Family Law News

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Drawing Straws to Equalize Sperm

The quirky and media friendly case, *J.C.M. v. A.N.A.*, [2012] B.C.S.C. 584, was released by the Supreme Court of British Columbia on April 23, 2012. This case involved two ladies involved in a spousal relationship for eight years. During the course of the relationship each party gave birth to one child using artificial insemination with sperm purchased from a single sperm donor. The couple separated then entered into a Separation Agreement which was thought to be all encompassing as it dealt with custody, support and division of property. Each of the parties had primary residence of one child and there was an access schedule wherein the children would share time with both the parents on different days. Property was divided but inadvertently, 13 sperm straws that remained from the sperm donor were not divided or accounted for under the original Separation Agreement. (Note: a sperm straw is a vial that the sperm donation is placed in to be stored for later use.)= The couple purchased the donor sperm at a sperm bank in the United States and paid approximately $250 per sperm straw. At the time the parties purchased the sperm from the donor, he had "retired from the program".

A few years after the breakdown of the relationship, one of the parties began a new spousal relationship and wanted to have another child with her new partner using the remaining sperm so that their child would be biologically related to the other children of her previous relationship. The Respondent wanted the sperm straws destroyed. The claimant attempted to contact the company in the United States and another family that had used the same donor to see if there was an alternate way to obtain sperm from the same donor but was unable to procure any. Because she was unable to find any alternate samples, she brought a Summary Trial before the court to deal with the issue of the remaining straws. Justice Russell found that the following issues were to be determined in her reasons for decision:

1. Are the sperm straws property?
2. Is it relevant for the court to consider the best interests of the existing children and any future donor offspring when deciding whether the claimant should be awarded the sperm straws?
3. Is insemination from an anonymous sperm donor proscribed in British Columbia?
4. If the answer to 1 is yes, how should the sperm straws be divided between the claimant and the Respondent?

In deciding these questions the judge looked to case law from the United States and the United Kingdom as well as a single case from Canada.

Justice Russell found that the sperm straws should be treated as property and divided between the claimant and the Respondent as such. She followed the Canadian case of *C.C. v. A.W.*, 2005 ABQB 290, wherein sperms was given as a gift to the Plaintiff and as such found to be property. In the case at hand, once the sperm was purchased it became property to be used for the parties' benefit. The sperm had been treated as property by everyone involved in the transaction, from the donor, to the distribution company, to the parties themselves.

Justice Russell next had to turn her mind to whether or not an analysis of the best interests of the children that were already alive, as well as, any potential child was appropriate. She found that speculating on the best interest of a child who may or may not be conceived was impractical and improper. She also declined to engage in an analysis of the best interest of the children already born as she found that it would be borderline discriminatory to couples, who must conceive through sperm donation. A best interests analysis is not undertaken when a case involves a male and female litigant that go on to procreate with a new partner. As a result, such an analysis in this situation should not have been any different.

The judge found that the case did not require her to make sweeping declarations regarding the legality of the anonymous sperm donation in British Columbia but rather only a determination of the disposition of the gametes purchased by the parties. The sperm had already been purchased and used by both parties previously.

Lastly she was left with determining

how the remaining 13 sperm straws would be divided between the parties. The parties had entered into an agreement to divide their joint assets. As is consistent with their approach, she found that the 13 straws were to be divided between the parties. Since an odd number cannot be divided and the sperm straw could not be cut in half, seven of the thirteen were given to the claimant and six were given to the Respondent. The claimant was to pay the Respondent $125 for the extra one half straw that she received. One wonders how this case would be decided in Hamilton Family Court and under a different provincial property regime. For instance if the parties were not married but living common law and the property was not jointly owned? One also can ponder the value of the sperm; to one spouse its value is priceless, to the other it was merely to be disposed of. Has the sperm increased in value as it is now obsolete or is it just your garden variety? ■

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