2002 CarswellAlta 1576

R. (C.) v. T. (M.)

C.R., Applicant and M.T., Respondent

Alberta Court of Queen's Bench

Sirrs J.

Heard: November 5, 2002
Judgment: November 5, 2002
Docket: Red Deer 0210-01573



Counsel: *Ms S. Alexander-Smith*, for Applicant

*R. **Low***, for Respondent

Subject: Family

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

Family law --- Guardianship — Appointment by court — Factors — Best interests of child

Family law --- Adoption — Under statute — Practice and procedure — Consent of parent — General

**Cases considered by *Honourable Mr. Justice Sirrs*:**

*H. (T.) v. S. (C.)*, 110 N.S.R. (2d) 207, 299 A.P.R. 207, 1991 CarswellNS 642 (N.S. Fam. Ct.) — considered

*K. (K.) v. L. (G.)*, [1985] 1 S.C.R. 87, [1985] 3 W.W.R. 1, [1985] N.W.T.R. 101, 16 D.L.R. (4th) 576, 57 N.R. 17, 58 A.R. 275, 44 R.F.L. (2d) 113, 1985 CarswellNWT 54, 1985 CarswellNWT 58 (S.C.C.) — considered

*Starko v. Starko*, *(sub nom. S. (D.G.) v. S. (S.L.))* 74 Alta. L.R. (2d) 168, 1990 CarswellAlta 83, 106 A.R. 62 (Alta. Q.B.) — followed

**Statutes considered:**

*Child Welfare Act*, R.S.A. 2000, c. C-12

s. 59(1) — referred to

*Domestic Relations Act*, R.S.A. 2000, c. D-14

s. 50(1) — referred to

s. 50(2) — considered

APPLICATION by father for guardianship of daughter.

***Honourable Mr. Justice Sirrs*:**

1 THE COURT: In this matter C.R. is the applicant, M.T. the respondent, in an application by Mr. R. for guardianship of a newborn baby girl. *FACTS* — Mr. R., now 24 years of age, and Ms. T., now 21 years of age dated for several months while they were both students at college. They enjoyed sexual relations during this time between September 2001 and February 2002, resulting in Ms. T.'s pregnancy. At no time did they live together, and the relationship, including sexual relations, terminated in February 2002.

2 When Mr. R. learned of Ms. T.'s pregnancy, he certainly made himself available and did not try to deny his responsibility. He showed a certain maturity by attending upon Ms. T. to discuss the alternatives available to Ms. T. He attended upon the doctors and at pre-natal classes.

3 Mr. R. and Ms. T. agreed that adoption would be their best option. They discussed permitting Mr. R.'s brother and sister-in-law, T. and C., to adopt the baby. Ms. T. rejected this proposal and a proposal of a cousin of hers because of concerns that close relatives would not provide the necessary separation for a stable home setting. Ms. T. also preferred that a family with a Mormon background raise her child.

4 Mr. R. deferred to Ms. T.'s wishes and involved himself in the selection of adoptive parents, including attending a face-to-face interview with the prospective adoptive parents, following which Mr. R. expressed his approval of the choice of adoptive parents.

5 In October 2002 Mr. R. was advised that he had a bigger say in the placement of the baby that he had previously thought. On October 8th, 2002, he again expressed to Ms. T. his wish that the baby be placed with his brother and sister-in-law.

6 On October 16th Mr. R. informed Ms. T. that he now wished to be guardian of the baby, that he and the baby would move to Slave Lake, where he would live with his brother and sister-in-law. He would take parental leave from his job, following which, he would enrol in college or get a job, during which time his sister-in-law would quit her job to be the daycare provider.

7 Ms. T. gave birth to a baby girl on October 31st, 2002.

8 Mr. R. is before the court seeking an appointment as guardian of the baby girl. Ms. T. opposes the application, as she favours the placement of the baby with the adoptive parents, Mr. and Mrs. F. of Calgary, Alberta, but should Mr. R. be successful in his guardianship application, she advises that she will, with the support of her parents, seek custody of the baby.

9 Mr. R.'s family have shown that they are ready, willing and able to assist in the raising of this baby. Mr. and Mrs. F. have been steadfast in their decision to adopt and thereby provide a home for the baby.

**The Law and the Analysis of Facts and Law.**

10 Mr. R. is not a *guardian pursuant to section 50(1)* of the *Domestic Relations Act*. Pursuant to the *Child Welfare Act, section 59(1)*, only the consents of guardians are required for the adoption of a child.

11 Mr. R. seeks an appointment as guardian under *section 50(2) of the Domestic Relations Act*. If he is appointed as a guardian, Mr. and Mrs. F. cannot adopt the child without his consent. Thus, Mr. R. could then effectively veto Ms. T.'s decision to allow the F.'s to adopt the baby.

12 Section 50(2) of the Domestic Relations Act allows the court to appoint a parent as guardian, provided that the court is satisfied that it is in the best interests of the child.

13 At this point it comes down to determining whether it is in the best interest of the baby that she be adopted or raised by Mr. R. or Ms. T because I am satisfied that if I appoint Mr. R. as guardian of the baby, the custody dispute will then be limited to Mr. R. and Ms. T.

14 In determining what is in the best interests of the baby, I have been referred to the case of *K. (K.) v. L. (G.)* [1985 CarswellNWT 54 (S.C.C.)], in which Justice McIntyre, as he then was, of the Supreme Court of Canada, in 1985, in deciding against the claim of the mother in favour of the adoptive parents, nevertheless determined at paragraph 27 that, "Parental claims must not be lightly set aside. They are entitled to serious consideration in reaching any conclusion."

15 Now, Mr. R. is a parent. He is the biological father of the baby. Thus, his interest in raising the child must be given serious consideration. As to what amounts to serious consideration, I have been referred to *H. (T.) v. S. (C.)* [1991 CarswellNS 642 (N.S. Fam. Ct.)], a case of the Nova Scotia Family Court, in which Justice Hubbey in 1991 found, in effect, that, all things being equal, then the biological ties tip the scales.

16 Ms. T. wants the baby to be adopted by the F.'s. It is this action that Mr. R. suggests is not in the best interests of the child. I cannot find that Ms. T. has any ulterior motive in placing this baby for adoption. Her decision that the baby would be best with an outside-the-family Mormon family is not unreasonable. As her counsel suggests, I am satisfied that it is a selfless act on her part to do what, at least in her mind, is in the best interests of her child.

17 As to what is in the best interests of a child, I have referred to the case of *Starko v. Starko* [(1990), 74 Alta. L.R. (2d) 168 (Alta. Q.B.)], reported at 74 ALR. Although this case dealt with the best interests in regards to custody, not guardianship as Mr. R. has stated his intention to seek custody, I think it appropriate to use the factors in this case. Also as the F.'s are not a party to this action, I do not have the information necessary to compare the alternative that the F.'s offer and thus I have compared only Mr. R.'s proposal to the adoption alternative in determining what I think is in the best interests of the child. Justice Picard set out some factors to consider in determining the best interests of the child.

> (1) The provision of necessities of life, including physical and health care and love, and she goes on to indicate that this love must be unconditional, as it is a critical building block in the child's self-esteem.

18 Now, Mr. R. proposes to place the baby in his two-bedroom apartment in Red Deer until he is able to move to Slave Lake. He is relaying on his family to provide a place to live and the money needed to provide for the baby while he takes paternity leave from his employment to care for the baby.

(2) Mr. R.'s family appears sincere in its commitment to provide unconditional love. Stability and consistency in an environment that fosters good mental and emotional health. Here, again, Mr. R. relies on his family to provide the stability and consistency needed by the baby, because, in his young life, he has not as yet displayed much maturity. He has started and quit college twice. He did not take the precautions necessary to avoid the pregnancy of a 21-year-old that he had only known for a few months.

19 Since February of 2002, after he learned of the pregnancy, he has only had part-time employment as a bartender, earning $900 a month. It is no surprise to me that he did not provide any financial support to Ms. T. Mr. R. has debts of $7,800 and has sought interest rate relief and borrowed from his roommate to keep his credit card current.

20 The birth of the baby somehow has given him a motive to settle down and seek out some trade skills, but he has not done anything to support this righteous conversion.

21 Mr. R. has no stable relationship with another woman to help him raise this child.

22 Mr. R. lacked any sensitivity in regards to the stress that his announcement that he was going to seek guardianship would cause a young lady who was in the last month of her pregnancy.

23 There is no doubt Mr. R. has good intentions, but in the six years since he has left high school, he has done very little to support the contention that he can provide for the stability and consistency that is necessary in a child's life.

24 Mr. R. plans to live with his brother and sister. Again, just like the situation where he indicates he is going to take out and learn a trade, he has not done it yet. He says, in defence of himself, that he is staying around Red Deer until the baby is born. I have concerns, again, about consistency and stability because living with a brother and sister is not easy. There is nothing before me to show me that this living arrangement would be compatible for any length of time.

(3) Opportunity to learn good cultural, moral, and spiritual values. Now, there is no evidence of Mr. R.'s cultural, moral, and spiritual values before me. It would appear that he again relies upon strong family support.

(4) There is the necessity of setting realistic boundaries of conduct and fair and consistent discipline in teaching appropriate behaviour and conduct. Now, I accept that Mr. R. is a new parent and should not be judged so far as having some kind of idea of how children should be disciplined, but I note his own lack of discipline in getting Ms. T. pregnant, providing no financial support, supporting Ms. T. in her efforts to find adoptive parents and then pulling out that support and failing to obtain legal help in February of 2002 so that things might have been determined in a timely fashion in regards to where this baby would be placed, but rather he tells her of his plans to thwart the adoption in the last month of her pregnancy.

(5) I am concerned that his lack of discipline would affect his ability to be consistent in developing discipline in the child. Opportunity to relate to and love and be loved by the immediate and extended family, an opportunity to form relationships. Mr. R. certainly has some support in this category. He has shown by affidavits and by presence today that his immediate family certainly is going to be available to help to love and form good relationships with this baby; however, he plans to take this baby to Slave Lake. There is no consideration given to Ms. T.'s family being involved with the upbringing of this child. That would be part of

Mr. R.'s extended family if he were to take over responsibility of this baby.

(6) The opportunity to grow and fulfill this baby's potential with responsible guidance. I am not satisfied that Mr. R. is able to provide an opportunity, as he is still searching out what he wants to do with his own life. It is not fair to this child if Mr. R. must set a path for his own future well-being. He will not be, for some time, in a position to provide for the effort necessary to provide an opportunity for a child.

25 In addition, Justice Picard suggests that one should consider who can provide an environment free of strife and conflict. As has been indicated to me, if Mr. R. is granted guardianship, he and Ms. T. are going to be embroiled in a custody battle. Mr. R. seems to welcome this battle.

26 Even if he wins the custody battle, he must maintain a relationship with the T. family as access would surely be granted. Mr. R. and Ms. T. had no more than a passing sexual relationship. If either one of them gains custody, there is bound to be strife and conflict between two people who know very little about each other, and who have grown to dislike each other, because in part neither respects the other's wishes concerning who should raise this newborn child.

27 These facts very much support the wisdom of a young Ms. T. when she decided at the outset that it would be better for someone outside the family to raise this child.

28 I am certain there are circumstances where it would be in the best interests of a child that his or her father be appointed guardian under section 50(2) of the Domestic Relations Act. This is not one of them. This is not, in my opinion, a case where the biological ties should tip the scales in Mr. R.'s favour because Mr. R. has not satisfied me that his plan is as good as Ms. T.'s for raising the child.

29 Ms. T. has followed all the rules of Alberta and has been duly diligent in seeking out a good adoptive set of parents for her child. She consulted with the biological father. She included him in the process. He willingly supported the process. Ms. T. did not do anything that I can see that justified Mr. R.'s change of mind and heart. His actions, again, in my mind, betray his lack of discipline, stability, maturity, and consistency in favour of doing, in this case, what his family wants.

30 Mr. R., I do not think you are ready to be guardian of a child. I am satisfied that it is in the best interests of your child that she be placed with adoptive parents.

31 *DECISION* — This application is dismissed.

*Application dismissed.*

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