

It's Good News To Have a Dad

The Background

The fact situation in *Johnson-Steeves v. Lee* is unusual, to say the least. But the decision is loud and clear - and is good news for fathers who want to be involved in the lives of their children.

Madam Justice C. L. Kenny, of the Court of Queen's Bench of Alberta, released written reasons on May 27th, 1997, which held that access is the child's right and that a mother and father both "form an integral part of each child's life whether or not they reside with their children." That decision has been upheld on appeal to the Alberta Court of Appeal which rendered a decision on November 7th, 1997.

Ms. Johnson-Steeves, the mother, told the court she made a deal with Dr. King Tak Lee, a long time friend, for them to have intercourse so he could father a child for her and contribute financially towards its care. He was to leave all decisions regarding the health and welfare of the child to her but would be able to visit with the child when he was in town. The nature and extent of the visitation wasn't discussed at the time. (Dr. Lee is a medical doctor in Toronto and lives in the Toronto area and Ms. Johnson-Steeves lives in Calgary.) The two had met in 1981 when Dr. Lee was practicing medicine and Ms. Johnson-Steeves was attending nursing school. They became friends but were out of contact from 1985 until Ms. Johnson-Steeves called him late in 1991. They agreed he would stop by and visit with her and her 2 children in March, 1992, on his way to a vacation in Whistler, B.C. They later agreed that Dr. Lee would join Ms. Johnson-Steeves and her parents for a few days in Las Vegas before going on to Whistler.

While in Las Vegas Ms. Johnson-Steeves proposed to Dr. Lee that he contribute frozen sperm to her so she could conceive a third child. She said she had felt like a failure because she had not been able to have natural births with her first two children and had long and difficult pregnancies. She attributed this to the size of her husband (6'3"), from whom she was then separated and involved with a very acrimonious divorce and custody battle. She wanted another child to prove to herself that she could "do it right". She denied at trial that she wanted another child so she could remain on social assistance for another two years, as would be the case if she was pregnant.

The Deal

According to the judgement Ms. Johnson-Steeves gave these reasons why she chose Dr. Lee as the person with whom to conceive a child:

- He was of a much smaller stature than her husband with "small hands and feet" which would increase her chances of carrying a smaller child and would allow for an easier delivery. As well, he was also academically extremely bright.
- He "fit the financial mould" she wanted as she didn't want this child to be part of the welfare system but wanted financial assistance to support the child and she knew Dr. Lee had the means to supply it. To be sure she had enquired about his income.
- She wanted the child to be of mixed heritage as this would be "a nice way to bring the world together." (She is part Caucasian and part Jamaican and he is of Chinese heritage.)

Ms. Johnson-Steeves had rejected using a sperm bank (because it cost \$500 an attempt and she didn't have the money) and adoption (because that wouldn't allow her to carry and deliver the child as she wanted). As well, in both of these cases she would be solely financially responsible for the child. She wanted Dr. Lee to freeze some

sperm and send it to her so she could impregnate herself, but Dr. Lee pointed out it wasn't as easy as that and she would need medical intervention.

Eventually they agreed that he would father a child and be a financial provider. Further he agreed he would not interfere in the health and welfare issues of the child as she wanted to raise the child her way and didn't want interference on issues such as schooling, breast feeding and immunization. It was understood that Dr. Lee would see the child from time to time and a bargain was struck. They shook hands on the deal and had intercourse several times and sometime in late April or early June she called him to tell him she was pregnant. Dr. Lee visited Ms. Johnson-Steeves for a week in April, before the news, and again in June and July. In late August or early September he took her for a week to Hawaii and he visited again in December, 1992. They talked on the telephone and he gave her various cheques totaling over \$3,000 before the child was born to help her out financially.

On January 26th, 1993, Nigel Johnson-Steeves was born and a blank was put beside the place of the father's name on the birth certificate. She sent Dr. Lee a picture and he visited her and the child in February, 1993. At that time he entered into a maintenance agreement with Ms. Johnson-Steeves under the Parentage and Maintenance Act, R.S.A. 1990, c. P-0.7, acknowledging that he was the father and agreeing to pay support for him in the sum of \$300 per month - the amount agreed upon in Las Vegas. She also expected additional funds from him and he provided \$3,000 over the next several months.

The Problem (top)

Dr. Lee visited again in August and November, 1993. After that he called to arrange for visits but Ms. Johnson-Steeves said no. Eventually she told him to call back in June, 1994, by which time she felt the acrimonious proceedings with her husband would be finished and she would be able to deal with this matter. He says she was upset because the money he was paying to the maintenance enforcement department (apart from the \$3,000 he gave directly to her) was being deducted from her social assistance and she wasn't getting it in addition to those payments. She says she was having trouble getting money from him and that she told him he couldn't see Nigel if he didn't give her the money she wanted. According to Ms. Johnson-Steeves, he had broken the agreement for financial assistance and therefore couldn't visit with Nigel.

The Proceedings (top)

Ms. Johnson-Steeves then commenced proceedings seeking permanent custody of Nigel, an order that Dr. Lee be denied access to him and an order for child support. Dr. Lee had no problem continuing to pay support and left it to the court to determine the correct amount but he opposed the claim for no access on the grounds that it is in the best interests of Nigel that there be access.

Ms. Johnson-Steeves told the court that she feels Nigel has a family with her and her two other children, that visits with Dr. Lee would break up that family and that Nigel has the extended family and role models she has chosen for him. She argued that Dr. Lee could add nothing to Nigel's life and that visits with him would be disruptive. She didn't want Nigel moved back and forth between parents and she worried that she would lose control over him and be unable to protect him if Dr. Lee were granted access rights.

As well, Ms. Johnson-Steeves put forward many complaints against Dr. Lee which the court found to be either unsubstantiated or not significant. In the words of the trial judgement:
The difficulty is that Ms. Johnson-Steeves wants complete control over all aspects of [Nigel's] life and if someone disagrees with her she considers that they are simply trying to make her life difficult. She appears to take no responsibility for any of the difficulties in her life.

In Ms. Johnson-Steeves terms, Dr. Lee was merely a sperm donor. She put forward the view that there was a distinction to be made between a biological father and a social father such that only social fathers - ones involved in the family unit - should have access rights. In summary, Ms. Johnson-Steeves felt that she had the right to define what her family was to consist of, how was to be in or out of it and what relationship her children were to have with anyone other than herself. She even raised a Charter argument, unsuccessfully, that she was being deprived of her right to liberty if the court granted access.

The court held that Dr. Lee was both the biological father and a parent under the legislation and gave no weight to the biological/social father argument. On appeal the Alberta Court of Appeal upheld the trial decision. The appeal decision is discussed below.

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The interesting part of the trial judgment, which was supported by the Court of Appeal, deals with the role of fathers in the lives of their children - especially where the mother wants to eliminate or reduce any such involvement.

On this aspect the trial judge accepted the evidence of Dr. Kneier, an expert in child psychology. Dr. Kneier had never met either party nor Nigel and his evidence was on the general question of access. He was aware of the fact that Nigel, who was now four and one half years old, had not seen Dr. Lee since he was 10 months. When responding to the concern raised by Ms. Johnson-Steeves that it would cause psychological trauma to Nigel to now meet his father, Dr. Kneier said fathers are good for children and having one is "good news not bad news".

The part of the trial reasons referring to Dr. Kneier's evidence is as follows:

It is Dr. Kneier's view that although children can, and often do, achieve a healthy development without a father, provided they have a good relationship with their mother in reasonable socioeconomic circumstances, it is better for children to have a relationship with their father than not to have one.[emphasis added] He says even a limited relationship is better than none at all. The only time no relationship is better is when there is a "bad or damaging or inadequate father".

Dr. Kneier opined that a good relationship by a boy with his father helps to develop intelligence and drive, improves academic achievement and helps develop independence, empathy and social adequacy with peers. His view of the timing of any reintroduction is "the sooner the better". He sees no benefit from delay. Where conflict exists, as appears to be the case here, Dr. Kneier believes that there are mechanisms available to address those conflicts as long as the parents focus on the child.

In a nutshell, [Madam Justice Kenny] took from Dr. Kneier's evidence that it is children's best interests to have the influence of a "good or adequate" father than not to have that relationship at all. Although a child can develop normally in a one parent household, they do better with the influence of both parents. Dr. Kneier says fathers are important to young boys, they yearn for a father and a child may wonder why he has no father when other people do. A child would be happy, curious, [sic] and interested to know the man who was their dad. As he said, "It's good news to have a dad".

The trial court held that although Nigel had not seen his father for over 3 1/2 years and does not know Dr. Lee, "that alone is no reason to refuse access." It also noted that the lapse of time was created by Ms. Johnson-Steeves' refusal to allow access.

The judge was asked to redefine the meaning of "family" and to accept that the idea that a family consists of a mother, father and children is antiquated and not reflective of current realities. After all, according to Ms. Johnson-Steeves, it was her choice to create the family unit without a father and she did so. She said she intended to tell Nigel that Dr. Lee is a special family friend who contributed the genetic material to create him. To this

Madam Justice Kenny said:

Families change, however, most do by circumstance, not choice. Those of us who work in the “legal arena” see this more often than most and often wonder if there are any happy families left, but there are hundreds of thousands of content families in all shapes and forms, with and without fathers, mothers, or both. I am of the view, however, that society and biology have not yet reached the point where we have dispensed with fathers or mother completely. They form an integral part of each child’s life whether or not they reside with their children. Nigel has a father and Ms. Johnson-Steeves’ desire that it not be so, does not make it so. Ms. Johnson-Steeves’ interest in arranging her world as she would like to see it does not mean that it is also in Nigel’s best interest. Nigel knows or will come to know that he has a father and mother as all children do. It is Nigel’s right of access to his father and not his mother’s right to bargain that away. At this stage, it does not matter to Nigel whether he was conceived by artificial insemination, during a one night stand, or during a long term relationship or marriage. What he does know is that he has a father and a mother. The fact that his father does not live with Nigel does not make Dr. Lee any less a father. [emphasis added]

And further:

I find that it is in Nigel’s best interest for Dr. Lee to have access to him. This in no way detracts from the mother’s primary role in Nigel’s life or the roles played by so many other members of the extended family. What it does do is recognize that a good and decent parent, and without hesitation I so categorize Dr. Lee, can enhance this child’s life. Indeed, to the extent that only such a father could do. [emphasis added]

The court left it to the parties and their counsel to consult with someone like Dr. Kneier and assist the parties in setting up the appropriate arguments to structure the reintroduction of Dr. Lee into Nigel’s life in a manner to maximize the benefit to the child, and to ensure that the differences between the parents do not interfere with the best interests of Nigel in creating a relationship with his father. If they can’t come up with a plan, then the court would do so for them.

The Court of Appeals Decision (top)

When the matter came before the Alberta Court of Appeal it was handled pretty swiftly with a clear endorsement of the approach taken by the trial judge and her reasons for decision.

The Court of Appeal held that, even if the Canadian Charter of Rights and Freedoms applied, which it did not decide, it doesn’t create “a right for the custodial parent to decide on a family model which excludes the other parent from the life for 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.”

So far as the agreement that the father and child had not developed any emotional attachment was concerned the court said this was due to the mother’s conduct and she could not rely on the doctrine of equitable estoppel. “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.”

On the fundamental issue involved in this matter the court stated clearly what most of us figured the law to be: “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.”

Conclusion (top)

In a way, nothing about the decision in this case is startling to family law lawyers. The court kept as the key objective the issue of what was in the best interests of the child and found that one parent can't take steps which deny the other parent basic rights of access with a child. The court resisted the invitation to find that modern society had reached a stage where a mother can define what a child's family is to consist of just to accommodate that mother's view of what she wants.

But what makes this case stand out, apart from the unusual fact situation, is the clear statement that a father's presence in a child's life is good, unless he is "bad or damaging or inadequate", and that it is the child's right to access that we need to look at.

This case makes "good news" for fathers who want to have more than a passing involvement in their child's life and sets out the principle with clarity and force that unless there is some strong reason to the contrary, the courts will support this kind of father/child contact.

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