In the Court of Appeal of Alberta

Citation: D.W.H. v D.J.R., 2013 ABCA 240

Date: 20130705
Docket: 1101-0277-AC
Registry: Calgary

Between:

D.W.H.

Respondent (Plaintiff)

- and -

D.J.R. and D.D.

Appellants (Defendants)

Restriction on Publication: Identification Ban – See the *Family Law Act*, section 100.

By Court Order, there is a ban on publishing information that may identify the children or guardians in this matter.

NOTE: This judgment is intended to comply with the restriction so that it may be published.

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Madam Justice Myra Bielby
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment of The Honourable Madam Justice Picard and The Honourable Mr. Justice O'Ferrall

Dissenting Memorandum of Judgment of The Honourable Madam Justice Bielby

Appeal from the Order by
The Honourable Madam Justice S.M. Bensler
Dated the 12th day of October, 2011
(Docket: FL01-11127)

Memorandum of Judgment

The Majority:

I. Introduction

[1] This is an appeal of the order granted by Bensler J., the chambers justice, which declared that the respondent, Mr. H., was a legal parent and guardian of the child S. The appellant, Mr. R., is the biological father of S. He is also a legal guardian of the child. Ms. D., the biological mother of S., was named a defendant in the originating notice of motion filed by Mr. H., but she is not a party to this appeal.

[2] For the reasons set out below, the appeal is dismissed.

II. Background

[3] There has been much litigation among the parties relating to the child, S. Two decisions set out findings regarding the homosexual relationship between the appellant, Mr. R. and the respondent, Mr. H., and their arrangements with Ms. D. who bore a child for them: *DWH v DJR*, 2007 ABCA 57, 412 AR 34 [*2007 Decision*], and *DWH v DJR*, 2009 ABQB 438, 478 AR 109 [*2009 Decision*]. These decisions were the result of applications by Mr. H. to maintain contact with the child through contact orders pursuant to section 35 of the *Family Law Act*, SA 2003, c F-4.5. The chambers justice relied on these decisions in rendering her own. As a consequence, we set out several of the key findings from these decisions relevant to this appeal.

[4] Mr. R. and Mr. H. were in a same-sex interdependent adult relationship when they determined that they wanted a child. The two men worked out an arrangement with a lesbian couple, Ms. D. and her partner. According to the arrangement, which was never formalized in writing, Ms. D. would be impregnated with Mr. R.'s sperm through assisted reproduction, or assisted conception, as the process was formerly known under the previous version of the *Family Law Act*. Ms. D. would then give the child to Mr. R. and Mr. H.

[5] Ms. D. gave birth to S. in May of 2003. Mr. R. and Mr. H. were both present for the birth. Together, the two men took care of S. for the first three years of the child's life. S. grew up referring to Mr. R. and Mr. H. as "Daddy" and "Papa," respectively. Ms. D. and her partner enjoyed regular visits with the child.

[6] Mr. R. and Mr. H. separated in June of 2006. Mr. H. moved out of the family home, where S. continued to reside with Mr. R. The relationship between Mr. R. and Mr. H. was then marked by conflict and deteriorated to the point where, unbeknownst to Mr. H., Mr. R. and Ms. D. put together a 'parenting agreement' declaring themselves the guardians of S. and being the primary responsibility of Mr. R. Mr. R. and Ms. D. acknowledged the presence of partners but agreed that

neither partner would stand *in loco parentis* to S. Mr. H. knew nothing of this agreement, and, of course, was not recognized in it.

[7] In October of 2006, Mr. H. brought an application for a contact order with respect to S. That application was denied. Mr. H. appealed and this Court concluded that Mr. H. stood *in loco parentis* to S. Specifically, the Court noted at para 18 of the *2007 Decision*:

> The appellant and male respondent were in a relationship of interdependence of some permanence as defined under the *FLA* at the time of birth and for most of the child's life. Moreover, a settled intention can be gleaned from subsequent events. The appellant was involved in planning her conception, preparing the home for her birth, was present in the birthing room, and when the baby came home to reside with them, he attended to her needs, changed her diapers, fed her, and cared for her as one might expect for three years. He was known to her as Papa. He wishes to maintain that relationship. In addition and as noted in [*Doe v Alberta*, 2007 ABCA 50, 404 AR 153], a relationship of interdependence with the other parent of a child will likely create such interdependence vis-à-vis the child, by virtue of a shared household over a period of time, in the minds of both parent and child.

[8] It is also of some significance that this Court determined that Mr. H. did not require leave to bring an application for a contact order under section 35 of the *Family Law Act*. Section 35 provides that, with leave, any person can apply for an order providing for contact with a child. But a parent or a person standing in the place of a parent may make the application without leave: s 35(2). So, at that point Mr. H. was either a parent or a person standing in the place of a parent.

[9] Having determined that Mr. H. did not require leave, this Court went on to review Mr. R. and Ms. D.'s arguments as to why Mr. H. should not have contact with the child. These included the fact that Mr. H. is HIV positive, that he had allegedly made poor choices in his relationships, and that he was, for a short time, irrational and emotional following his separation from Mr. R. It was also said that S. would suffer confusion and instability if she was required to see Mr. H. The Court concluded that none of these arguments "dislodge[d] the recognition that contact by parents to their children is generally presumed, without more, to be in the child's best interests": *2007 Decision* at para 19. This Court granted an order that entitled Mr. H. to "reasonable access as requested, that is contact for a period of three hours twice per week during the afternoon when the child would otherwise be in day care, or such further access as may be agreed upon by the parties pending trial or further court order": at para 20.

[10] After the *2007 Decision*, Mr. R. took steps to have an expert child psychologist perform a parenting assessment on Mr. H. An evaluation was finalized in November of 2007, which recommended that Mr. H. have no further contact with S. Mr. R. and Ms. D. immediately brought an application to discontinue Mr. H.'s access to the child. Their application succeeded and contact between Mr. H. and S. was completely discontinued.

[11] Following the discontinuance of his contact with S., Mr. H. applied for another contact order. A six-day trial took place in May and June of 2009, before Eidsvik J., who accepted this Court's conclusion that Mr. H. stood in the place of a parent to the child. The question before Eidsvik J. was whether to grant a contact order on the basis of factors set out at section 35(5) of the *Family Law Act*. With respect to this question, Eidsvik J. found that the expert child psychologist's evaluation provided her with little assistance, primarily because of flawed underlying assumptions about Mr. H.'s relationship with S. The report assumed that Mr. H. was not a father or a parent, and that he had no right to believe he should be treated as one. Ultimately, Eidsvik J. found that access visits with Mr. H. promoted the best interests of S. She also found that S.'s emotional health could be jeopardized in the long run if Mr. H. was unable to re-establish a parental relationship with the child and held that Mr. R. and Ms. D.'s denial of contact between Mr. H. and S. was unreasonable: *2009 Decision* at paras 103-104.

[12] Following the trial, the parties were informed that under the wording of the *Family Law Act*, Mr. R. was not the legal father of S., and that by operation of the *Family Law Act*, the child's only legal parent was Ms. D., who did not have primary custody of the child. Mr. R. then applied to become, and was appointed, a guardian of S. in November, 2010. Mr. H. consented to the application.

[13] On September 7, 2010, Mr. H. filed a notice of motion seeking final determinations with respect to the parentage, guardianship and custody of S. He also sought joint custody of S. On September 16, 2010, Mr. H. filed another notice of motion, this one also seeking declarations of parentage and guardianship, as well as a declaration that certain sections of the *Family Law Act* offend section 15 of the *Canadian Charter of Rights and Freedoms*. It is unclear from the record what additional steps, if any, were taken with respect to these motions.

III. Decision Below

[14] The present appeal stems from an originating notice of motion filed by Mr. H. on October 28, 2010 naming Mr. R. and Ms. D. as defendants. In this motion, Mr. H. sought declarations that sections of the *Family Law Act*, as well as sections of the *Vital Statistics Act*, SA 2007, c V-4.1, offend section 15 of the *Charter.* A few weeks later Mr. R. applied to become S.'s guardian. The point is this: the parties were involved in making various applications during this time.

[15] The chambers justice heard Mr. H.'s application on April 20, 2011. The Minister of Justice and Attorney General ("Intervener") acted as intervener. Mr. R. and Ms. D did not appear, nor did they file any evidence and or make any submissions. There is nothing to indicate why they chose not to do so.

[16] The chambers justice issued an initial set of reasons for judgment on October 12, 2011: *DWH v DJR*, 2011 ABQB 608, 518 AR 165 [*Original Reasons*]. There, she acknowledged that the *Family Law Act* had recently been amended by the *Family Law Statutes Amendment Act*, SA 2010, c 16 [*Amendment Act*]. Despite the amendments, however, the chambers justice found it was necessary to consider the constitutionality of certain sections of the previous version of the *Family Law Act*,

since this version governed the parentage of S. (Unless stated otherwise, all subsequent references are to this previous version of the *Family Law Act*).

[17] For the purposes of this appeal, it is not necessary to review in detail the chambers justice's analysis of the constitutionality of sections of the *Family Law Act* and *Vital Statistics Act*. Her determinations in this regard have not been challenged. With respect to the *Vital Statistics Act*, the chambers justice noted that while Mr. H. had alleged that it violated his section 15 *Charter* rights by failing to recognize non-biological gay male intended parents on their children's birth certificates, he had not developed this argument. In her words, "the Applicant focussed almost exclusively on the *Family Law Act* and did not adequately address the provisions of the *VSA*": *Original Reasons* at para 142.

[18] Regarding Mr. H.'s argument that the old *Family Law Act* violated the equality guarantee in section 15 of the *Charter*, the chambers justice focussed primarily on section 13 of the old *Act*, which sets out the circumstances under which a male person is considered the father of a child conceived by way of assisted conception. The section read as follows:

> **Assisted conception**
>
> 13(1) In this section, "assisted conception" means the fertilization by a male person's sperm of a female person's egg by means other than sexual intercourse and includes fertilization of a female person's egg outside of her uterus and subsequent implantation of the fertilized egg into her uterus.
>
> (2) A male person is the father of the resulting child if at the time of an assisted conception he was the spouse of or in a relationship of interdependence of some permanence with the female person and
>
> > (a) his sperm was used in the assisted conception, even if it was mixed with the sperm of another male person, or
> >
> > (b) his sperm was not used in the assisted conception, but he consented in advance of the conception to being a parent of the resulting child.
>
> (3) Subject to the exceptions in the regulations, a male person whose sperm is used in an assisted conception involving an egg of a female person who is neither his spouse nor a person with whom he is in a relationship of interdependence of some permanence is not the father of the resulting child and acquires no parental or guardianship rights or responsibilities of any kind as a result of the use of his sperm.

[19] In accordance with the steps set out in *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396, the chambers justice began her analysis by identifying the relevant comparator group – other couples who require assistance in conceiving a child, such that they fell under section 13 of the old *Family Law Act*. She then found that section 13 created an adverse distinction on the

basis of a combination of prohibited and analogous grounds (gender and sexual orientation) between gay male intended fathers and others who require assisted conception. Specifically, the section deemed a male person in a spousal relationship or a relationship of interdependence of some permanence with the female person who gave birth to the child to be the father of the resulting child by operation of law, even if his sperm was not used in the fertilization process, as long as he consented in advance to being a parent: s 13(2)(b) of the old *Family Law Act* (repealed in 2010). As noted by the chambers justice at para 44 of the *Original Reasons*:

> This is clearly an instance of an individual becoming a parent by operation of law based solely on intent as opposed to biology without having to resort to the adoption process. It is also, given the wording of s. 13, applicable only to heterosexual couples using assisted conception.

[20] Next, the chambers justice considered whether section 13 perpetuated disadvantage or prejudice, or stereotypes on the claimant group (intended gay male fathers). She found that it did, in that it forced members of that group to endure a protracted legal process in order to have their parentage and guardianship recognized (unlike heterosexual intended fathers whose paternity is automatically recognized by operation of law). Her findings in this regard are summarized at paras 90-91:

> The effect of the *FLA* is that when gay males in a committed relationship decide to have a family assisted by a female (in this instance with the assistance of a friend who conceives for them) they should either be satisfied with guardianship status (which they must apply for to receive) or they must undertake the protracted adoption process. Denying a gay father (biological or intended) the status of legal parent has a negative effect on his human dignity...
>
> The ultimate operation of the *FLA* suggests that same-sex couples are somehow less able, or less worthy, of being parents. This reflects outdated assumptions or understandings about family in Canadian society.

[21] Having found that Mr. H.'s section 15 *Charter* rights had been infringed, and that the infringement was not demonstrably justified under section 1, the chambers justice moved on to the appropriate remedy. For his part, Mr. H. asked for a reading in of the words necessary to bring section 13 of the *Family Law Act* into conformity with the *Charter*. The chambers justice refused to take this step. In her view, reading in language to acknowledge the parental status of men in same-sex relationships who utilize assisted conception to start a family would be an unacceptable intrusion into the legislative domain. Instead, the chambers justice indicated that she would have declared section 13 of the *Family Law Act* to have been invalid and then suspended her declaration to avoid creating a legal vacuum. However, she considered such declaration and suspension to be unnecessary, since the offending provision had been repealed by the *Amendment Act*.

[22] After addressing the *Charter* issues, the chambers justice moved on to decide whether to grant a declaration naming Mr. H. a parent and guardian of S. In her view, the originating notice of motion filed by Mr. H. sought a declaration of parentage, but not guardianship. It was her

understanding that Mr. H. had already commenced a guardianship application in another proceeding, and thus it was not her place to decide that matter.

[23] As to the question of parentage, the chambers justice was troubled by the fact that Ms. D. was S.'s only legal parent, and thus considered exercising the court's inherent *parens patriae* jurisdiction to grant a declaration in favour of Mr. H. The chambers justice referred to the Ontario Court of Appeal's decision in *AA v BB*, 2007 ONCA 2, 83 OR (3d) 561 [*AA*] as authority for the proposition that a court can use that jurisdiction to grant a declaration of parentage where there is a legislative gap that prevents the legal recognition of the parent in question, and it is in the best interests of the child that there be such legal recognition.

[24] It is useful at this point to summarize the Ontario Court of Appeal's decision in *AA*. AA (a woman) was in a same sex union with CC. BB, a male friend of the couple, assisted them in starting a family by enabling CC to conceive. The parties agreed that AA and CC would be the primary caregivers of the child, DD, and DD referred to them as his two mothers. However, under Ontario's *Children's Law Reform Act*, RSO 1990, c C 12 [*CLRA*], CC and BB were the legal parents of DD.

[25] AA sought a declaration that she, too, was a parent of DD. The application judge recognized that AA clearly acted as a parent to the child. Nevertheless, he found that he could not grant a declaration of parentage because the legislative scheme of the *CLRA* did not contemplate the possibility of a child having more than one mother. The Ontario Court of Appeal agreed with the application judge's interpretation of the *CLRA*, but saw this as a legislative gap that could be filled by an exercise of the court's inherent *parens patriae* jurisdiction. Rosenberg J.A. stated on behalf of the court at para 35:

> Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The *CLRA*, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.

[26] Ultimately, the court found it was in the child's best interests for both his mothers to be legally recognized as parents, in large part to provide AA with decision-making power with respect to the child in the event that anything happened to CC. Thus, the court exercised its *parens patriae* jurisdiction to grant a declaration of parentage in favour of AA.

[27] Drawing from *AA*, the chambers justice in this case determined the Alberta *Family Law Act* also contained a legislative gap in that parentage by operation of law is not available to intended gay male fathers. Further, she found that it was not in the child's best interests to have only Ms. D. recognized as a her legal parent, given that Messrs. H. and R. had been the child's primary caregivers. Thus, the chambers justice granted a declaration naming Mr. H. a parent, stating at para 139:

> In the case at bar, Mr. H. acted as one of the primary caregivers to the child S. for the first three years of her life. Baby S. was dependant on Messrs. H. and R. to provide for all of her needs during this period. Both individuals acted as *de facto* parents towards the child and jointly provided for her necessities of life. It is contrary to the best interests of the child S. to be limited to the legal recognition of a sole parent, Ms. D. There is no other method of correcting for this deprivation outside of the exercise of the *parens patriae* jurisdiction. I thus declare Mr. H. to be a legal parent of S.

[28] The chambers justice added that her declaration did not automatically alter any of the parenting or guardianship arrangements currently in place for the child S.: at para 140.

[29] After the *Original Reasons* were released, the Intervenor (the Minister of Justice and Attorney General) wrote to the chambers justice, with the consent of the parties, to advise her that the *Domestic Relations Act*, RSA 2000, c D-14 was in force when S. was born, and that this was arguably the applicable legislation with respect to the child's parentage. The chambers justice requested and received further submissions from Mr. H. and the Intervenor on the *Domestic Relations Act*.

[30] On December 19, 2011, the chambers justice released a set of supplemental reasons for judgment: *DWH v DJR and DD*, 2011 ABQB 791, 528 AR 160 [*Supplemental Reasons*]. She found that she ought to have considered Mr. H.'s *Charter* challenge in the context of the *Domestic Relations Act*. Citing *Dikranian v Québec (Procureur Général)*, 2005 SCC 73, [2005] 3 SCR 530, the chambers justice stated at para 3:

> It is clear that the legislation governing the Applicant's *Charter* challenge is that which was in force at the time of the child's birth. The rights and obligations attaching to parental status crystalize when a child is born and continue to operate to determine parentage throughout a child's lifetime. These rights and obligations vest at the time of birth and are not altered by subsequent legislative amendments. There was no clear or unambiguous intent by the legislature to [a]ffect these rights or obligations through the introduction of the *FLA*.

[31] The chambers justice then considered whether section 78(1) of the *Domestic Relations Act* infringed Mr. H.'s section 15 *Charter* rights. That section reads as follows:

> **Presumption of parentage**
>
> 78(1) For all purposes of the law of Alberta, unless the contrary is proven on a balance of probabilities, there is a legal presumption that a person is the father of a child in any of the following circumstances:
>
> (a) the person was married to the mother of the child at the time of the birth of the child;

> (b) the person was married to the mother of the child and the marriage was terminated by
>
> (i) a decree of nullity of marriage granted not more than 300 days before the birth of the child, or
>
> (ii) a judgment or divorce granted not more than 300 days before the birth of the child;
>
> (c) the person married the mother of the child after the birth of the child and has acknowledged that the person is the father of the child;
>
> (d) the person cohabited with the mother of the child for at least one year immediately before the birth of the child;
>
> (e) the person is registered as the father of the child at the joint request of himself or herself and the mother of the child under the *Vital Statistics Act* or under similar legislation in a province or territory other than Alberta.

[32] The chambers held that, like the *Family Law Act*, the *Domestic Relations Act* violates the equality guarantee in section 15 of the *Charter* (see para 12 of the *Supplemental Reasons*):

> The *DRA* bases male parentage on the existence of a spousal or common-law relationship with the birth mother; an occurrence that will never be realized in a same-sex relationship. As such, the *DRA* grants the benefit of presumed parentage (and with it, joint guardianship rights under s. 50 where the father is in a marriage or common-law relationship with the mother) to heterosexual couples alone. This limited recognition through presumption operates to an unfair disadvantage for individuals not in a heterosexual relationship with the birth mother and is discriminatory. See paras. 43 - 50 of my [*Original*] Reasons.

[33] The chambers justice then returned to the question of whether to grant a declaration of parentage. The *Domestic Relations Act* was found to contain an even wider legislative gap than the *Family Law Act*, in that it fails to contemplate parenting situations involving same-sex couples as well as situations involving reproductive technology.

[34] As in her *Original Reasons*, the chambers justice determined that it was in best interests of S. to grant a declaration of parentage in favour of Mr. H., using the court's *parens patriae* jurisdiction. She came to this conclusion even though she now viewed Mr. R. to be legal parent of the child, such that S. had two legal parents (Mr. R. and Ms. D.). The chambers justice viewed Mr. R. as legal parent because of section 78(1)(e) of the *Domestic Relations Act* – registration under the *Vital Statistics Act*. Despite the fact that S. had two legal parents, the chambers justice concluded

a declaration of parentage in favour of Mr. H. was necessary because it was not in the best interests of S. to be deprived of the legal recognition of *both* Mr. R. and Mr. H. as parents.

[35] In addition to a declaration of parentage, the chambers justice also named Mr. H. a guardian over S. She considered this to be justified on the basis that, had section 78(1) of the *Domestic Relations Act* not discriminated against Mr. H., his status as a guardian would have been recognized automatically under that *Act*. She referred to section 50 of the *Domestic Relations Act*, which provides that the joint guardians of a minor child are the mother and the father, provided the father was married to or cohabited with the mother prior to the birth of the child, or was married to the mother after the birth, and has acknowledged his status as father. The chambers justice reasoned at para 29:

> Had the provisions of the *DRA* not discriminated against the Applicant, he would have been both a parent and a guardian under that *Act*. If this initial discrimination had not occurred, the Applicant would not have been required to bring his current application under the *FLA*. As such, and in order to treat the Applicant on an equal footing as a heterosexual male in a spousal relationship with the birth mother, the Applicant must be declared to be a guardian of the child S. However, a gap would have continued to exist under the *DRA* as it would have limited the number of possible guardians to two. Therefore, in exercise of my *parens patriae* jurisdiction, I would also name the Applicant as a guardian over the child S.

[36] The chambers justice added that this declaration of guardianship, "does nothing to alter any of the parenting arrangements, including custody and access arrangements, currently in place": at para 30.

IV. Issues on Appeal

[37] This appeal pertains only to the declarations of parentage and guardianship. The appellant does not dispute that certain sections the *Domestic Relations Act,* as well as the older version of the *Family Law Act,* violate section 15 of the *Charter*, nor that these *Acts* contain legislative gaps. Nor does the appellant challenge the chambers justice's finding that the *Domestic Relations Act* is the governing legislation with respect to the parentage of S.

[38] The appellant advances three grounds of appeal. First, he submits that the chambers justice erred in declaring Mr. H. to be a parent and guardian of S. because the originating notice of motion filed by Mr. H. on October 28, 2010, does not seek such declarations. Second, the appellant argues that the chambers justice erred in the exercise her *parens patriae* jurisdiction in three ways: a) the welfare of a child must be "at risk" before a court can exercise the jurisdiction to fill a legislative gap; b) the chambers justice exercised the jurisdiction for the benefit of Mr. H., and; c) there was not enough evidence before the chambers justice for her to make a determination regarding S.'s best interests. The appellant's third ground of appeal contends that the chambers justice contravened section 9(7) of the current version of the *Family Law Act* by creating a situation in which S. has three parents.

V. Standard of Review

[39] What standard of appellate review applies to a chambers justice's conclusion about a child's best interests? Although framed in various ways (sufficiency of notice, *parens patriae* jurisdiction, sufficiency of evidence, etc.) each of the appellant's grounds of appeal are reducible to this: did the chambers justice err in concluding that it would be in S.'s best interests to have Mr. H. as her parent and guardian so as to warrant this Court's intervention?

[40] In *Van de Perre v Edwards*, 2001 SCC 60, [2001] 2 SCR 1014, the Court emphasized that a deferential standard was appropriate because "finality is not merely a social interest; rather, it is particularly important for the parties and children involved" and determining the best interests of a child are "inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process": para 13. Moreover, "it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal: para 14 [emphasis added].

And finally,

> 15 ... the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence ... an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

Accordingly, this forms the foundation of our review of the order on appeal.

VI. Analysis

A. Issue One–Declarations of parentage and guardianship not requested in the originating notice of motion

[41] As noted by the chambers justice in her *Original Reasons*, the originating notice of motion filed by Mr. H. on October 28, 2010, does not expressly a seek a declaration of parentage, nor does it contain any reference to a declaration of guardianship. This raises whether the chambers justice proceeded appropriately by granting such declarations, and in particular, whether Mr. R. was denied an opportunity to present evidence that could have informed her decision.

[42] In general, it is inappropriate to decide an issue that has not been expressly raised in the notice of motion filed by the applicant. The result could be unfairness to the other side; moreover,

it could mean that the court lacked information needed to render a fully informed decision. Justice Veit touched on these issues in *Zaharia v Sharkey*, 2000 ABQB 308, [2000] AJ No 543, where she noted at para 19:

> The Zaharias did not request any sanction in their notice of motion. The court cannot give to a party something more than what the party has asked for; this is, in part, in recognition of the policy that the party opposite must have knowledge of everything that is requested by the other side so as to know the extent of their potential jeopardy and so as to be able to respond to it.

[43] With these points in mind, we find that in the particular circumstances of this case, the chambers justice's decision to grant declarations of parentage and guardianship does not warrant our intervention. We can do no better than quote with approval what the learned chambers justice had to say about this argument in her *Supplemental Reasons* at paragraph 34:

> The Applicant's Notice of Motion clearly details the grounds of his *Charter* claim, stating that the legislation fails to provide "parental presumptions for intended gay male fathers" and "does not make provisions for the familial structure of a gay male family or provide a remedy to accept these gay male parent sets." His claim clearly sought recognition as a parent, which ultimately was the remedy granted.

We could also point to other relief sought in Mr. H.'s originating notice of motion which made it clear that he was seeking recognition of his status as a parent of the child, S. As far as the notice to Mr. R. is concerned, keeping in mind that Mr. H.'s status as a parent or a person standing in the place of parent had already been recognized when he was permitted to bring an application for a contact order without leave pursuant to section 35 of the *Family Law Act*, the originating notice of motion names him and Ms. D.

[44] Moreover Mr. H.'s two September applications (which also named them) and Mr. R.'s guardianship application also form part of the context. The former expressly sought guardianship, custody and parentage so we are unable to conclude that Mr. R. was unaware or otherwise "blind sided" by what eventually transpired, or that this application was heard in a vacuum. He chose not to be represented by counsel although the evidence was that he would have been financially able to do so.

[45] And the evidence put before the chambers justice also made it clear that Mr. H. was seeking formal recognition of his parental status. That evidence consisted of the events leading up to the child's birth as well the parenting performed by Mr. H. during the first three years of the child's life, all of which evidence was found to be fact in two prior proceedings involving the same parties and which proceedings were specifically referred in Mr. H.'s originating notice of motion.

[46] Furthermore, the chambers justice determined that it was in the best interests of S. for Mr. H. to be recognized as the child's legal parent, in large part to reflect the reality of the events leading up to the child's birth, as well as early years of the S.'s life. In other words, the declaration was

intended to give legal recognition to S.'s own understanding of Mr. H. as her "Papa." Since the relevant legislation could not provide this legal status to Mr. H., the chambers justice opted to exercise her *parens patriae* jurisdiction to grant the declaration.

[47] We conclude that, had Mr. R. appeared before the chambers justice to oppose the declaration of parentage, he would have had a very heavy burden to overcome the conclusions that the declaration was in S.'s best interests. And, he would have had the heavy burden of proving that the events leading up to the child's birth, and the three years that followed, did not make Mr. H. a parent to S.

[48] In other words, Mr. R.'s argument was bound to fail. Two decisions (neither of which has been appealed) contain findings regarding the committed nature of the relationship between the parties leading up to the arrangement they entered into with Ms. D., the terms of that arrangement, and the fact that Mr. H. cared for S. as a dedicated father throughout the early years of her life. Considering the detailed findings in these earlier decisions regarding the lives of the parties and their relationship with S., we find that Mr. R. could not have discharged his burden, or changed the chambers justice's conclusion that the child would benefit from a declaration of parentage in Mr. H.'s favour.

[49] As for the chambers justice's decision to grant a declaration of guardianship as distinct from the declaration of parentage, we note that this portion of the *Supplemental Reasons* does not expressly refer to the best interests of S. According to the chambers justice, it was necessary to exercise her *parens patriae* jurisdiction to name Mr. H. a guardian over the child because "had the provisions of the *DRA* not discriminated against [him], he would have been both a parent and a guardian under that *Act*." This conclusion is built on the finding that section 50 of the *Domestic Relations Act*, like section 78(1), discriminates against gay males by denying them a benefit (guardianship) that flows automatically to heterosexual males who were married to or cohabited with the mother within a certain time frame around the birth of the child.

[50] We conclude that the chambers justice was considering the best interests of S. when she named Mr. H. a guardian. Specifically, she regarded the discriminatory effects of sections 78(1) and 50 of the *Domestic Relations Act* on Mr. H. as adversely affecting the child's interests. That is, it is not in a child's best interests for *her parent* to be denied the same benefits that flow automatically to heterosexual parents.

[51] To successfully challenge the chambers justice's determination that an appointment of guardianship was in the child's best interests, the appellant would have had to show that Mr. H. was not, or had never been, S.'s parent. But, of course, all of that had been previously decided. In other words, despite the appellant's lack of participation in the hearing, there were binding findings of fact before the chambers justice on this point – enough that Mr. R. would not have been able to show otherwise, had he participated.

[52] There are two final points to note with respect to this issue.

[53] First, after the *Original Reasons* were issued, the appellant was on notice that the chambers justice thought the originating notice of motion filed by Mr. H. contained a request for a declaration of parentage. However, it would appear he took no steps to put additional information before her while she considered applicability of the *Domestic Relations Act*. This factor goes further towards alleviating any concerns about any potential unfairness.

[54] Second, the chambers justice expressly precluded that these declarations would have an immediate effect on the existing custody and access arrangements. Although Mr. H. may be better positioned to apply to alter these arrangements, his role with respect to S. remains the same as it was before. This is critical because it means not only that the appellant's present rights with respect to S. have not been altered but also that the child's parenting arrangements have not been affected.

[55] The chambers justice's decision to grant declarations of parentage and guardianship in favour of Mr. H. does not warrant intervention by this Court.

B. Issue Two - The chambers justice erred in using her *parens patriae* jurisdiction to declare Mr. H. to be a parent and guardian of S.

[56] The appellant argues that the chambers justice made three errors in exercising her *parens patriae* jurisdiction. First, the welfare of the child S. was not at risk, and thus, she should not have invoked the jurisdiction. Second, the chambers justice exercised the jurisdiction for the benefit of Mr. H. Third, the chambers justice did not have enough evidence to determine what was in the best interests of S.; in particular, she did not have evidence from the appellant or Ms. D., the child's other legal parent.

[57] The *parens patriae* discussion arose in the context of the chambers justice's *Charter* analysis. First, she held that section 13(2) of the *Family Law Act* and later section 73 of the *Domestic Relations Act* discriminated against Mr. H. because he had to endure an extended and protracted process in order to have his guardianship and parentage recognized, which process similarly situated heterosexual males did not have to endure. Secondly, the chambers justice held that the infringement was not a reasonable limit prescribed by law as could be reasonably justified in a fair and democratic society: s 1. That holding meant that the impugned provisions were of no force and effect: s 52(1). She then turned to the question of remedy. Section 24(1) of the *Charter* provides that anyone whose rights have been denied may apply to the Court to obtain such remedy as the Court considers appropriate. As indicated above, the chambers justice read Mr. H.'s originating notice of motion as seeking the remedy of a declaration of parentage and guardianship. So the idea of a declaration of parentage utilizing the Court's *parens patriae* jurisdiction in the face of a legislative gap arose in the context of a *Charter* remedy.

[58] A court's discretion to exercise its *parens patriae* jurisdiction is limited, and must be exercised for the benefit of the person for whom it is exercised, and not for others: *E (Mrs) v Eve,* [1986] 2 SCR 388 at 427e-g, 71 NR 1 [*Eve*]. As stated by La Forest J. in *Eve* at 426c-d:

> The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

[59] The jurisdiction is available in a variety of circumstances, including the existence of "legislative gap" that adversely affects the interests of the child in question: *Beson v Director Director of Child Welfare (Nfld)*, [1982] 2 SCR 716, 44 NR 602 [*Beson*]. In *Alberta (Child Welfare) v BD*, 1992 ABCA 98, 2 Alta LR (3d) 142, the Court made clear that the existence of a legislative gap, alone, does not provide a basis for the Court to exercise its *parens patriae* jurisdiction. The exercise must produce some benefit to the welfare of the child in question.

[60] As discussed above, both the *Original* and *Supplemental Reasons* demonstrate that the chambers justice regarded the act of legally recognizing the parental and guardianship status of Mr. H. as advancing the best interests of S. Specifically, she determined that it was in the best interests of S. that the law recognize Mr. H. as her parent, given that he was her parent. This conclusion presumes that children benefit when the law recognizes the reality of their family situations, even when that reality falls outside the norm. The same presumption underlies the decision of the Ontario Court of Appeal in *AA*.

[61] Thus, there was no immediate "risk" to S.'s welfare, but this is not necessary to exercise the *parens patriae* jurisdiction. There was no such risk in *AA*. Rather, the law requires that the jurisdiction be invoked to promote the best interests of the child. The chambers justice's exercise of her *parens patriae* jurisdiction was intended to advance the best interests of S.

[62] As to the suggestion that Mr. H. was the beneficiary of the *parens patriae* jurisdiction, we simply say that when her reasons are read as a whole, it is clear that the chambers justice was considering the best interests of S. Whether Mr. H. *also* received a benefit – declarations in his favour – is not relevant. As the cases of *Beson* and *AA* show, an exercise of the court's *parens patriae* jurisdiction may incidentally benefit the adult applicant.

[63] Finally, with respect to the appellant's third argument, the chambers justice had two unappealed decisions before her that contained many findings relevant to determining what was in the best interests of S., as well as the submissions of Mr. H. Considering the information that was before her, we cannot say that her determination with respect to the best interests of S. warrants our intervention.

C. Issue Three –The chambers justice Contravened Section 9(7)(b) of the Current Version of the Family Law Act

[64] Finally, the appellant contends the chambers justice contravened section 9(7)(b) of the current version of the *Family Law Act* – which was in force at the time when her order was issued – by creating a situation in which S. has three parents. The subsection reads as follows: "9(7) An

application or declaration [of parentage] may not be made under this section if ... (b) the declaration sought would result in the child having more than 2 parents."

[65] The chambers justice did not consider the current version of the *Family Law Act* to be the governing legislation with respect to the parentage of S. At first, she considered the relevant legislation to be the previous version of the *Family Law Act*. Then, after receiving the Intervener Attorney-General's advice, she determined it to be *Domestic Relations Act*. Neither the older version of the *Family Law Act* nor the *Domestic Relations Act* contains a provision equivalent to section to 9(7)(b).

[66] Mr. R. does not argue that the chambers justice lacked the authority to grant declarations of parentage under the previous version of the *Family Law Act* or the *Domestic Relations Act*.

[67] Under the current version of the *Family Law Act*, it is unclear whether S. had two legal parents when the chambers justice made her declarations with respect to Mr. H. To explain, under section 8(3) of that *Act*, Mr. R. does not benefit from a presumption of parentage because S. was born as a result of assisted reproduction. Under section 8.1(2), a male person who contributes reproductive material for an assisted reproduction is assumed to be the parent, unless the birth mother is a "surrogate." Surrogate is defined under section 5.1(1)(d) as:

> a person who gives birth to a child as a result of assisted reproduction if, at the time of the child's conception, she intended to relinquish that child to
>
> (i) the person whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo used in the assisted reproduction, or
>
> (ii) the person referred to in subclause (i) and the person who is married to or in a conjugal relationship of interdependence of some permanence with that person.

[68] Without deciding this issue, it seems arguable that Ms. D. meets the definition of surrogate, as the facts indicate that she "gave" S. to Mr. R and Mr. H. in exchange for the opportunity to be impregnated a second time with Mr. R.'s sperm, and raise that child with her own partner.

[69] Assuming that Ms. D. meets the definition of surrogate, in order for Mr. R. to qualify as a legal parent to S., he would need Ms. D.'s consent to an application for a declaration under section 8.2(1)(b) as well as the declaration itself. To our knowledge, this has not occurred, and thus if one relies on the current version of the *Family Law Act*, alone, to determine the parentage of S., it may be the case that S. had one only legal parent (Ms. D.) when the chambers justice declared Mr. H. to be a parent, such that there was no possibility of offending subsection 9(7).

VII. Conclusion

[70] This chambers justice, who was very familiar with the nature and facts of the case before her, made no reviewable error in arriving at her conclusions. We wish to reinforce what we said at para 54; this appeal concerns Mr. H.'s status. It does not address issues concerning parenting, custody, access and support which would be subject to a Queen's Bench chambers application in the usual course. For the reasons above, the appeal is dismissed.

Appeal heard on November 9, 2012

Memorandum filed at Calgary, Alberta
this 5th day of July, 2013

Picard J.A.

O'Ferrall J.A.

Bielby J.A. (dissenting):

[1] The respondent, Mr. H, commenced the within proceeding by way of an Originating Notice of Motion in which he sought declarative relief only, including declarations that certain sections of the *Family Law Act*, SA 2003, c F-4.5 (*Family Law Act*) and the *Vital Statistics Act*, SA 2007, c V-4.1 (*Vital Statistics Act*) offended various provisions of the *Canadian Charter of Rights and Freedoms*, a declaration that these offending provisions could not be saved by s 1 of the *Charter* and declarations that certain words be read into the *Family Law Act* as a result.

[2] The resulting order, the subject of this appeal, grants relief not sought in this Originating Notice of Motion. It declares the respondent, Mr. H, to be a legal parent and a guardian of S (the child), although it goes on to provide that "this declaration does not alter any of the parenting arrangements, including custody and access arrangements, currently in place".

[3] The appellant, Mr. R, has appealed only from the granting of those parts of the order which provide relief which was not sought in the Originating Notice of Motion, i.e. the declaration that Mr. H is a parent and a guardian of the child. Mr. R says that portion of the order is particularly egregious, because he chose not to appear and defend the application before the chambers judge as he did not believe he was in jeopardy in any way based on the relief sought in the Originating Notice of Motion. He was unrepresented at that time. Additionally, at the time Mr. H made this application, he had a separate outstanding application before a different judge, the case management judge, in which he sought guardianship of the child, access to her and a declaration of parentage.

[4] The application before the chambers judge took place in two parts. At the time the chambers judge made her original decision, she erroneously believed it was governed by the provisions of the *Family Law Act*. As noted in the majority decision, after she had issued her original reasons on October 12, 2011, reported as ***DWH v DJR***, 2011 ABQB 608, 518 AR 165 (*Original Reasons*), the Intervener (the Minister of Justice and Attorney General) wrote to advise that the *Domestic Relations Act*, RSA 2000, c D-14 (*Domestic Relations Act*) was in force at the time the child was born and that this was arguably the legislation applicable to the child's parentage, rather than the *Family Law Act*. Mr. H was provided with a copy of that letter but there is no evidence that Mr. R was sent a copy of it.

[5] After receipt of the Intervener's letter, the chambers judge requested and received further submissions from Mr. H and the Intervener on the issue of applicable legislation, but not from Mr. R. She then made the order which declared Mr. H to be a legal parent and a guardian of the child, by way of supplemental reasons issued December 19, 2011, reported as ***DWH v DJR***, 2011 ABQB 791, 228 AR 160 (*Supplemental Reasons*). She mistakenly believed that the Originating Notice of Motion had expressly sought a declaration of parentage; see para 27 of the *Supplemental Reasons*. One formal order was entered in relation to both decisions. It dismisses the constitutional challenge to the *Vital Statistics Act* and declares Mr. R to be a legal parent and guardian of the child.

[6] The majority decision faults Mr. R for not somehow providing the chambers judge with additional information, presumably *ex post facto*, to point out that the Originating Notice of Motion did not request a parenting declaration, when he realized that she had made a declaration of parentage in her *Original Reasons*. However, the record is not clear as to when Mr. R received a copy of the *Original Reasons*, or that he was aware that the chambers judge had made that decision prior to his being served with the single formal order entered after the *Supplemental Reasons* were issued. It is clear, however, that Mr. R promptly filed a Notice of Appeal, on November 10, 2011, expressly raising lack of notice as his sole ground of appeal.

[7] The parentage of, residential care of, and contact with, the child have been heavily litigated between Mr. R and Mr. H. Mr. R has persistently sought contact with and a role in the child's life since his separation from Mr. H. This history supports Mr. R's position that he would have vigorously defended the application which produced the order which is the subject of this appeal, had he been made aware of the possibility that it would yield a declaration of parentage on behalf of Mr. H.

[8] As observed in the majority decision, in general, it is inappropriate for a court to decide an issue that has not been expressly raised in the notice of motion. The result could be unfairness to the other side; moreover, it could mean that the court lacked information needed to render a fully informed decision; see ***Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)***, 2012 ABCA 36 at paras 35-36, 522 AR 201; ***Hicks v Kennedy*** (1957), 6 DLR (2d) 567 at 569, 20 WWR 557 (Alta SC (AD)); ***Zaharia v Sharkey***, 2000 ABQB 308 at para 18, [2000] AJ No 543.

[9] The majority, after observing that the Originating Notice of Motion filed by Mr. H and served on Mr. R does not expressly seek a declaration of parentage, nor contain any reference to a declaration of guardianship, nonetheless concludes that Mr. R knew or should have known that these issues were in play. It concludes that this knowledge should be inferred because it is implicit in seeking declarations that legislation violates the *Charter*, from other unidentified "relief sought in [Mr. H's] Originating Notice of Motion", from the fact that Mr. H's standing to seek relief had earlier been ascertained in other proceedings, from the fact Mr. R was named as a party in the Originating Notice of Motion, from the context of earlier litigation and from the evidence led in the two prior proceedings, which was specifically referred to in the Originating Notice of Motion.

[10] With every respect, I cannot agree that Mr. R should have been or was aware of his jeopardy in this application because of any of those factors. He clearly and immediately objected to the result, as evidenced by his prompt filing of a notice of appeal. The context of the earlier litigation cuts both ways in terms of implications which should have been drawn. It was, no doubt, expensive. When Mr. R was served with the Originating Notice of Motion he was unrepresented and had sole residential care of the child, with no access to her by Mr. H. On reading the document he would have not seen any claim for relief which would alter that situation. Companion applications for guardianship and access were outstanding and before the separate case management judge. These factors support Mr. R's contention that he did not know that parentage and guardianship would be sought in the application which yielded the decisions under appeal.

[11] I disagree with the majority's view that, despite the lack of notice to Mr. R on the critical issue of a claim for a declaration of parentage, the best interests of the child mandated the granting of that declaration, trumping his right to express notice, and the opportunity to be heard before that declaration was made. This is further exacerbated by the fact this conclusion was reached in the admitted absence of an express finding of the best interests of the child in either the *Original Reasons* or the *Supplemental Reasons* under appeal. The chambers judge made her decision based upon a purported exercise of her *parens patriae* jurisdiction to fill a legislative "gap" and based on her assumption, made without any authority, that there is a presumption that it is in the best interests of a child to have legal recognition of more than a sole parent; see paras 137-138 of the *Original Reasons*; paras 22 and 25 of the *Supplemental Reasons*.

[12] It is difficult to see how the best interests of the child can properly be determined, let alone trump, a fundamental right to be heard when the party who has had the child's exclusive day-to-day care for years has not been advised that the issue is to be decided, nor given the opportunity to tender evidence on the subject. Findings made in both a 2007 application and a 2009 trial which demonstrate that Mr. H was a dedicated father to the child before his separation from Mr. R, as observed in the majority decision, cannot justify depriving Mr. R of his right to be heard on this matter in 2011. Further relevant events may have occurred between the granting of the trial judgment in 2009 and the hearing of this application in April 2011.

[13] Authority from this court directs that a consideration of the welfare of the child should not be undertaken in the absence of evidence. As stated by Russell J.A. in ***JU v Alberta (Regional Director of Child Welfare)***, 2001 ABCA 125 at para 8, 281 AR 396:

> Lastly, even assuming that the *parens patriae* jurisdiction was available due to an incapacity of the mother and the legislative gap, in our view the chambers judge erred in purporting to exercise that jurisdiction on behalf of the mother in the absence of evidence of impact on the child who is entitled to the protection of the *parens patriae* jurisdiction and whose interest may ultimately be paramount.

[14] Nor is it an answer that had Mr. R made representations before the chambers judge, the result would not have changed, that the granting of a declaration of parentage to Mr. H was a foregone conclusion. First, the evidence led during earlier proceedings does not paint a picture of Mr. H which leads to the inevitable conclusion that the child would benefit from a declaration that Mr. H was her legal parent. As noted in the majority decision, this earlier evidence indicates that Mr. H has health issues, has allegedly made poor choices in his love life and was, for a short time, irrational and emotional following his separation from Mr. R. It is also clear that there is significant ongoing animosity between Mr. R and Mr. H that would impact on the child, should access with Mr. H recommence.

[15] Second, the fact that the making of the decision under appeal did not result in an immediate change in the parenting arrangements for the child, and that another successful application would be required before Mr. H could actually expect to resume contact with her, does not answer the effect of the loss of Mr. R's potential input on the decision under appeal. Absent the order under appeal, Mr. H may not have had a right to pursue that further application for resumed contact with the child.

[16] In summary, the jurisprudential landscape arising from issues of assisted reproduction, surrogate parenting and same sex unions is sufficiently new and untried to allow me to safely conclude that Mr. H's success was a foregone conclusion, and to conclude that Mr. R would not have had anything relevant to say to the chambers judge on the issue of a declaration of parentage of the child. If an appellate court concludes that a lower court breached the rules of natural justice by granting relief without sufficient notice to an opposing party, it may overturn the decision if the outcome might have been different had notice been given: ***Paniccia Estate v Toal***, 2012 ABCA 397 at para 37.

[17] While I, too, am reluctant to have this litigation continue from the perspective of its effect, potential and real, on the child's well-being, to allow the order under appeal to stand would not have the effect of ending contention between the parties. As noted, litigation continued via companion applications being made before a separate case management judge. Even if Mr. H is ultimately to be found to have the right to seek access to the child, it remains to be determined whether that right should be granted, as being in her best interests.

[18] For these reasons I would have allowed the appeal to the extent of setting aside paragraph 2 of the formal order of the chambers judge but not otherwise, with the result that her decision would have stood to the effect that it dismisses Mr. H's challenge to the constitutional validity of the *Vital Statistics Act*, dismisses his claim for damages against the Intervener and awards him costs as the costs order against the Intervener. Any determination of Mr. H's claim to parentage and guardianship of the child would thus remain to be determined in the context of the balance of the litigation between him and Mr. R. Evidence could be led there as to the child's current situation, and as to her best interests generally, before the judge who then determines the ongoing role, if any, Mr H is to have in her life.

Appeal heard on November 9th, 2012

Memorandum filed at Calgary, Alberta
this 5th day of July, 2013

Bielby J.A.

Appearances:

Respondent (Plaintiff) D.W.H. in Person

E.L. Lenz, Q.C.
for the Appellant D.J.R.