

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S., Freeman and Pugsley, J.J.A.

Cite as: Nova Scotia (Attorney General) v.  
Digby (District) , 1993 NSCA 113

**B E T W E E N:**

<p><b>THE ATTORNEY GENERAL OF NOVA SCOTIA</b></p> <p style="padding-left: 100px;"><b>appellant</b></p> <p><b>- and -</b></p> <p><b>THE MUNICIPALITY OF THE DISTRICT OF DIGBY</b></p> <p style="padding-left: 100px;"><b>respondent</b></p>	<p>) <b>Alex F. Shaw, Q.C.</b></p> <p>) <b>for appellant</b></p> <p>)</p> <p>)</p> <p>)</p> <p>) <b>Peter A. McInroy</b></p> <p>) <b>for the respondent</b></p> <p>)</p> <p>)</p> <p>) <b>Appeal Heard:</b></p> <p>) <b>May 31, 1993</b></p> <p>)</p> <p>) <b>Judgment Delivered:</b></p> <p>) <b>May 31, 1993</b></p> <p>)</p> <p>)</p> <p>)</p>
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**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**THE COURT:** Appeal allowed from Family Court judgment that the child of an unmarried woman who married a man other than the child's father prior to apprehension of child remained child of unmarried woman under regulations made under the **Children and Family Services Act**, S.N.S. 1990, c. 5, and therefore the financial responsibility of the Province of Nova Scotia, per oral reasons of judgment of Freeman, J.A.; Clarke, C.J.N.S., and Pugsley, J.A., concurring.

The reasons for judgment of the Court were delivered orally by:

**FREEMAN, J.A.:**

The Minister of Community Services apprehended a child who was born to an unmarried woman who subsequently married a man who was not the child's father; the issue in his appeal is whether responsibility for the costs of the child should be borne by the Province of Nova Scotia, or the Municipality of the District of Digby where the family has settlement.

Section 52(3) of the Regulations made under the **Children and Family Services Act**, S.N.S. 1990, c. 5, provides:

"Where a child has no settlement within the Province, **or a child is the child of an unmarried mother**, the Minister shall pay the costs of taking the child into care, and of the maintenance of the child in care. "(Emphasis added)

The issue is not whether the child has settlement, as it appears to have under s. 5 of the **Settlement Act**, R.S.N.S. 1989 c. 423, but whether the definition of "child of an unmarried mother" in the regulations made under the **Children and Family Services Act** continues to apply after the marriage of the mother.

The Family Court judge found the child was the child of an unmarried mother and assigned responsibility to the province. The Province, represented by the Attorney General of Nova Scotia, has appealed on the ground that the trial judge erred in failing to consider or in misinterpreting s. 51 (2) of the Regulations. Section 51 of the regulations provides:

"For the purpose of section 51 of the **Act**, 'a child or an unmarried mother' means the child of a woman who at the date of the birth of the child was

- (a) single;
- (b) divorced for not less than twelve months;
- (c) a widow for not less than twelve months; or
- (d) married, but was living separate and apart from her husband continuously for not less than twelve months.

(2) For the purposes of this section and Section 51 of the **Act**, where a woman was

- (a) living with a man in circumstances

similar to that of husband and wife continuously for one year or more immediately before the birth of the child; or

- (b) living with her husband at the date the child was taken into care pursuant to Section 33 of the **Act**, or an application was filed pursuant to section 32 of the **Act**

the child of the woman shall be deemed to be the child of a married woman."

The interpretation urged on behalf of the Attorney General is that the child was the child of a married woman living with her husband when it was taken into care and therefore falls within the provisions of s. 51(2)(b); it should be deemed to be the child of a married woman.

The respondent municipality argues that s. 51(2)(a) should be read in the light of s. 51(1)(d) of the regulations, and applies to a woman living apart from her husband when the child is born who returns to him by the date the child is taken into care. This interpretation is ingenious, but it runs counter to the plain language and apparent intent of the statutory provisions.

The definition of unmarried woman in s. 51 of the regulations fixes her child with a status as of the time of birth. That is one of the few instances in the enactments where circumstances at the date of birth are the governing consideration. Elsewhere in the **Act** and **Regulations** the relevant time is when the child is taken into care.

An example is the determination to be made by the court, when the child is not the child of an unmarried woman. This is set out in s. 51(5) of the **Act**:

"(5) For the purpose of this Act, the court shall determine the settlement that the child had

- (a) on the date the child was taken into custody; or

- (b) where the child was not taken into custody, on the date on which the application was made."

Being the child of an unmarried woman is a status that is subject to change: if the mother marries the father of the child, the child is "legitimated" from the date of birth. See **Family**

**Maintenance Act**, s. 19. If she marries anybody else, she remains the mother of the child but she ceases to be an unmarried woman: s. 51(2)(b) of the regulations applies.

The **Act** contains no procedure for determining whether a child is the child of an unmarried mother; the Family Court judge adopted a fair approach in requiring notice before making the determination. Such a determination is necessary only when the Department does not acknowledge the child is the child of an unmarried mother.

When a previously unmarried mother marries, there is an assumption that a new family unit is created, and there is no reason for members of this unit to be treated differently from members of other family units.

The interpretation urged by the province of s. 51(2)(b) of the regulations is not inconsistent with the assumption, nor contrary to the plain meaning of the regulation or the statute.

The appeal is allowed without costs and the declaratory relief sought by the appellant is granted as follows:

(1) The child, M. W. R., was not a child of an unmarried mother within the meaning of Section 51 of the **Children and Family Services Act** on the 19th day of November, 1992, the date when he was taken into care.

(2) The place of settlement of the child M. W. R., was the Municipality of the District of Digby on the 19th day of November, 1992.

Freeman, J.A.

Concurred in: Clarke, C.J.N.S.

Pugsley, J.A.

