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IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
[Cite as: S.C. v. C.T., 2007 NSFC 32]

BETWEEN:

S. C.

Applicant

- AND -

C. T.

Respondent

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

APPEARANCE DATES: JAN. 29, MARCH 5, MAY 28, JULY 3, ALL 2007

DECISION DATE: AUGUST 13, 2007

APPEARANCES: LINDA RANKIN FOR THE APPLICANT
TIMOTHY PEACOCK FOR THE RESPONDENT

DECISION

Issue: Applicant seeking declaration of paternity pursuant to section 11 A of the Vital Statistics Act and DNA testing of the Respondent whom she gave to believe is the father and who has acted as if he was the father

Result: Applicant lacks credibility, application appears to lack bona fides. Application not dismissed outright but rather adjourned without day to allow her to have DNA testing on other possible father whom, she asserts, is willing to do undergo testing. If the testing affirms her allegation she can apply to have the matter continued. If the court believes there is a genuine issue as to paternity DNA testing should be ordered in the best interests of the children. The best interest of the children is an important, but not the only, factor.

By the Court:

1. The mother of two boys, born September 10, 2004 and May 26, 2006 respectively, seeks a declaratory order as to their paternity pursuant to the Vital Statistics Act, and, to that end, seeks an order for DNA testing of the children and of the Respondent.

2. There is a long answer and a short answer to the application at this point. This will be the short answer.

3. I refer to sections 11A, 11B and 11C of the **Vital Statistics Act** and to the cases of **H. (D.) v. W. (D.),** [1992] O.J. No. 1737 (Ont. Gen. Div., Charron, J.), **D. (J.S.) v. V. (W.L.)** (1995), 11 R.F.L. (4th) 409 (B.C.C.A.), and to **B. (F.X.) v. B. (M.S.)** (2007), 36 R.F.L. (6th) 403, (Y.T.S.C.). I am not aware of any Nova Scotia cases on these relatively new sections of the Act.

4. From these cases, dealing with legislation in the cases of Ontario and of the Yukon Territories (that are not quite the same as Nova Scotia's), and of British Columbia where there was no legislation on point, I derive the following principles:

> 1. It will generally be in the best interests of children that any genuine doubt as to their paternity be resolved (**D. (J.S.) v. V. (W.L.)**).
>
> 2. As important as the best interest of the child may be, as Justice Charron wrote at para. 12, "...it is not the only factor to be considered".
>
> 3. DNA testing should not be ordered where to do so is unlikely to resolve the substantive claim (**D. (J.S.) v. V. (W.L.)**, para. 25).
>
> 4. "The strength of the applicant's case is one relevant factor to be considered" (**H. (D.) v. W. (D.)**, para. 10).

> 5. That generally any real issue of paternity should be resolved using the best possible evidence...DNA evidence (**D. (J.S.) v. V. (W.L.)**).

5. Justice Veale in **(B. (F.X.) v. B. (M.S.)** wrote, para. 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.

6. In the case before me I can have little if any confidence in the credibility of the Applicant, based on the documentation in front of me. The Respondent's name appears as the father of both children and, for that to be the case, the mother (and the Respondent) would have had to swear a statutory declaration as to paternity for the older child who was born in Nova Scotia, and presumably for the child born in Newfoundland also. Thus she would have lied under oath, or, if you give her the benefit of the doubt, she would have had to have been indifferent as to whether she told the truth. She has allowed the Respondent to believe for years that he was the father and to act like a father. She and the Respondent went through a lengthy custody and access proceeding before me with numerous appearances ending just months ago and she did not breathe a word about the issue of paternity. She admittedly gives specific names to the other men whom she claims might be the children's fathers but offers no evidence from anyone but herself, although, from her affidavit, she says that one of the men named has acknowledged that he may be the father of the older child. Her stated reason for wanting the tests is for the health records of the children, but that reads like a formulaic, 'boiler plate' rationalization.

7. I suspect that the Applicant no longer finds the Respondent's involvement in her life or that of the children welcome (she goes to great lengths in her affidavit to argue what an

unpleasant person the father is, which may or may not be so), but this doesn't really address the question of paternity. Even if the Respondent is found not to be the biological father that does not resolve, or dissolve, his claim for custody. If her stated reason for the application is to found a claim for child support, made necessary by the 1988 decision of the Appeal Division of the Supreme Court in **Reed v. Smith,** 86 N.S.R. (2d) 72, then that rationale has gone by the boards as she is no longer seeking care and custody of the children, but is agreeing to them being in the care of relatives.

8. From the pleadings to date I have to say that I have the gravest doubts as to the *bona fides* of this application and the credibility of the applicant. If one were to order DNA testing on the basis of the evidence before me now it would amount to sanctioning an open season on 'dads'. While, as I say, I accept that as a general principle that the best interests of children would be to know for certain who their biological parents are, I think one needs a better reason to order DNA testing, in circumstances such as this, than a mother's petulance or transparent attempt to write the respondent out of the script of the children's lives.

9. The Applicant says that the man whom she claims to be the possible or probable father of the older child is willing to submit to DNA testing. In my opinion, that is the option to be pursued and I will adjourn the application without day to enable this to happen. Depending on the test results I may, on due notice to the other gentleman, grant a declaratory order that this other man is the father of the older child. Equally, if her allegation about the paternity of the older child is affirmed I might then conclude that she has sufficient credibility and *bona fides* to warrant ordering DNA testing with respect to the younger child. I believe I owe it to the children to hold that door open for now.

10. Application for DNA testing is adjourned without day.

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Bob Levy, J.F.C.