Docket No.: CA 159363
Date: 20000626

NOVA SCOTIA COURT OF APPEAL

[Cite as: Jefferson v. Johnson, 2000 NSCA 83]

Glube, C.J.N.S.; Freeman and Chipman, JJ.A.

BETWEEN:

GARLAND ALLAN WILLIAM GABRIEL JOHNSON

Appellant

- and -

SHIRLEY E. JEFFERSON

Respondent

REASONS FOR JUDGMENT

Counsel:	Appellant in person Peter C. Rumscheidt for the respondent
Appeal Heard:	May 10, 2000
Judgment Delivered:	June 26, 2000
THE COURT:	Appeals dismissed per reasons for judgment of Freeman, J.A.; Glube, C.J.N.S. and Chipman, J.A. concurring.

FREEMAN, J.A.:

[1] When he was two weeks old, in August 1966, the appellant, Garland Johnson, was placed in the home of Albert Clarence Johnson and his wife, Eunice Johnson, as a foster child. While aware of the true relationship, he says he grew up considering them his parents and himself their son. His surname at birth was Gabriel but he uses the surname Johnson. The Johnsons considered adoption but despite the close emotional bonding the appellant asserts, never carried through with it.

[2] Garland was still living with them on February 17, 1996, when the relationship came to a tragic end. Mrs. Johnson fatally shot her husband. Garland Johnson says this occurred during a psychotic attack.

[3] Mrs. Johnson was disqualified as beneficiary of a $22,500 insurance policy on her husband's life. The insurer paid the loss benefit into court on an interpleader, to be distributed in accordance with the following provision of the policy:

> Unless you specify otherwise, any amount due for loss of life will be paid as follows:
>
> 1. At your death, it will be paid to your spouse, if living; otherwise equally to your then living lawful children, if any, (including stepchildren and adopted children); otherwise equally to your then living parents or parent; otherwise to your estate.

[4] No departure from this provision was specified under the policy.

[5] Justice Nunn of the Supreme Court of Nova Scotia found there was no basis for Garland to share in the insurance money with Shirley Jefferson and Perry Johnson, who met the policy definition of lawful children of the Johnsons. Garland Johnson has

appealed to this court.

[6] While the parties appear to accept that the money paid into court is governed by the policy and not the deceased Mr. Johnson's estate, his will does recognize the appellant. It directs the trustee

> . . . to divide all the rest and residue of my estate equally between my two children, Shirley Johnson and Perry Johnson and Garland Gabriel, for their own use absolutely.

[7] Unfortunately this language is not only irrelevant to the present issue but ambiguous as well. Its literal meaning appears to include Garland Gabriel in addition to the two named as children, Shirley Johnson and Perry Johnson. Garland Johnson however argues that the testator's intention was to say "three children" rather than two. Shirley Johnson, now the respondent Ms. Jefferson, is the natural daughter of Eunice Johnson and was Mr. Johnson's stepdaughter. Perry Johnson was legally adopted by the Johnsons.

[8] Garland Johnson's eventual status in the home was as a foster child under a "permanent life placement" or "permanent life plan" terms agencies apparently apply to successful placements where further moves are not contemplated and adoption seems a likelihood. The agency remains the legal guardian until the foster child reaches the age of majority.

[9] Garland Johnson applied for the admission of fresh evidence, mostly in the form of agency records, as to the success of the permanent arrangement. This was not

opposed and I have considered it as admissible. It shows that Garland flourished under the Johnsons' care and that they expressed intentions to adopt him, which remained unrealized. The material makes his wish to be recognized as their son by the rest of the world quite understandable. Unfortunately it does not provide a basis for giving that wish legal status.

[10] Sadly for Mr. Johnson, there is no such thing as a common law adoption to be inferred from the relationships of foster parents and foster children, no matter how nurturing, no matter how long they endure, no matter what expectations they raise in the child. Legal adoption is the only substitute for the blood tie which gives rise to legal rights other than those specifically created, as in wills or contracts. This principle was recognized by Justice Nunn, who concluded his decision by stating:

> So my decision really is that the interpretation of the living lawful children, if any, includes the stepchild in this case and the adopted child and those are the only persons who are entitled under the policy.

[11] Garland Johnson was represented by counsel before Justice Nunn but not on the appeal. He has limited legal training apart from a high school law course. In preparing his factum he consulted a number of sources, some unfamiliar to this court. Those which it has been possible to trace or confirm fall short of suggesting a means whereby a foster child can acquire the rights of a lawful child of the foster parents apart from adoption.

[12] The grounds of appeal in his factum purport to include an attack on the

constitutionality of "ss. 151 to 157 of the Insurance *Act*, R.S.C. 1968, c. 6 (s. 151.), and of s. 158 c. 6 to s. 164 c. 6, R.S.C. 1968 to 1972, c. 5 (s.2.) as amended." These references do not appear relevant to the present matter, and Mr. Johnson did not pursue this ground in oral argument. In any event a constitutional issue cannot be entertained because none was raised in the trial court and no notice has been given to the Crown.

[13] Mr. Johnson cites **Ogg-Moss v. The Queen** (1984), 11 D.L.R. (4th) 549 (S.C.C.) in support of his assertion that the term "children" includes foster children. The case is not authority for that proposition. The court remarked that a child was "defined at common law as the legitimate offspring of a parent, but in most jurisdictions this definition has been amended by statute to constitute all offspring, whether legitimate or not, as the 'children' of their natural or adoptive parents." The court was not considering foster children.

[14] Two Ontario statutes in fact specifically exclude foster children from their definitions of parents: the *Compensation for Victims of Crime Act*, R.S.O. 1990, c. 24, s. 1(b) and the *Family Law Act*, S.O. 1986, c. 4, s. 1.

[15] No similar provisions have come to my attention in Nova Scotia, but the common law principles are so well established that exclusionary provisions are hardly necessary, although they may be included for clarity in specific statutes. While not argued in this appeal, there would be serious public policy objections to imposing upon

foster parents a duty to provide for foster children in their insurance coverage or testamentary dispositions, and any departure from the common law would require a clear expression of legislative intent.

[16] Mr. Johnson is not helped by the *in loco parentis* principle referred to in his factum. In **Re Buchanan** (1975), 16 N.S.R. (2d) 262 (S.C.T.D.) it was held that although the person in question may have been *in loco parentis* to the child, the applicant had been "unable to cite any cases where the *in loco parentis* principle [had] been recognized as establishing a legal relationship where none otherwise exists." This decision was followed in **Kennedy v. McIntyre Estate** (1987), 4 W.W.R. 85 (Man.Q.B.) and **MacDonald et al. v. Adams et al.** (1989), 64 D.L.R. (4th) 476 (P.E.I.S.C.T.D.).

[17] In the absence of any evidence of any intent to specify otherwise under the insurance policy subject to this appeal, the definition of lawful children contained in the policy, which includes stepchildren and adopted children but not foster children, must be accepted. A careful examination of the facts and submissions before the court does not disclose any palpable or overriding error on the part of Justice Nunn, and his conclusions should not be interfered with. I would dismiss the appeal.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.