NOVA SCOTIA COURT OF APPEAL
Citation: ***C.P. v. D.S.***, 2008 NSCA 10

Date: 20080125
Docket: CA 281587
Registry: Halifax

Between:

C. P.

Appellant

v.

D.S. and D.S.

Respondents

Publication Ban:	**pursuant to s. 94(1) of the Children and Family Services Act**
Judges:	Roscoe, Bateman and Fichaud, JJ.A.
Appeal Heard:	January 16, 2008, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Bateman, J.A.; Roscoe and Fichaud, JJ.A. concurring.
Counsel:	Linda Tippett-Leary, for the appellant Deborah Conrad and Jill Graydon, for the respondents

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Reasons for judgment:

[1] The appellant is the birth mother of the child J.E.S. The respondents are the child's adoptive parents and, as well, relatives of the child.

[2] J.E.S. was born in the spring of 2002. A few months later, J.E.S., who was then residing with her birth parents, was found to be in need of protective services. A temporary guardianship order issued in Alberta where the family lived. The child was returned to her birth parents but again apprehended by the child welfare authorities. In 2005 an order for permanent guardianship was granted.

[3] Upon first learning of the welfare authorities involvement with J.E.S. in 2005, the respondents temporarily re-located to Calgary, and put themselves forward as potential adoptive parents.

[4] On the same day that the permanent guardianship order was granted, it was terminated and replaced by a Private Guardianship Order, under which the respondents became the guardians of J.E.S. (**Child, Youth and Family Enhancement Act**, C-12, R.S.A. 2000). The order contained a provision that access by the birth parents was left to the discretion of the respondents.

[5] The respondents returned with the child to live in Nova Scotia where they applied to adopt her.

[6] On February 19, 2007 the birth parents, who now reside in British Columbia, were each personally served with Notice of the Adoption Hearing, scheduled to take place on May 1, 2007. Neither appeared at the hearing. The respondents' application to adopt J.E.S. was granted.

[7] The appellant appeals from that Adoption Order. At this stage the appellant says that she is not seeking to oppose the adoption, but wishes to be heard on the issue of access. The birth father is not participating in this appeal.

Legislative Background

[8] The **Children and Family Services Act**, S.N.S. 1990, c. 5 (the "Act") requires that birth parents consent to the adoption of a child not in the permanent

care of an agency (subject to limited exceptions). Where the birth parents have not provided consent they must each receive notice of the proposed adoption hearing. Once notice of the hearing has been given, the court is entitled to dispense with the birth parent's consent, if s/he fails to appear at the hearing, or in any event:

> 74(3) Where the person proposed to be adopted is under the age of majority and is not a child in care, no order for the child's adoption shall be made, except as herein provided, without the written consent to adoption of the child's parents which consent may not be revoked unless the court is satisfied that the revocation is in the best interests of the child.
>
> . . .
>
> 75 (1) Where the applicant seeks to dispense with the consent of any living person, the applicant shall give that person notice of the time and place of the adoption hearing together with a copy of the application and all material proposed to be used in support of it not later than one month before the hearing of the application.
>
> (2) Notice shall be given by personal service or, if the person cannot be so served, by substituted service as directed by the court.
>
> (3) Any person served pursuant to subsections (1) and (2) who does not appear at the hearing of the application and object to the adoption is deemed to have consented to the adoption. . . .
>
> (4) Where the court is satisfied that a person, whose consent is required pursuant to subsection (2) or (3) of Section 74,
>
> . . .
>
> (f) is a person whose consent in all the circumstances of the case ought to be dispensed with,
>
> the court may order that the person's consent be dispensed with if it is in the best interests of the person to be adopted to do so. 1990, c. 5, s. 75.

[9] Although the child here had been the subject of a "permanent care" order in Alberta, as mentioned above, that order was terminated in favour of private guardianship by the respondents. When the adoption application first came on for hearing on February 15, 2007, the birth parents had not been given notice. The

judge adjourned the application to the May 15th date, directing that the birth parents be notified in the interim.

[10] When the application resumed on May 15th the judge dispensed with the parents' consent on the basis that neither were in attendance, nor represented at the hearing (s. 75(3)). He granted the adoption order which makes no provision for access.

[11] An adoption order may "continue or vary" an existing access provision:

> 78(6) Where an order for adoption is made in respect of a child, the court may, where it is in the best interests of the child, continue or vary an order for access or an access provision of an agreement that is registered as an order under the Maintenance and Custody Act in respect of that child. 1990, c. 5, s. 78; 2005, c. 15, s. 6.

[12] The Private Guardianship Order under which the respondents were granted care of the child states:

> (b) access to the mother [C.P.] and the father [J.S.] is at the discretion of the private guardians [D. and D. S.];

[13] The appellant takes the position that this is an access provision within the meaning of s.78(6) of the **Act**.

Fresh Evidence

[14] The appellant asks that we receive fresh evidence on this appeal. That evidence consists of an affidavit from the appellant and one from the Nova Scotia Legal Aid staff lawyer, Charlene Moore. The affidavits attest to the appellant's unsuccessful efforts to retain counsel to represent her at the adoption hearing.

[15] Summarizing, the appellant deposes that when served with the adoption notice the appellant contacted B.C. Legal Aid, which, in turn, contacted N.S. Legal Aid requesting representation for the appellant. In late March, 2007 the appellant was notified that N.S. Legal Aid would not provide counsel. The appellant appealed that decision and was notified on April 26 that her appeal was successful.

On that day she telephoned a staff legal aid lawyer in Nova Scotia and was told to call back the next day, Friday, April 27.

[16] Ms. Moore deposes that on April 27, 2007, she prepared a legal aid certificate for the appellant which, with a list of possible counsel, was to be sent to the appellant by mail. The appellant says that it was her understanding that a legal aid lawyer would be present at the May 1st hearing to speak on her behalf. On May 1st she telephoned the Nova Scotia Legal Aid offices, spoke with Ms. Moore and learned that she was not represented at the adoption hearing. She was subsequently advised that the adoption had been granted.

[17] As is the practice with such applications, we received the proposed fresh evidence but reserved our decision on its admission (**R. v. Stolar**, [1988] 1 S.C.R. 480; 40 C.C.C. (3d) 1 at p. 491 S.C.R., p. 8 C.C.C.). The test for admission of fresh evidence on appeal, directed to an issue of fact or law decided at trial, was set out by McIntyre, J., writing for the Supreme Court of Canada, in **Palmer and Palmer v. The Queen**, [1980] 1 S.C.R. 759; (1979), 50 C.C.C. (2d) 193 at p. 760 S.C.R., p. 193 C.C.C.. The proposed evidence must satisfy all of the following criteria: it is not generally admitted if, by due diligence, it could have been produced at trial; it must bear upon a potentially decisive issue; must be reasonably capable of belief; and must be such that, if believed, it could reasonably be expected to have affected the result.

[18] However, where integrity of the trial process is the focus of the fresh evidence application, the test from **Palmer**, **supra** is not strictly applied. (**R. v. Taillefer**; **R. v. Duguay**, [2003] 3 S.C.R. 307, **R. v. Dunbar**, [2003] B.C.J. No. 2767 (Q.L.)(C.A.), **R. v. W.(W.)** (1995), 84 O.A.C. 241; 100 C.C.C. (3d) 225).

[19] The appellant is not offering the fresh evidence here to dispute a factual or legal finding at trial, but to establish that she intended to be at the adoption hearing and had made reasonable efforts for legal representation, but was not present or represented at the hearing despite her efforts. Counsel for the respondents and the presiding judge were unaware that the appellant birth mother wished to be heard. Consequently, says the appellant, the process leading to the adoption order was flawed. Through inadvertence she was denied her right to be heard.

[20] Counsel for the respondents takes issue with several of the factual assertions contained in the appellant's affidavit, mainly surrounding the birth mother's alleged past attempts to contact the child and denial of her requests for access. The appellant, who continues to reside in British Columbia, was not available for cross-examination on her affidavit.

[21] I would admit fresh evidence limited to the portions of the appellant's affidavit addressing her efforts to secure counsel for the adoption hearing (paras. 6, 7 and 8) and the affidavit of Charlene Moore. Clearly the due diligence requirement is not applicable here. I am satisfied that the evidence of the appellant's attempts to be represented at the hearing is reasonably capable of belief; the steps she took to engage counsel were reasonable in the circumstances and that she acted with dispatch. I am further satisfied that the judge presiding at the adoption application, having ordered notice to the birth parents, would have heard the appellant's submissions had she been present or represented.

DISPOSITION

[22] Section 83 of the **Act** permits an appeal of an adoption order:

> 83 (1) A person aggrieved by an order for adoption made by the court may appeal therefrom to the Nova Scotia Court of Appeal within thirty days of the order. . . .

[23] The judge was entitled to dispense with the mother's consent if she did not appear at the adoption hearing. However, I am satisfied that she had a *bona fide* intention to appear or be represented and that she made reasonable, although unsuccessful, efforts to do so. The right to be heard is a principle of natural justice. It would be procedurally just to set the adoption order aside and permit the appellant to be heard.

[24] Before doing so, however, it is appropriate that I consider whether such a result would be in the best interests of the child. I have tremendous sympathy for the respondents here who have provided a loving home for the child and incurred what is undoubtedly significant expenses in relation to securing her welfare. They have an understandable interest in finality and have and will experience uncertainty and frustration in these circumstances. However, I am satisfied that allowing the appeal and remitting the matter is consistent with the child's best interests. She has resided with the respondents since 2005 and will continue to do so pending the

further hearing. The consequent delay need not impact the child. It is, in my view, in the child's best interests that her birth mother's wish to have access be determined on the application to adopt.

[25] In allowing the appeal and remitting the matter to the application court I would make no comment on the merits of the appellant's intended submissions to that court. Additionally, it will be for the application court to decide whether the reference to access in the Private Guardianship Order is an "access order" or "access provision" within the meaning of s.78(6) of the **Act**. Finally, the respondents are not precluded from raising, before the application court, the issue of whether the appellant's consent to the adoption is required under s.74 of the **Act**, in view of the prior permanent care order in Alberta.

[26] I would allow the appeal, set aside the adoption order and remit the adoption application to a judge of the Family Division.

Bateman, J.A.

Concurred in:

Roscoe, J.A.
Fichaud, J.A.