, that this would be an unfair burden to meet before leave to obtain blood tests could be granted. Charron J. went on to favour the proposition "that it is in the best interest of the child that, where a real issue as to parentage is raised, the truth be ascertained on the best evidence possible."

[21] In that case, where the applicant was a man challenging the paternity of the husband of the mother at the time the child was born, Charron J. concluded that it was a bona fide application and that "it would be in the best interests of the infant and in the interest of justice to have the issue resolved on the best evidence available."

[22] Arguably, section 9(3) requires this Court to make a declaration once it finds that "a presumption of paternity exists." However, the fact that section 15 of the *Children's Act* empowers the court to grant leave to obtain blood tests suggests that blood tests can be ordered in an application for a declaration of paternity. In my view, it is appropriate that a blood test could be ordered to provide additional evidence. However, the decision on whether blood tests should be ordered is a discretionary one.

[23] I conclude that the following principles apply to an application for blood tests to determine paternity:

1. The applicant does not have to prove on the balance of probabilities that someone other than the presumed father is the father of the child;
2. The order is discretionary;
3. The application must be bona fide;

4. It must be in the best interest of the child and in the interest of justice to have this issue resolved on the best evidence available.

[24] In applying these principles, I conclude that this application for the blood tests should be dismissed. I reach this conclusion for the following reasons:

1. The application is not a bona fide one. The mother married F.X.B. and swore that he was the father of the child long before she raised the paternity issue in the course of a custody dispute;
2. The alleged possible father is not a party to the application. In other words, the blood test would not necessarily determine the truth and could leave the child's parentage in permanent doubt. (See *S.C.* v. *R.W.,* [1996] B.C.J. No. 1415 (B.C.C.A.)).
3. There is no independent evidence or evidence from the other possible father supporting the application.
4. Even if the blood test determined that F.X.B. is not the biological father, it may have little impact on this custody case. F.X.B. has demonstrated "a settled intention to treat" this child as his child and has had custody since April 19, 2006.

[25] I therefore exercise my discretion to dismiss the application for a blood test.

The Declaration of Paternity

[26] The onus is on the mother to establish on the balance of probabilities that F.X.B. is not the father of the child. F.X.B. has three presumptions supporting his paternity. Only one presumption is required to shift the onus of proof to the mother.

[27] Aside from the overwhelming presumptions in favour of paternity, some evidence of doubt about paternity is based on the fact that F.X.B. expressed doubts about his paternity in July, 2005 before the child was born. F.X.B. admitted the doubt but was satisfied with the mother's assurance that he was the father. It is not surprising that the father might have a doubt about the paternity of the child given the brief relationship with the mother. However, it is significant that once the mother gave her assurance of paternity, the father did not raise the issue again and accepted paternity in fact and in written documentation. He attended the birth of the child and has custody of the child.

[28] The other evidence questioning the father's paternity is the mother's assertion that she had been intimate with a friend two times shortly before she was intimate with the father, and it was possible that he was not the father of the child.

[29] This assertion must be considered in the context of the sworn statements by the mother that F.X.B. is the father. Her statements in the Affidavit of Paternity are not subject to any doubt or possibility and were made months before she raised the paternity issue in this custody dispute.

[30] I also find it very significant that she did not challenge the father's paternity in the wardship application in the Territorial Court. That Court made a paternity finding that has not been appealed.

[31] The mother's evidence to the contrary is very weak and suspect. It does not satisfy me, on the balance of probabilities that F.X.B. is not the father of the child. I declare that F.X.B. is the father of the child.

VEALE J.