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2006 CarswellAlta 1782, 2006 ABQB 940, [2007] A.W.L.D. 2321, [2007] A.W.L.D. 2289, [2007] W.D.F.L. 2682, 414 A.R. 306, 154 A.C.W.S. (3d) 886

S. (J.) v. R. (J.)

J.S., Appellant and J.R., Respondent

Alberta Court of Queen's Bench

D.C. Read J.

Heard: December 5, 2006
Judgment: December 21, 2006
Docket: Edmonton FL03-02646

Counsel: Cindy Turner, for Appellant

Richard A. **Low**, for Respondent, Mr. & Mrs. H.

Subject: Family; Civil Practice and Procedure

Family law --- Adoption — Under statute — Jurisdiction of courts

Mother and father dated in February 2005, cohabited in March 2005 and separated in August 2005 — Mother gave birth to baby girl in December 2005 and in February 2005, decided to give it up for adoption in British Columbia — Mother alleged father was abusive, posed threat to herself and her child and would not be able to care for child — Mother applied for and was granted ex parte order dispensing with need to notify father of adoption — Child was adopted by couple in British Columbia and lived with adopted parents for one year — Father contested adoption order — Father applied to Alberta family court to assume jurisdiction in case, set aside ex parte order and make him guardian of child — Application dismissed — It was not in best interest of child for court to assume jurisdiction of adoption order — Child had resided with adoptive parents for over one year and it was in best interest of child for case to be heard there — Alleged abuse by father did not pose safety risk.

Civil practice and procedure --- Judgments and orders — Ex parte orders — Setting aside — Practice on application to set aside

Mother and father dated in February 2005, cohabited in March 2005 and separated in August 2005 — Mother gave birth to baby girl in December 2005 and in February 2005, decided to give it up for adoption in British Columbia — Mother alleged father was abusive, posed threat to herself and her child and would not be able to

care for child — Mother applied for and was granted ex parte order dispensing with need to notify father of adoption — Child was adopted by couple in British Columbia and lived with adopted parents for one year — Father contested adoption order — Father applied to Alberta family court to assume jurisdiction in case, set aside ex parte order and make him guardian of child — Application dismissed — It was not in best interest of child for court to assume jurisdiction of adoption order — Child had resided with adoptive parents for over one year and it was in best interest of child for case to be heard there — Alleged abuse by father did not pose safety risk.

Cases considered by *D.C. Read J.*:

H. (D.N.), Re (2006), 2006 ABQB 681, 2006 CarswellAlta 1232 (Alta. Q.B.) — considered

H. (D.R.), Re (2004), 2004 ABQB 481, 2004 CarswellAlta 851 (Alta. Q.B.) — considered

P. (N.) v. LDS Adoption Services (2006), 24 R.F.L. (6th) 41, 392 A.R. 282, 57 Alta. L.R. (4th) 59, 2006 ABQB 78, 2006 CarswellAlta 126, [2006] 7 W.W.R. 533 (Alta. Q.B.) — referred to

W. (E.D.) v. Alberta (Director of Child Welfare) (2005), 2005 ABQB 304, 2005 CarswellAlta 592, 382 A.R. 80 (Alta. Q.B.) — followed

Statutes considered:

Adoption Act, R.S.B.C. 1996, c. 5

Generally — referred to

s. 11 — referred to

s. 17(1) — referred to

s. 17(4) — referred to

s. 37(1)(a) — referred to

s. 37(1)(c) — referred to

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12

Generally — referred to

s. 1(1)(a.1) "adoption order" [en. 2003, c. 16, s. 3(a)(i)] — considered

s. 1(1)(b) "biological father" — considered

s. 59 — referred to

s. 59(1)(a) — considered

s. 59(2) — referred to

s. 63 — referred to

s. 63(2)(c) — referred to

s. 64(1) — referred to

s. 68(4) — referred to

s. 73 — considered

s. 73.1 [en. 2003, c. 16, s. 78] — considered

Family Law Act, S.A. 2003, c. F-4.5

Generally — referred to

s. 1(f) "father" (i) — considered

s. 20(2) — considered

s. 20(3)(a) — considered

s. 23 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 387(1) — considered

R. 387(2) — referred to

APPLICATION by father to assume jurisdiction, set aside ex parte order for adoption and grant guardianship.

***D.C. Read J.*:**

Nature of the Application

1 The Applicant asks this Court to assume jurisdiction and to grant a guardianship order for a child who has been adopted in British Columbia. Impliedly, if not expressly, he has asked that I vacate an *ex parte* order granted by Sanderman J. dispensing with his consent to the adoption. The Respondent opposes the application on the basis that the Applicant is now a legal stranger to the child and that Alberta is not the appropriate jurisdiction in which to deal with these issues. The adoptive parents were represented on the application, but only for purposes of contesting the Court's jurisdiction.

Facts

2 This matter has a relatively long history in the Alberta courts. However, the story really begins when Mr. S. and Ms. R., who had known each other for about two years, began to date in February 2005. In March of that year, they began to co-habit at Mr. S.'s mother's home. Their child was conceived that same month. After learning of the pregnancy, they became engaged to be married. Difficulties developed between them, however, and in August 2005, the couple separated. Ms. R. gave birth to a baby girl on December 10, 2005. She took the child

home with her.

3 The history of this matter in the court system begins on December 12th, 2005, when Ms. R. signed a consent order in Alberta for adoption of the child by a couple in British Columbia. The child was taken to that province and began living with the prospective adoptive parents Mr. and Mrs. H. A detailed home study had been conducted of Mr. and Mrs. H. and their home situation in May 2005. Post-placement supervisory visits were conducted by a social worker and licensed adoption worker in January 2006, February 2006 and March 2006.

4 On December 14, 2005, Ms. R. obtained an *ex parte* order from Sanderman J. dispensing with the need for Mr. S.'s consent to the adoption and service on him of further documents in relation to the adoption. The order specifically indicates that it is granted on it appearing that Mr. S. poses a threat to the birth mother and adoptive parents.

5 Mr. S. suspected that the baby had been born and might be put up for adoption and therefore applied on December 23, 2005 to be added to the Birth Father's Registry in British Columbia. His information was registered on December 28th. The letter from the Registry acknowledging his application and the registration stated: "If there is a proposed adoption for the child, you will be notified by double registered letter sent to the address provided in your application form." His counsel represented before Slatter J. in a previous proceeding in this matter that Mr. S.'s mother filed notices of objection in every province, but no evidence has been presented to substantiate that claim in terms of any province other than British Columbia.

6 On February 10, 2006, Mr. S. filed a *Family Law Act* Claim in the Provincial Court of Alberta seeking guardianship and parenting of the child. In the attached statement, Mr. S. said that Ms. R had told his mother that she had a granddaughter. Although he stated that he believed Ms. R had placed the child up for adoption, he also indicated that the child resided with Ms. R. He advised in the statement that he believed he would be able to provide a stable and loving home for the child, that he was renting the basement suite in his mother's home and that his mother had expressed a desire to have the child reside there with them.

7 Ms. R. responded on February 27, 2006 saying that the child had been placed for adoption with Mr. and Mrs. H. in British Columbia and they would be finalizing their adoption in that province. She did not list Mr. S. as a guardian of the child and indicated her view that appointing him as a guardian would result in more conflict between her, Mr. S. and Mr. and Mrs. H. regarding who should parent the child, which would not be in the child's best interests. She refused to disclose the identity of the adoptive parents, citing privacy concerns and an order of the Court directing that Mr. S. not be notified of the adoption for safety concerns. She also raised the issue that Mr. and Mrs. H., as co-guardians, had not consented to his guardianship. She said that Mr. S. was incapable of providing a stable home for the child.

8 On March 6, 2006, Mr. S.'s application under the *Family Law Act* was heard in Provincial Court and ordered transferred to the Court of Queen's Bench by Judge Easton. Mr. Low, the lawyer for Ms. R., agreed to ensure that the adoptive parents were personally served with a copy of the order and Mr. S.'s Claim if Mr. S. obtained an order for service *ex juris*. Mr. H., one of the adoptive parents, swears in his affidavit of September 11, 2006 that Mr. Low told him that Mr. Low's Edmonton agent advised counsel for Mr. S. on March 6th that the adoption application would be filed in British Columbia once the child had resided with the adoptive parents for six months and suggested that Mr. S. should retain a lawyer in British Columbia to bring an action in that province if he wanted to dispute the adoption.

9 It was only in March that Mr. S. learned of the *ex parte* order granted by Sanderman J. dispensing with his consent to the adoption. In his cross-examination on affidavits, Mr. S. said that he first learned of some of the allegations made by Ms. R. in her affidavit in support of the application to dispense with the need for his consent when he went to Sanderman J.'s office in an attempt to have the *ex parte* order set side. However, his counsel indicates that he was in error in saying this because neither Mr. S. nor his counsel has ever appeared before Justice Sanderman to have the *ex parte* order set aside. Apparently, Mr. S. has never seen the affidavit itself as the file is sealed, but did see a similar one which Ms. R. swore in August 2006.

10 On May 16, 2006, Mr. S. made an *ex parte* application before Ouellette J., who granted leave to serve the adoptive parents *ex juris* and made an order that they be substitutionally served with the Claim and his order by serving counsel for Ms. R. On May 19, 2006, Mr. S. amended his Claim to ask in addition to guardianship and parenting of the child that the adoption file (presumably the Lethbridge adoption file) be unsealed, the matter be transferred to Edmonton and that a stay be granted of the adoption proceedings. The Claim was made returnable for July 11, 2006. It appears that through some error, only the order for substitutional service was served upon counsel for Ms. R. who had offered to serve Mr. and Mrs. H., the adoptive parents. Notwithstanding this, at some point, the adoptive parents received notice of the Amended Claim and Ouellette J.'s order or orders, although Mr. H. has deposed that they were never served with the Claim or orders.

11 Counsel for Mr. S. asked counsel for Ms. R. for the name of the lawyers in British Columbia acting for the prospective adoptive parents. Mr. Low said that he would "take this request under advisement," but he did not disclose the name of counsel until much later.

12 On June 22, 2006, the prospective adoptive parents filed a notice of motion in these proceedings, returnable July 11, 2006, for an order that service of the Amended Claim as well as the order for service made by Ouellette J. be set aside. The matter apparently was adjourned by consent to July 20th.

13 On June 27, 2006, the social worker who conducted the home study of Mr. and Mrs. H. deposed that the adoption was being dealt with and finalized under the British Columbia *Adoption Act* and that she was aware that Mr. S. had applied to be registered on the British Columbia Fathers' Registry as at December 23, 2005.

14 On July 4, 2006, the adoption order was made final in British Columbia.

15 Mr. Low did not appear at the July 20th hearing but sent an agent who advised Slatter J. that Mr. Low was also acting for Mr. and Mrs. H. for the sole purpose of disputing that Ouellette J. had ordered service *ex juris* or setting the order aside if he had. Surprisingly, Slatter J. was not told that the adoption order had already been made in British Columbia. Counsel for Mr. S. was not aware at that time that the adoption order had been made. It is not clear whether Mr. Low's agent was aware or not. When Slatter J. asked why the application before Sanderman J. had proceeded *ex parte*, the agent responded as follows:

> At the Director's [of Catholic Social Services] directions sir, the Director had advised all adoption agencies that the way that they proceed in situations where notice to the - there is reasons to not have consent of birth father, is to simply bring an *ex parte* application. Justice Sanderman had been the justice who's been hearing these applications.

16 Slatter J. ordered that the matter be dealt with in special chambers, including the issue of whether Mr. and Mrs. H. had attorned to the jurisdiction. Both counsel were agreeable to an adjournment to September 20, 2006 for that purpose. Mr. Justice Slatter expressed his view that he had jurisdiction over Mr. S., Ms. R. and the

H.'s for the purpose of ordering that none of those parties proceed with the adoption. He asked for the British Columbia court's assistance in staying the adoption until the validity of the dispensation of Mr. S.'s consent had been dealt with by this Court.

17 It was not until August 15th, that counsel for Mr. S. learned of the adoption from counsel for Ms. R. The jurisdiction in British Columbia in which the adoption was granted was blacked out of the copy of the order provided to Mr. S.'s counsel as were the names of Mr. and Mrs. H. On August 25, 2006, Mr. S. filed a Special Family Law Notice of Motion giving notice that he intended to bring an application for an order setting aside the adoption order, an order declaring that Alberta is the proper jurisdiction for a hearing of the matter and an order fixing a date for trial.

18 Mr. S. and Ms. R. were scheduled to be cross-examined on their affidavits on September 11, 2006, but Ms. R. did not attend on that date. Cross-examinations proceeded on October 24, 2006.

19 Mr. S. has retained counsel in British Columbia to set aside or appeal the adoption order. From representations made before me by his Alberta counsel, it appears that B.C. counsel has obtained an order allowing their offices to review the adoption file and proceedings, but the B.C. counsel is otherwise awaiting the outcome of these proceedings before taking further steps in British Columbia.

Issues

20 The following issues arise:

1. Does this Court have jurisdiction to and if so should it set aside the *ex parte* order granted by Sanderman J. dispensing with Mr. S.'s consent to the adoption?

2. Does this Court have jurisdiction to and if so should it hear Mr. S.'s application for guardianship of the child?

Analysis

Setting Aside of Ex Parte Order

21 In order to seek to set aside the adoption order in British Columbia and to proceed with his guardianship application, Mr. S. must have Sanderman J.'s *ex parte* order set aside. On the representations made to me by counsel and on my review of the court file, I have concluded that this order has not already been set aside.

22 Section 1(1)(b) of the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 (CYFEA) specifies that "biological father" means the man:

(i) who is married to the biological mother at the time of the birth of the child,

(ii) acknowledged by the biological mother as the biological father of the child,

(iii) declared by a court to be the biological father of the child, or

(iv) who satisfies a director that he is the biological father of the child.

23 The parties have both acknowledged that Mr. S. is the child's biological father. Counsel for Ms. R. ques-

tioned whether Mr. S. was disputing that he was the father, given his evidence during cross-examination on his affidavits that he had been diagnosed as being infertile. However, Mr. S. also admitted to being the child's biological father in his affidavits and his cross-examination. It is apparent that Mr. S. has some difficulties with communication. The evidence was that he is disabled as a consequence of a birth injury and has problems both in communicating and understanding. In reviewing the transcript of the cross-examination, it appeared to me that rather than infertile he might have meant that he was impotent following what the parties referred to as the "threesome" incident, given that he obtained a prescription for Viagra. In any event, it is clear that Mr. S. is pursuing the guardianship application as he agrees that he is the child's biological father.

24 Section 59(1)(a) of the CYFEA provides that an adoption order of a child is not to be made without the consent of all guardians of the child other than the petitioner. Section 20(3)(a) of the *Family Law Act*, S.A. 2003, c. F-4.5 applies. It states that where the mother and the father of a child are not the guardians of the child under subsection (2) (and Ms. R. and Mr. S. are not) both are the guardians of the child until such time as the child begins to usually reside with one of the parents, when that parent becomes the sole guardian of the child. "Father" for purposes of that Act, means the "biological father" (s. 1(f)(I)).

25 The child in this case was born on December 10, 2005. Ms. R. attests that she took the child home with her after the birth. On December 14th, Ms. R. obtained the *ex parte* order from Sanderman J. dispensing with the need for Mr. S.'s consent to the adoption. In his affidavit of June 27, 2006, Mr. H. deposes that he and Mrs. H. attended in Edmonton several days after the child was born. He refers to the December 14th order allowing the adoption placement to be made immediately and says that he and his wife then received the child and took her with them to British Columbia. There was no specific evidence of how long after the child's birth she was taken to British Columbia to live with Mr. and Mrs. H. However, it must have been only days after she was born. In my view, the child cannot be said to have begun to usually reside with Ms. R. in that amount of time. Accordingly, I conclude that the legislation made Mr. S. a guardian of the child. Therefore his consent to the adoption ordinarily would have been required.

26 Section 63 of the CYFEA requires that the consents obtained under s. 59 be provided with the petition for adoption. However, s. 63(2)(c) allows a petitioner to provide as an alternative to a consent "an affidavit indicating the reasons why the petitioner is requesting that the Court dispense with one or more of the consents." Section 68(4) of the Act states that on considering a petition for adoption, the Court may make an order dispensing with the consent of a guardian of the child other than a director, or a person who is required under s. 59(2) to provide a consent "if the Court, for reasons that appear to it to be sufficient, considers it necessary or desirable to do so." Presumably, these are the provisions that Ms. R. acted under in obtaining the *ex parte* order from Sanderman J.

27 The order was granted in a proceeding under the CYFEA filed in Lethbridge/MacLeod. The file has been sealed and Mr. S. does not have access to the file or the file number. As a result, he has brought his application in the present *Family Law Act* proceeding for the file to be unsealed and transferred to Edmonton. I am prepared to and do order that it be transferred here and that it be unsealed, but only for purposes permitting Mr. S. to review the file through his counsel. Otherwise, the file is to remain sealed unless the Court orders otherwise.

28 The British Columbia *Adoption Act*, R.S.B.C. 1996, c. 5, s. 11 allows the Court on application to dispense with notice of a proposed adoption to a birth father if it is satisfied that it is in the child's best interests to do so, or that the circumstances justify dispensing with the notice. An application to dispense with consent can be joined with an application for an adoption order. Section 17(1) of that Act provides that on application, the

Court may dispense with a required consent if it is satisfied that it is in the child's best interests to do so or other circumstances justify dispensing with the consent. An application under that section may be made without notice to any other person and may be joined with any other application that may be made under this Act: s. 17(4) My interpretation of this provision is that it allows for a court to dispense with the consent of a guardian to an adoption in appropriate circumstances.

29 The legislation in Alberta is different from that in British Columbia. There is no express provision in the Alberta Act that allows notice of an application to a guardian or the child's biological father to be dispensed with or to dispense with his consent: *H. (D.N.), Re*, 2006 ABQB 681 (Alta. Q.B.) [hereinafter *Re J.D.B.*] at para. 25. In fact, s. 64(1), requires a petitioner to serve notice of the hearing of the petition not less than 30 days before the date of the hearing on the guardians of the child and biological father of the child. As Watson J. (as he then was) says in *Re J.D.B.* at para. 5:

> It is plainly the will of the Legislature that notice be given to biological fathers, in particular, so that they are in a position to express any objections they may have, or to take any positions that they may wish to take in relation to the adoption of their natural children.

30 Sanderman J.'s order has not been appealed and were it to be appealed, this appeal would not be before me. However, Sanderman J.'s order was made *ex parte*. Therefore, it can be revisited. Rule 387(2) provides that any order made *ex parte* may be discharged by any judge on notice given to every person affected.

31 Sanderman, J.'s order was made under Rule 387(1) of the Alberta *Rules of Court* which allows the Court to make an *ex parte* order if satisfied that no notice is necessary or that the delay caused by giving notice might entail serious mischief. According to Stevenson & Côté's *Alberta Civil Procedure Handbook* 2000 (Edmonton: Juriliber, 2000), p. 288, there must be clear evidence presented of the harm that would be done by giving notice or by waiting until notice is given.

32 Although it is not before me, there is evidence before me that the affidavit Ms. R. relied upon in the application before Sanderman, J. is similar to the evidence she swore in a later affidavit. It appears, therefore that in her affidavit of December 12, 2005, Ms. R. swore that she was afraid of Mr. S. as he had proven to be a dangerous person and she had serious concerns about harm that might come to her or to the prospective adoptive family if he was notified of the adoption. The order granted by Sanderman J. specified that it was being granted on it appearing that Mr. S. posed a threat to Ms. R. and to the adoptive parents.

33 Only the affidavit was before Sanderman, J. I have had the benefit as well of reviewing the cross-examination on the later affidavit, which cross-examination occurred much after the application before him.

34 Even if notice can be dispensed with on the basis that the Respondent poses a safety risk, which I do not decide, Mr. S.'s affidavits taken together with the cross-examination of Ms. R. on her affidavit suggest that no such risk existed in this case.

35 Ms. R. deposed that after she moved in with Mr. S., he began controlling her and started to run all aspects of her life, including what she should wear, what music she could listen to, what religion she should adhere to and with whom she could associate. In his affidavit of August 25, 2006, Mr. S. responded to the allegations made by Ms. R. He conceded that on occasion he tried to give Ms. R direction regarding the choices that she was making. He claimed that Ms. R wanted to go out dancing and drinking while pregnant but he told her she should not do so. He asked her to wear a dress that he had bought for her rather than sweat pants to a formal

affair. He asked to have some input into the music they listened to. He advised Ms. R that he would not convert to her faith but did not object when she did not want to have their wedding ceremony in a church of his faith. He deposed that the only friend he objected to her associating with was her old boyfriend, who Mr. S maintained was a crack cocaine user. In my view, Ms. R.'s allegations of control do not establish that Mr. S. was a threat.

36 Ms. R. deposed that Mr. S. is mentally challenged, has a low I.Q. and is on AISH. Mr. S. admitted to having a learning disability, but said that his mother has agreed to assist in raising the child. Again, these assertions do not go to his dangerousness. Ms. R. was friends with Mr. S. for two years before going out with him. She must have been aware of his mental abilities before moving in with him and presumably, was accepting of them. In cross-examination, she said that she did not view him as mentally challenged, although he had problems communicating and with spelling and grammar.

37 Ms. R. deposed that soon after cohabiting with him she became aware that he was heavily involved in a drug gang, selling crack cocaine on the streets of Edmonton, and that he had been involved with the gang for a long time. In her cross-examination on affidavit, Ms. R. admitted that she had never seen Mr. S. use drugs other than some Ecstacy which he had taken with her on one occasion. She described his gang as his half-brother, his best friend and his uncle's girlfriend's son - their own little group. She testified that she had never seen him sell drugs. Mr. S. denied having a drug habit or having ever sold drugs, but admitted to having tried drugs in his youth and having taken Ecstasy with Ms. R.

38 Mr. S. was adamant that he was not in a drug gang. However, at one point during his cross-examination, when asked whether he denied having received any money from drug gangs, he said, "That's correct. I got out of that completely." Mr. S. admitted that his younger half-brother and a friend were involved in drug activity while Ms. R. lived with him and that they visited his home, although he denied that they would bring drugs to his house. He said that he knows the people his brother associated with in the drug trade because he went to school with them. He claimed that Ms. R. associated with the half-brother as he gave her rides to work. He said that he was upset at his brother's involvement, they argued about it, that his brother is no longer involved in drug activity and in any event he hardly ever sees him. On cross-examination, Ms. R. confirmed that Mr. S. tried to convince his brother to get out of drug activity.

39 Ms. R. deposed that Mr. S's role in the drug gang was to transport cash from on-street agents to members higher up in the gang and that he would receive $100 from each cash envelope that he would transport. Mr. S. denied this. He said that on one occasion he delivered money in a sock from his half-brother to a friend of the brother's who was supposed to use it to buy a motorbike for the brother. He was paid $100 for doing so.

40 Ms. R. deposed that on several occasions she heard Mr. S. and his gang members talk about how they beat up people who owed them money or when they had scores to settle. She said that Mr. S. and his friends or gang members would tell her about beating people up with crowbars and other weapons. She also described two occasions when Mr. S.'s brother came to the apartment with blood on his clothes claiming to have beaten someone up. Mr. S. denied ever having beaten anyone up or having talked about doing so. He conceded that his brother visited them once with blood on his clothes but said this was the result of a motorbike accident. He denied that his brother ever spoke about beating someone up. In cross-examination, Ms. R. recalled that the brother had appeared with bloody clothes after an accident. In an affidavit sworn July 8, 2006, she corrected her previous affidavit by stating that there was just one occasion when the brother visited them with blood on his clothes and said that he had beaten someone up.

41 Ms. R. deposed that intimidation was commonly used to keep gang members' girlfriends quiet about their activities. In cross-examination, she admitted that she did not know whether Mr. S.'s half-brother had a girlfriend. She said that she could not remember the names of any of the girls, that there were a lot of girls in and out and that they were not friends of hers. She agreed that she had not had anything but casual conversations with the few girlfriends that she had met. She did not give any examples of intimidation.

42 Ms. R. deposed that Mr. S. demanded that she participate in a "threesome." Mr. S denied having intimidated Ms. R, having participated in any such sexual acts or having forced sex or sexual acts on anyone. In his first affidavit, he admitted that he and Ms. R attempted a threesome at her instigation and that he encouraged her to live out her fantasy if that is what she wanted to do. He said that he became upset at her response to one of the men she invited over and that she went into another room and carved a word into her arm, explaining to him that she always screwed up the things that were good in her life. In a supplementary affidavit, Mr. S. stated that the threesome was his idea as he wanted to give Ms. R. a chance to live out their fantasies before marriage. However, he also said that it was a test and that he hoped she would not go through with it. He said that they both accessed a website to speak to men about engaging in a threesome but they could not find anyone Ms. R. was attracted to so they used the telephone grapevine. He said Ms. R. recorded a message greeting to attract the men and spoke with them to lure them over. He acknowledged in cross-examination that it was not just Ms. R. but rather both of them who invited the men to come over.

43 Ms. R. deposed that Mr. S. had drug use problems in the past, drank heavily and when in a drunken state would become argumentative and get into fist fights. She agreed in cross-examination that his drug problems were before he was involved with her and that she had only ever seen Mr. S. in one fight, a fist fight with his brother. Mr. S acknowledged that he drinks alcohol on occasion and that there have been occasions when he has been drunk on weekends and argumentative.

44 Ms. R. deposed that Mr. S. had threatened her with physical harm. In cross-examination, she admitted that he had never threatened her. She said that her father and other men had been verbally abusive towards her and that Mr. S. had been argumentative with her or demeaning towards women and that made her feel threatened. She also indicated that once, when they were on the way to the doctor's office for an appointment, she was arguing with him and he was yelling at her "right in my face as if he were trying to sit there and talk to one of his buddies." She confirmed that she testified in a harassment hearing and when asked by the Crown prosecutor if she was scared of Mr. S. she said no, that she was concerned. However, she also said that actually she was scared at the time because Mr. S. was in court and so she did not say that she had been scared of him.

45 Ms. R. agreed that she and Mr. S. had become engaged after she learned that she was pregnant and that she remained with him for two or three weeks after the "threesome" event.

46 Ms. R. mentioned in the affidavit that she had been in touch with the Edmonton Police Service due to Mr. S.'s constant harassment of her and her mother and that he had been arrested twice for harassment and breach of the conditions of his bail. She advised that she had told the police about Mr. S.'s drug activity. Mr. S. admitted that he had a court date respecting the harassment charges which relate to e-mails sent to Ms. R. Ms. R confirmed in her cross-examination that the harassment charges were based on e-mails that she received.

47 Much of this evidence may be relevant to whether it is in the best interests of the child that the adoption order be reopened or that Mr. S. be granted guardianship. However, it does not establish that he posed a safety risk. I note that in *W. (E.D.) v. Alberta (Director of Child Welfare)* (2005), 382 A.R. 80, 2005 ABQB 304 (Alta.

Q.B.), [hereinafter *E.D.W*] at para. 25, Ross J. held that evidence of abusiveness is irrelevant to an application to dispense with service unless the evidence shows that harm to the child's best interests is likely to result from service. Her case was an appeal of an application for permanent guardianship but it seems to me the principle is the same. I note that *H. (D.R.), Re*, 2004 ABQB 481 (Alta. Q.B.) [hereinafter *D.R.H*] is to the contrary. In *D.R.H* the biological mother raised security concerns relating to the biological father. Lee J. dispensed with the need for the biological father's consent to the adoption as he found that the father could make no meaningful contribution to the process or the best interests of the child. I find the reasoning in *E.D.W* persuasive and follow it and expressly decline to follow *D.R.H.*

48 The H.'s argue that they have not attorned to the jurisdiction. However, they had notice of the proceedings before me and were, in fact, represented before me, albeit for the limited purpose of disputing jurisdiction. They were not represented on the original application made by Ms. R. to dispense with Mr. S's consent and service upon him. They dispute that Alberta is the proper jurisdiction in which to deal with matters concerning the child. However, it is only this Court which may set aside the *ex parte* order of Sanderman J. In all of the circumstances, I do set aside Sanderman, J.'s *ex parte* order, as I am permitted to pursuant to Rule 387(2).

Jurisdiction to Deal with Mr. S.'s Application for Guardianship

49 Mr. Low, counsel for Ms. R. and, for limited purposes, the adoptive parents, argues that Ouellette J.'s order for substitutional service was 'improper' because no personal service was attempted on the adoptive parents. However, the evidence before Ouellette J. was that Mr. Low offered to facilitate personal service through his office if an order for service *ex juris* was obtained. Such an order was obtained although it appears it was not actually served on Mr. Low. While this is regrettable, since Mr. and Mrs. H have had notice, in my view nothing turns on the fact that the order for service *ex juris* was not served upon them.

50 However, even if service of the Amended Claim on Mr. and Mrs. H. is established, Mr. S.'s parenting application is moot unless and until such time as the adoption order in British Columbia is set aside. The effect of an adoption order under the British Columbia *Adoption Act* is that the "child becomes the child of the adoptive parent" (s.37(1)(a)) and the birth parents "cease to have any parental rights or obligations with respect to the child" (s.37(1)(c)). Section 73 of CYFEA says "an adoption effected according to the law of any jurisdiction outside Alberta has the effect in Alberta of an adoption order made under this Act, if the effect of the adoption order in the other jurisdiction is to create a permanent parent-child relationship." Given this legislative regime, at present, Mr. and Mrs. H. are the child's parents for all purposes and Mr. S. is a legal stranger to the child.

51 Section 73.1 of the CYFEA gives the Alberta Court the ability to set aside an adoption order within one year or after one year if "the order was procured by fraud" and it is in the best interests of the child to do so. Ms. R. argues that Mr. S.'s application under this section cannot succeed because it only applies to Alberta adoptions. I agree. "Adoption order" is defined under s. 1(a.1) of the CYFEA as being an adoption order granted under the provisions of that Act.

52 I do note that the CYFEA gives the Alberta court jurisdiction to set aside an order procured by fraud and I must say that the evidence relied upon by Ms. R. before Sanderman, J. gave me much concern and may come close to what this section refers to as "fraud". At the very least it was very misleading and seemingly intentionally so. I am concerned, as well, that the order was obtained *ex parte* based on this questionable evidence, given the high duty upon those who obtain such *ex parte* orders.

53 However, the child has been in the care of Mr. and Mrs. H. and living in British Columbia for about a

year now. Given that, in my view, British Columbia is the proper jurisdiction to determine the best interests of this child. Furthermore, it is my view that a British Columbia court is the proper court to consider an application to set aside the adoption granted in that province.

54 If the adoption is set aside, this Court then would have jurisdiction pursuant to s. 23 of the *Family Law Act* to deal with the guardianship and parenting issues raised by Mr. S. because he resides here. However, I believe that the appropriate jurisdiction to deal with these issues as well, is British Columbia as the child is resident there and has a real and substantial connection with that province: *P. (N.) v. LDS Adoption Services* (2006), 57 Alta. L.R. (4th) 59, 2006 ABQB 78 (Alta. Q.B.), at para. 20, citing Castel and Walker, *Canadian Conflict of Laws*, 6th ed., vol. 2 (Marham, Ontario: LexisNexis, 2005) at s. 18.1.d). Clearly, however, it will be for the British Columbia courts to decide if they wish to take jurisdiction over the guardianship and parenting issues raised by Mr. S. If the British Columbia court declines to take jurisdiction, then Mr. S. may renew the application he has made here.

55 Accordingly, Mr. S.'s application for guardianship and parenting is adjourned pending the outcome of the British Columbia application. Mr. S. has leave to renew this application should the British Columbia court decline to take jurisdiction in his application for guardianship and parenting rights and determine that Alberta is the proper venue for this application.

56 Costs may be spoken to if desired.

Application dismissed.

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