CITATION: Romanoski Estate v. Seburn, 2016 ONSC 3481
COURT FILE NO.: 10-21738
DATE: 2016/05/26

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
The Estate of Freddie Romanoski, deceased, by his Litigation Administrator, Tracey Sears, Tamia Faith Romanoski, minor under the age of 18 by her Litigation Guardian, Tracey Sears	)	Robert J. Hooper, for the Plaintiffs
Plaintiffs	)	
- and -	)	
Christopher Seburn, John Doe, 2108149 Ontario Limited o/a The Cue Zone Sports Pub and Billiards, John Doe Bartender, 144673 Ontario Limited carrying on business as Whiskey a GoGo, Jane Doe Bartender, and Whiskey a GoGo	)	David LeDrew, for the Defendant 144673 Ontario Limited carrying on business as Whiskey a GoGo
Defendants	)	
	)	**HEARD at Hamilton, Ontario:**
	)	March 31, 2016

The Honourable Justice P. R. Sweeny

Introduction

[1] This motion raises the question: Can the mother of an unborn child whose father dies as a result of the negligence of another, pursue a claim under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("the FLA") for pecuniary losses? The moving party says no, and the claim should be dismissed on this summary judgment motion. The mother says yes, and the issue should be determined in her favour on this motion.

[2] The mother's ability to pursue a claim depends upon her being found to be a spouse within the meaning of Part III of the FLA. The parties have been unable to find any case directly deciding this issue.

Background Facts

[3] Freddie Romanoski ("Freddie") suffered fatal injuries in a car accident on August 5, 2008. At the time of the accident, Freddie and Tracey Sears ("Tracey") lived together at 41 East 24th Street in Hamilton. They were not married. They had lived together since January 2008. Tracey had a daughter from a previous relationship, Baillie Madison Sears ("Baillie"). Tracey was pregnant with Freddie's child. The child, Tamia Faith Romanoski ("Tamia"), was born on March 11, 2009.

[4] A claim has been issued on behalf of Tamia, Tracey, and Freddie's Estate. The defendants include the driver of the vehicle in which Freddie was a passenger, and two businesses that allegedly served alcohol to Freddie and the driver – one being the moving party 1446673 Ontario Limited, carrying on business as Whiskey a GoGo ("the Defendant").

Summary Judgment

[5] I am satisfied that there is no genuine issue requiring a trial with respect to the issues, and that the summary judgment process provides me with the evidence to fairly and justly answer the question raised on this motion. I have authority to grant summary judgment in favour of a responding party (see *Landrie v. Congregation of the Most Holy Redeemer*, 2014 ONSC 4008, [2014] O.J. No. 3132).

Relevant Statutory Provisions

[6] Tracey's ability to pursue a claim arises out of s. 61 of the FLA which provides as follows:

Part V

DEPENDANTS' CLAIM FOR DAMAGES

Right of dependants to sue in tort

61.(1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if

not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

[7] The definitions of "dependent" and "spouse" in Part III read as follows:

PART III

SUPPORT OBLIGATIONS

Definitions

29. In this Part,

"dependant" means a person to whom another has an obligation to provide support under this Part; ("personne à charge")

"spouse" means a spouse as defined in subsection 1(1), and in addition includes either of two persons who are not married to each other and have cohabited,

(a) Continuously for a period of not less than three years, or

(b) In a relationship of some permanence, if they are the natural or adoptive parents of a child. ("conjoint")

[8] The definition of "child" in s.1(1) of the FLA reads:

"child" includes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody; ("enfant")

DISCUSSION AND ANALYSIS

[9] The parties agree that Tamia can pursue a claim under s. 61 of the FLA because the common law recognizes the property rights of a child *en ventre sa mère* (See, for example, *Musselman v. 875667 Ontario Inc., 2010 ONSC 3177*, [2010] O.J. No. 2325, Reilly J. at paras. 25-74).

Defendant's Position

[10] The Defendant makes two arguments in support of its position:

(1) the definition of "child" in s.1(1) of the Act requires that Freddie exhibit a settled intention to treat Tamia as a child of the marriage and, since the child was not born, that could not occur; and

(2) on the basis of the reasoning in the case of *Vasey et al. v. Economical Mutual Insurance Co.*, [1986] O.J. No. 1891, 54 O.R. (2d) 692, Tracey cannot pursue a claim.

Settled Intention

[11] The definition of "child" in s. 1(1) is an extended definition. In my view, it is not relevant to the issue before me. The extended definition would apply for the purposes of determining whether a parent has child support obligations to a child who is neither a natural nor adopted child. The definition of "spouse" in Part III specifically refers to the child as natural or adopted. Tamia is Freddie's natural child. Therefore, there is no need for Freddie to exhibit a settled intention to find that Tamia is a child of his family.

[12] Tracey also sought to use the definition of "child" with respect to Baillie to establish her entitlement as a spouse under s. 61. She argues that Freddie exhibited a settled intention to treat Baillie as a child of his family and that the extended definition would apply to this case. This analysis is not relevant to the issue before me. The extended definition of "child" would appear to be for the purposes of ensuring an obligation of a stepparent to support a stepchild. If Baillie was a child for the purposes of child support, that does not make Tracey a spouse for the purposes of spousal support. The definition of "spouse" in Part III refers specifically to natural or adoptive parents. Freddie is not the natural parent of, nor did he adopt Baillie. Therefore, Baillie cannot be a child of Freddie to establish Tracey as a spouse for the purposes of s. 61.

Vasey v. Economical

[13] *Vasey* involved a claim made by a child born after the death of his father in a motor vehicle accident, and the child's mother, for death benefits under a policy of automobile insurance. McTurk D.C.J. held that an unborn child, subsequently born alive, was not a "dependant" under Schedule C of the *Insurance Act*. The relevant definition of dependent was "a person, ... under the age of 18 years who resides with and is principally dependent upon the head of the household or the spouse of the head of the household for financial support." He reasoned that to include the unborn child in the definition of "dependent" would be to amend that statute by extending the plain and unambiguous meaning of the word. As the child was not a person at the date of the accident, he was not a "dependent" within the meaning of the schedule.

[14] In *Willard v. Zurich Insurance Co.*, [2004] O.J. No. 4388, 73 O.R. (3d) 309 (SCJ), Gauthier J. provides a detailed analysis of the *Vasey* decision at paras. 36 to 41. Gauthier J. observed that McTurk D.C.J. did not apply the legal fiction of the child *en ventre sa mere*, and relied on the reasoning in decisions which have subsequently been rejected. She concluded that the reasoning in *Vasey* was not persuasive. I agree with her analysis.

[15] In *Vasey*, McTurk D.C.J. also held the mother of the unborn child could not pursue a claim. In addressing the mother's claim, he noted at para. 11:

> ... the plaintiff herein argues that by reason of this fiction the legal recognition of Margaret Vasey falls within the definition of "spouse" under Sch. C. All the authorities referred to with respect to the rights of an unborn child, however, deal with exactly that; that is, the rights of the unborn child and, in no case that I have been referred to have I come across anywhere where some other party is given some right of their own reason of the application of applying the fiction of *en ventre sa mere*.

His conclusion was that the legal fiction was confined to circumstances which are for the benefit of the unborn child and that the legal fiction could not be applied for the benefit of the mother.

[16] The definition of "spouse" in *Vasey* included either a man or a woman not being married to each other who have cohabited "in a relationship of some permanence where there is a child born of whom they are natural parents." Although the definition is similar to the definition under the FLA, the court was not required to consider the context of a claim under s. 61 of the FLA or the legislative purpose and intent of the FLA.

Tracey's Position

[17] Tracey says I should follow the reasoning in *Dagg v. Cameron*, 2015 ONSC 2597, 125 O.R. (3d) 511. In *Dagg*, the applicant was the mother of a child *en ventre sa mère* at the date of the father's death. The issue was whether she was a spouse for the purposes of the *Succession Law Reform Act*, R.S.O. 1990 c. S.26 ("SLRA"). The definition of a spouse under s. 57 of the SLRA includes the same definition as set out in Part III of the FLA, that is, two persons who are not married to each other and have cohabited, "in a relationship of some permanence, if they are the natural or adoptive parents of a child." Section 1 of the SLRA defines "child" to include "a child conceived before and born alive after the parent's death." This definition captures the legal fiction of the child *en ventre sa mère*. It does not, as the Defendant argues, make the reasoning inapplicable to this case before me.

[18] In holding that the mother was a dependent, Bale J. observed:

> There is nothing absurd in interpreting the Act to attach a support obligation to a common law relationship, based on the birth of a child following the death of one of the common law spouses. Rather, to interpret the Act in the way that Anastasia suggests would mean that if a child was born, for example the day before the death of one parent, the surviving parent would be a spouse, but not if the child was born two days later – clearly an inequitable result (at para. 15).

The inequitable result observed by Bale J. could occur in this case if Tracey cannot pursue a claim under s. 61.

Interpretation of the FLA

[19] In *Mason v. Peters* (1982), 39 O.R. (2d) 27, the Court of Appeal was dealing with the interpretation of s. 60 of the *Family Law Reform Act*, R.S.O. 1980, c. 152 ("FLRA"). The FLRA was repealed and replaced by the FLA. Although the FLA contains many different provisions from the FLRA, s. 61 of the FLA is essentially the same as s. 60 of the FLRA. The Court of Appeal observed that: "The Family Law Reform Act is a remedial statute and should be liberally construed so as to give full effect to the legislative intent" (p. 37). These comments apply to the interpretation of the FLA also.

[20] The Court went on to say, referring to s. 60:

> Now, we have a general scheme of compensation covering family losses where injury, whether the injury is fatal or non-fatal, is caused by a third party to one of the family members. The right of action established by the Act evidences the Legislature's intention to accord greater recognition to the interest in family relations and provide greater protection against wrongful disturbance or destruction of that advantageous relationship (p. 37).

The focus is on family losses.

[21] The FLA acknowledges in the preamble:

> Whereas it is desirable to encourage and strengthen the role of the family ... and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children.

[22] The FLA provides in s. 30 that "every spouse has an obligation to provide support for himself or herself and for the other spouse". Section 33(8) set out the purposes of an order for support of a spouse. One of the stated purposes is that an order for support should "(b) share the economic burden of child support equitably." In determining the amount of support for a spouse, s. 33(9)(l) directs that the court shall consider, *inter alia,* "(vi) the effect on the spouses earnings and career development of the responsibility of caring for a child."

[23] The purpose of the Act, its remedial nature, and the acknowledgement that both spouses have an obligation to support the child, support finding that Tracey, as the mother of Tamia, is a person who ought to be entitled to make a claim as a dependent under s. 61.

[24] In *Fitzsimonds v. Royal Insurance Co. of Canada,* 1984 ABCA 7, [1984] A.J. No. 2559, the Alberta Court of Appeal noted:

> A fiction has developed in the law that in respect of property rights an unborn child who is subsequently born alive is in the same position as a child living at the time of the death of the benefactor. This fiction has existed for over a century and is so well established that for a statute conferring property rights on children to be interpreted as excluding a child who was *en ventre sa mère* at the time of the death of the father would require specific words of exclusion. In interpreting statutes such as the *Insurance Act* I think cognizance must be taken of this fiction. It would be known to the legislative draftsman and the legislation would be passed with this fiction in mind (para. 4).

[25] Those comments apply in interpreting the FLA. In interpreting the specific provisions in the FLA, the legal fiction of *en ventre sa mère* must be considered. Tamia has a claim as an unborn child. It would be consistent with the legal fiction that Tracey would also have a claim. The birth of Tamia and the relationship between Tracey and Freddie prior to the death of Freddie, establish the "some permanence" requirement of the definition of spouse in Part III of the FLA.

[26] The purpose of s. 61 is to acknowledge the harm done to families as a result of the death of a family member. The section is entitled "right of dependents to sue in tort." In my view, it is consistent with the intention and purpose of the FLA that the mother of a child *en ventre sa mère* should be entitled to pursue a claim for pecuniary loss arising out of the death the child's father under s. 61 of the FLA. Therefore, I find that Tracey is entitled to pursue her claim under s. 61 of the FLA.

Costs

[27] If the parties are unable to agree on costs, I will receive written costs submissions limited to three pages, plus a bill of costs and any offers to settle, addressed to me at my chambers in Welland. Tracey has 10 days from the release of this decision to provide submissions, and the Defendant has a further 10 days to respond.

Sweeny J.

Released: May 26, 2016

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Plaintiffs

- and –

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Defendants

DECISION

Sweeny J.

Released: May 26, 2016