

NOVA SCOTIA COURT OF APPEAL

Citation: *L.D.F. (Re)* 2005 NSCA 64

Date: 20050408

Docket: C.A. 237211

Registry: Halifax

Between:

**IN THE APPLICATION OF L.D.F. TO ADOPT THE
PERSON WHOSE BIRTH IS REGISTERED AS NO.
* BY THE DEPUTY REGISTRAR GENERAL OF
NOVA SCOTIA (* *editorial note- removed to protect
identity*)**

- under -

THE CHILDREN AND FAMILY SERVICES ACT

Restriction on publication: Pursuant to s. 94(1) of the **Children & Family
Services Act**

Judge(s): Chipman, Oland & Hamilton, JJ.A.

Appeal Heard: March 31, 2005, in Halifax, Nova Scotia

Held: Appeal dismissed, as per reasons for judgment of Hamilton,
J.A.; Chipman & Oland, JJ.A. concurring

Counsel: Joseph MacDonell & Kerri-Ann Robson, for the Appellant

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

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, L. D. F., a single mother, appealed the November 26, 2004 decision of Justice Douglas MacLellan, refusing to grant her the adoption she sought with respect to her four year old daughter. At the conclusion of the hearing before us we indicated the appeal was dismissed with reasons to follow. These are the reasons.
- [2] The facts are scant, as acknowledged by the appellant, because the only evidence before the chambers judge was the usual documentation provided to a court with an application for an uncontested adoption.
- [3] The appellant is currently 25 years old, was not married at the time of her daughter's birth in June 2000 and remains single. The child has been living with the appellant since birth. The child's father has had no contact with her nor has he provided any child support since November 2000. The appellant has worked for her present employer for approximately two years.
- [4] There is no evidence as to why there has been no contact between the child and her father since November 2000 or whether he was or is presently able to provide financial support for her and whether the appellant ever sought child support. It is not known if the appellant and the child have lived with the father or anyone else or if there is contact between the child and the extended families of either parent. We do not know how the child was supported from November 2000 when the father ceased support until February 2003 when the appellant started her present job.
- [5] The father was not notified of the adoption application and has not consented. Notice of the proposed adoption was given to the Minister of Community Services as required by s.76(1) of the **Children and Family Services Act**, Stats. N.S.1990, c. 5. The Minister made no recommendation with respect to the adoption and did not conduct a home study. The Minister chose not to intervene or to take any position on the appeal.
- [6] The chambers judge refused to grant the adoption on the basis that it was not in the child's best interests to do so even though he found all of the technical requirements for the adoption had been complied with. He agreed with the appellant that the father was not entitled to notice and was not required to consent to the adoption as a result of the interplay between s. 67(1)(f) and s. 74(3) of the **Act** because he had not had contact with the child or provided support for her for two years.
- [7] In ¶ 3 of his decision the chambers judge set out his concern with the proposed adoption:

. . . What benefit does this child receive from having an adoption in these circumstances?

[8] In ¶ 5 of his decision he answered that question:

. . . I find that there is no benefit to the child here to be adopted by her natural mother. The [child] already has all the rights that an adoption would give her.

[9] He further stated:

[7] I conclude that an adoption here would not benefit the child and would, in fact, interfere with the child's right to have contact with her natural father and to benefit from any possible relationship. . . . I really do not know what the father's position is.

. . .

[8] . . . Therefore, weighing the perceived benefit against the loss resulting from the adoption process, I am not prepared to grant this adoption.

[10] The "perceived benefit" the chambers judge was referring to was giving the mother more security by having control of the child. At the hearing before us appellant's counsel described this "benefit" as "the mother gaining control of the child's destiny, in case the father just walked in." The loss the chambers judge was referring to was the loss of possible contact with and support from the father.

[11] The issue before us was whether the chambers judge erred by failing to give adequate consideration to the factors he was required to consider, and by placing too much emphasis on irrelevant factors, in his determination of whether it was in the best interests of the child that the adoption be granted.

[12] The appellant acknowledged the limited powers of this court on an appeal such as this, in the sense that we are not to intervene with the chambers judge's decision unless there is a material error, a serious misapprehension of the evidence, or an error of law. **Hickey v. Hickey**, [1999] 2 S.C.R. 528 at ¶ 10 and 12; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, ¶ 11 and 12.

[13] The appellant agreed that the primary consideration in an application for adoption is the best interests of the child as set out in s.2(2) of the **Act**:

In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

[14] The appellant agreed the chambers judge addressed the question of what was in the child's best interests but argued that he erred by failing to give adequate consideration to the factors set out in s. 3(2) and (3) of the **Act** that must be considered in determining the best interests of a child and by placing too much emphasis on an irrelevant factor, the child's loss of a potential relationship with her father if the adoption was granted.

[15] Sections 3(2) and (3) are as follows:

(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:

(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;

(b) the child's relationships with relatives;

(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;

(d) the bonding that exists between the child and the child's parent or guardian;

(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;

(f) the child's physical, mental and emotional level of development;

(g) the child's cultural, racial and linguistic heritage;

(h) the religious faith, if any, in which the child is being raised;

(i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for

adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

(n) any other relevant circumstances.

(3) Where a person is directed pursuant to this Act in respect of a proposed adoption to make an order or determination in the best interests of a child, the person shall take into consideration those of the circumstances enumerated in subsection (2) that are relevant, except clauses (i), (l) and (m) thereof.

(Emphasis added)

[16] In her factum the appellant argued that the chambers judge failed to give adequate consideration to the factors set out in subsections (a), (c), (d) and (e) of s.3(2) in particular. She argued that if the chambers judge had adequately considered these factors that he would have granted the adoption. She argued the adoption would allow her to ensure stability in the child's life. It would allow her (1) to maintain a positive relationship with the child and ensure the child a secure place as a member of her family, fulfilling s.(a); (2) to provide continuous care for the child, fulfilling s.(c); (3) to strengthen the bond that presumably already exists between the appellant and the child, fulfilling s.(d) and (4) to meet the physical, mental and emotional needs of the child, fulfilling s.(e), all being in the child's best interest.

[17] The applicable factors enumerated in s.3(2) may provide guidance in determining the best interests of a child in the more usual type of adoption where persons who are not the biological parents of a child seek to create the

legal relationship of parent and child with a child who has no parent to adequately care for him or her, simultaneously severing the ties between the child and his or her biological parents. On the facts of this case however, where the proposed adoption would not change the legal relationship between the child and the appellant, her biological mother, these enumerated factors provided little guidance to the chambers judge in trying to determine the best interests of the child. In this case these factors are neutral because the child will continue to be in exactly the same position in terms of her relationship with the appellant whether the adoption is granted or not. The adoption will not change that relationship.

- [18] Without being able to obtain guidance from a consideration of the applicable enumerated factors in s.3(2), the chambers judge was left to consider “any other relevant circumstances” under s.3(2)(n) in determining whether the proposed adoption was in the best interests of the child. The other circumstance he considered was the consequence of the proposed adoption to the child with respect to her relationship with her father. The appellant argued the chambers judge erred by placing too much emphasis on the child’s loss of her possible relationship with and support from her father.
- [19] We disagree. Without the adoption the child’s legal relationship with her father is governed by the **Maintenance and Custody Act**, R.S.N.S. 1989, c.160. Section 8 provides that a child’s parents have a legal duty to support their child if they are able. Sections 18 and 19 provide a framework for access and custody to be determined with respect to a child of unmarried parents, unless there has been an adoption. If the adoption was granted those statutory provisions would no longer apply and pursuant to s.80(1)(b) of the **Act** the child would cease to be her father’s child, with the consequent loss of possible contact, support and inheritance. On the facts of this case the chambers judge did not err when he balanced the neutral impact the adoption would have on the child’s relationship with the appellant against the loss to the child of a possible relationship with and support from the father, and found there was a net loss to the child if the adoption was granted.
- [20] This type of balancing test for determining the best interests of the child in the context of adoption was approved of by this court in **Wolfe v. Cherrett** (1978), 28 N.S.R. (2d) 17 at page 29 where the issue was whether it was in the best interests of the child to dispense with the consent of a biological parent in a step-parent proposed adoption:

¶ 40 I must respectfully conclude that the learned trial judge did not ask the right question, namely, would the child derive a material net gain in welfare if the father were permanently cut off? Not having asked the right question, he, of course, did not identify and weigh the factors which should be considered in answering that question.

See also **J.J.M. v. S.D.L.** (1993), 117 N.S.R. (2d) 159, ¶ 32.

[21] The appellant did not satisfy us, on the meagre facts available to the chambers judge, that he failed to properly take into account the applicable enumerated factors set out in s.3(2) or that he placed too much emphasis on the child's potential relationship with her father in reaching his conclusion as to whether the proposed adoption was in the best interests of the child. It is clear from his decision that the chambers judge understood that the primary consideration in an application for adoption is the best interests of the child and that he identified and weighed several factors in deciding this. His comment that "knowing your natural parents is a benefit" was not determinative. He made no reversible error in exercising his discretion in refusing to grant the adoption.

[22] Accordingly, the appeal was dismissed.

Hamilton, J.A.

Concurred in:

Chipman, J.A.

Oland, J.A.