

QUEEN'S BENCH FOR SASKATCHEWAN

Date: **2011 08 30**
Docket: F.L.D. No. 49 of 2011
Judicial Centre: Saskatoon, Family Law Division

Citation: **2011 SKQB 317**

BETWEEN:

W.J.Q.M. ("John")
and L.J.E. ("Bill")

PETITIONERS

- and -

A.M.A. ("Mary")
and JANE DOE

RESPONDENTS

Counsel:

R. Gabruch
No one appearing

for the petitioners
for the respondents

JUDGMENT
August 30, 2011

RYAN-FROSLIE J.

[1] To protect the identity of the child and the parties, pseudonyms have been used throughout this judgment.

[2] The petitioners apply, pursuant to s. 43(3) of *The Children's Law Act, 1997*, S.S. 1997, c. C-8.2 and/or s. 11 of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01 for a declaration that the respondent, Mary, who is the gestational carrier of the child, K.R.E-M. ("Sarah"), born August 5, 2009 is not Sarah's mother and further for an order pursuant to s. 29(1) of *The Vital Statistics Act, 2009*, S.S. 2009, c. V-7.21 directing the registrar of vital statistics to amend Sarah's registration of live birth by removing Mary's name therefrom.

[3] The issues are whether this Court has jurisdiction to grant the relief requested and, if so, whether it should do so in the circumstances of this case.

Background

[4] The petitioners are a same sex couple who entered into a gestational carrier agreement with the respondent, Mary, in November, 2008. Pursuant to that agreement, Mary underwent in vitro fertilization of an embryo created by using the sperm of the petitioner, John, and ova from the respondent, Jane Doe, an anonymous donor. As a result of that procedure, Mary gave birth to Sarah, on August 5, 2009 in Saskatchewan. Pursuant to the terms of their confidential agreement, it is clear that Mary never intended to exercise any parental rights with respect to Sarah and, in fact, waived all her parental, custodial and social rights with respect to the said child.

[5] Following the birth of Sarah, the petitioners and Mary filled out the registration of live birth form as required by *The Vital Statistics Act, 2009*. On that form, John was identified as Sarah's father, Mary as her mother and Bill, John's same sex partner as an "other parent".

[6] Since her birth, Sarah has lived with the petitioners and they have been solely responsible for her care and upbringing.

[7] Mary attests that she does not view herself as Sarah's mother and supports the petitioners' application to remove her name from that designation on Sarah's registration of live birth.

Analysis

[8] The current legislation in Saskatchewan with respect to vital statistics is *The Vital Statistics Act, 2009* which came into effect on August 31, 2009. Its purpose, as set out in s. 3 thereof is to create a mechanism for the recording of live births, deaths, stillbirths and marriages that occur within the province. In short, its purpose is to record information.

[9] Registrations of live birth are the vital records that document the birth of children in this province. In registering a child’s birth, information is recorded, including the child’s name, place and date of birth, attending physician and the duration of the pregnancy, the name of the mother and information with respect to her, including the total number of children born to her and her marital status, the name of the father and information with respect to him, including his marital status, and finally, information with respect to an “other parent”, if any. Pursuant to s. 4 of *The Vital Statistics Act, 2009*, the registration of this information creates a rebuttable presumption that the child’s birth occurred in accordance with the information provided. In other words, there is a presumption that the persons named as the mother and/or father are the child’s parents.

[10] Prior to the present *Act*, vital statistics legislation in this province did not contain any definitions with respect to the terms “mother”, “father” or “parent”, nor did it provide a designation of “other parent” on registrations of live birth. *The Vital Statistics Act, 2009* contains the following definitions with respect to those terms, namely:

“father” means the person who acknowledges himself to be the biological father of a child;

...

“mother” means the woman from whom a child is delivered;

...

“other parent” ...means a person other than the mother or father who is cohabiting with the mother or father of the child in a spousal relationship at the time of the child’s birth and who intends to participate as a parent in the upbringing of the child. ...

“parent” means a mother, father or other parent.

[11] Section 29 of *The Vital Statistics Act, 2009* allows for registrations of live birth to be amended if a court of competent jurisdiction makes a determination of “parentage” with respect to a child. Parentage is not defined in *The Vital Statistics Act*,

2009. Its common meaning, according to *The Concise Oxford Dictionary*, 9th ed., s.v. is “lineage”, “descent from or through parents”. In *Black’s Law Dictionary*, 7th ed., s.v. “parentage” is defined as “kindred in the direct descending line”. It is clear that s. 29 is referring to declarations which recognize the biological parents of a child, that is, the man and/or woman whose sperm and/or ova created the child.

[12] Part VI of *The Children’s Law Act, 1997* deals with a “child’s status and parentage”. Sections 40 and 41 of that Part set out the legal importance of the parent/child relationship. Those sections read as follows:

Child of natural parents

40(1) Subject to section 17 of *The Adoption Act, 1998*, for all purposes of the law of Saskatchewan:

- (a) a person is the child of his or her parents; and
- (b) a person’s status as a child of his or her parents is independent of whether he or she is born inside or outside marriage.

(2) Kindred relationships are to be determined according to the relationships described in subsection (1).

(3) All distinctions between the status of a child born inside marriage and a child born outside marriage are abolished and the relationship of parent and child, and kindred relationships flowing from that relationship, are to be determined in accordance with this section.

Construction of instruments and statutes

41 For the purpose of construing an instrument or *Act*, a reference to a person or group or category of persons described in terms of relationship to another person by blood or marriage is to be construed to refer to and include a person who comes within the description by reason of the relationship of parent and child as determined pursuant to section 40.

[13] The reference in s. 40 to “kindred relationship” makes it clear that the relationship being referred to in those sections is that of a child to his or her biological parents.

[14] Section 43 of *The Children's Law Act, 1997* deals with declarations of parentage. The portion of s. 43 relevant to the within application reads as follows:

Parentage

...

43(2) Any person having an interest may apply to the court for a declaratory order that:

(a) a man is recognized in law to be the father of a child; or

(b) a woman is recognized in law to be the mother of a child.

(3) Where the court finds on the balance of probabilities that a woman is or is not in law the mother of a child, the court may make a declaratory order to that effect.

(4) Subject to subsection (5), where the court finds that a presumption of paternity exists pursuant to section 45 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court may make a declaratory order confirming that the paternity is recognized in law.

[15] The definitions with respect to “father”, “mother” and “parent” contained in *The Children's Law Act, 1997* are not the same as those contained in *The Vital Statistics Act, 2009*. Pursuant to *The Children's Law Act, 1997*, those terms are defined as follows:

“father” means the father of a child and includes:

(a) a man declared to be the father pursuant to section 43 or 44; and

(b) a man recognized as the father pursuant to section 50, 51, 55 or 56”.

“mother” means the mother of a child and includes:

(a) a woman declared to be the mother pursuant to section 43 or 44; and

(b) a woman recognized as the mother pursuant to section 50, 51, 55 or 56.

“parent” means

(a) the father or mother of a child, whether born within or outside marriage; or

(b) the father or mother of a child by adoption.

[16] The definition of “mother” under *The Children’s Law Act, 1997* is considerably broader than that under *The Vital Statistics Act, 2009* which includes only the woman “from whom a child is delivered”. *The Children’s Law Act, 1997* definition is, however, ambiguous in that it defines “mother” to mean “mother”.

[17] The Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 set out the principle to be applied in interpreting statutory provisions. At para. 21 of that decision, Justice Iacobucci, speaking for the Court, quoted with approval the principle enunciated by Pierre-Andre Cote, *The Interpretation of Legislation in Canada*, 2nd ed., (Cowansville, Que.: Yvon Blais, 1991) and Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) namely:

Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.

[18] Applying this principle to the definition of “mother” in *The Children’s Law Act, 1997*, I find that it refers to a child’s biological mother. Such an interpretation is consistent with the ordinary view of parentage which relates to kindred (blood) ties. It is also consistent with the provisions of Part VI of *The Children’s Law Act, 1997* relating to a declaration of parentage with respect to a child’s father for which the Court may order genetic testing. It would be inconsistent to view the biological father as a parent and not the biological mother.

[19] Section 43(3) of *The Children’s Law Act, 1997* gives the Court jurisdiction to make a declaratory order that a woman either is or is not the mother of the child “in law”. The Court also has jurisdiction to make declaratory orders pursuant to s. 11 of *The*

Queen's Bench Act, 1998, notwithstanding that no other relief is claimed. Once such an order is made, s. 29 of *The Vital Statistics Act, 2009* requires the registrar of vital statistics to amend a child's statement of live birth in accordance with the order. As such, this Court clearly has authority to make the orders requested by the petitioners. The real issue is whether such an order should be made in this case.

[20] In Saskatchewan, there is no case law with respect to the removal of a "mother's" name from a child's registration of live birth where that mother is a gestational carrier. The issue, however, has been dealt with by superior courts in other jurisdictions.

[21] In *J.C. v. Manitoba*, 2000 MBQB 173, 151 Man. R. (2d) 268, the genetic parents, the gestational carrier and her spouse applied before the birth of the child for a declaration that the birth registration be completed showing the genetic parents as the mother and father of the child to be born. The Court declined to grant the relief requested because the gestational carrier who would be giving birth to the child was the "mother" within the meaning of Manitoba's vital statistics legislation. The Court, however, indicated that a declaration of parentage with respect to the genetic mother could be made after the birth was registered.

[22] In *R.(J.) v. H.(L.)*, [2002] O.J. No. 3998 (Ont. Sup. Ct.) (QL), the applicants were a married couple who entered into a gestational carriage agreement which resulted in the birth of twins. The applicants, who were the twins' biological parents, applied for a declaration that H.L., the gestational carrier, was not the twins' mother. They also applied for a declaration of paternity. The application was made following the birth of the children but prior to registering their births with vital statistics. In granting the relief sought, Kiteley J. stated that if the application had been opposed, there may have been a problem with registering the birth without using the gestational carrier's name.

[23] In *M.D. v. L.L.* (2008), 52 R.F.L. (6th) 122 (Ont. Sup. Ct.), the applicants entered into a gestational carriage agreement with L.L., who then underwent in vitro fertilization of an embryo created from the applicants' ova and sperm. Following the child's birth, the applicants applied for (among other things) a declaration that L.L. was not the child's mother. Nelson J. granted the declaration. In doing so, he stated the following at para. 55:

[55] A declaration of parentage pursuant to section 4 of the CLRA is a judgment in rem, recognized for all purposes by the world: *Sayer v. Rollin* (1980), 16 R.F.L. (2d) 289, [1980] O.J. No. 613 (Ont. C.A.), at para. 5. What additional benefit is there in a declaration of non-parentage when combined with a section 4 declaration? The declaration of non-parentage is, it seems to me, simply a clarification of status for the genetic parents, the surrogate mother and her spouse, vis a vis their respective relationships towards the child. Where there are two persons with potential claims to be the child's mother, a declaration that one of them is the child's mother might not preclude the other from also being that child's mother. Thus, a declaration of non-maternity would clarify the status of the interested parties in a manner that is worthy of judicial determination.

[24] A finding that a person is the "mother" and/or "father" of a child in law carries with it both rights and obligations. A child's parents have the right to make decisions with respect to their child and they have the obligation to care and provide for it. Such obligations continue even after death as evidenced by legislation such as *The Dependants' Relief Act, 1996*, S.S. 1996, c. D-25.01. It also determines a child's rights, with respect to inheritance as set out in *The Intestate Succession Act, 1996*, S.S. 1996, c. I-13.1 and who they may or may not marry with respect to kindred relationships as referred to in *The Marriage Act, 1995*, S.S. 1995, c. M-4.1.

[25] It is clear from the definition of "mother" contained in *The Vital Statistics Act, 2009* that Mary, the gestational carrier, is Sarah's mother for the purposes of that Act as she is the woman from whom Sarah was delivered. Naming her as Sarah's mother on

the registration of live birth raises a presumption that she is also Sarah's biological mother. Section 43 of *The Children's Law Act, 1997*, however, provides a mechanism for overriding that presumption where a declaration of parentage is made. In this case, I am satisfied on a balance of probabilities that Mary, the gestational carrier, is not Sarah's biological mother. I am also satisfied neither the applicants nor Mary ever intended that Mary would assume any parental rights or obligations with respect to Sarah. As such, a declaration that Mary is not Sarah's mother is warranted.

[26] There shall be a declaration of non-parentage pursuant to s. 43(3) of *The Children's Law Act, 1997*, that Mary is not the mother of the child, Sarah, born August 5, 2009. Pursuant to s. 29(1) of *The Vital Statistics Act, 2009*, the registrar of vital statistics shall amend Sarah's registration of live birth accordingly.

J.
J. A. Ryan-Froslic