

SUPREME COURT OF NOVA SCOTIA

(Family Division)

Citation: O.R. (Re), 2016 NSSC 296

Date: 20161102

Docket: SFHCFSA 102013

Registry: Halifax

Between:

Nova Scotia (Community Services)

Applicant

and

Birth Registration # 2016-02-002781

Respondent

Restriction on publication: 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:

“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 relative of the child.”

Judge: Associate Chief Justice Lawrence I. O'Neil

Heard: October 14, 2016 in Halifax, Nova Scotia

Written Decision: November 2, 2016

Counsel: Judith A. Schoen

By the Court:

Introduction

[1] The court has before it an application to adopt the person registered as Registration No. 2016-02-002781, by the Registrar General for the Province of Nova Scotia.

[2] The child was born March 7, 2016. Shortly thereafter on March 30, 2016, the child was made subject to an adoption agreement pursuant to s.68 of the *Children and Family Services Act*, S.N.S 1990, c.5, (the '*CFSA*'). The agreement is between the child's biological mother and the Minister of Community Services purportedly acting under the powers of an agency approved pursuant to clause (i) of section 3(1) of the *CFSA*. On the very same day, March 30, 2016, the Applicants herein, filed a Notice of Proposed Adoption of the subject child.

[3] The mother's signature appearing on the adoption agreement is witnessed by independent counsel and a person authorized by s.71(1) of the *CFSA* signed on behalf of the Minister of Community Services.

[4] The agreement is one page in length consisting entirely of the following six (6) clauses:

1. I, A.M.R., hereby give up my female child, O.R. who was born at the IWK Hospital, in Halifax, in the County of Halifax, Province of Nova Scotia on the 7th day of March, A.D., 2016, to the Agency for the purpose of being adopted under the provisions of the *Children and Family Services Act*.
2. I, A.M.R., hereby freely surrender my child, understanding that if the child is adopted I will be deprived permanently of the parental rights with respect to the child.
3. This agreement is to remain in effect for one year from the date it is signed unless during that time the child is placed for adoption and in that case the agreement shall continue in full force and effect until an adoption order is made or until the application to Court for Adoption is dismissed, discontinued or unduly delayed.

4. I, A.M.R., acknowledge that by entering into this agreement, I am giving to the Agency all my rights, powers and responsibilities as a parent of my child and I further understand that the Agency continues to have those parental rights, powers and responsibilities for so long as this agreement continues in force.
5. If the child is placed in a home for the purpose of adoption and a Notice of Proposed Adoption is given by or on behalf of the adopting parents to the Minister of Community Services, I, A.M.R. cannot terminate this Agreement. However, if the child has not been placed for adoption, or, a Notice of Proposed Adoption has not been received by the Minister, I may terminate the agreement at any time by giving notice to the Agency pursuant to subsection (4) of Section 68 of the Children and Family Services Act.
6. If the Agency is unable to place the child for adoption while this agreement is in effect, then, upon termination of this agreement, the Agency shall return the child to myself except where the child is taken into care as permitted by and in accordance with Section 33 of the Children and Family Services Act.

[5] Section 68 of the CFSA reads:

Adoption agreement

68 (1) A parent of a child may enter into an adoption agreement with a child-placing agency whereby the child is voluntarily given up to the child-placing agency for the purpose of adoption.

(2) The term of an adoption agreement shall be for a period not to exceed one year and, in the case of a newborn child, shall not be effective until fifteen days after the birth of the child.

(3) A child shall not be placed in a home for the purpose of adoption pursuant to an adoption agreement unless and until every parent of the child has entered into such an agreement.

(4) Subject to subsection (5), where the child has not been placed in a home for the purpose of adoption, a parent who entered into the adoption agreement may, in writing, at any time during the term of the agreement, notify the child-placing agency that the parent wishes to terminate the agreement and have the child returned to the parent.

(5) Where a child has been placed in a home for the purpose of adoption as a result of an adoption agreement, and the persons with whom the child is placed have filed a notice of proposed adoption with the Minister prior to the expiration of the term of the agreement, then, notwithstanding subsection (2), the adoption agreement continues in force and may not be terminated by the parent who entered into the agreement, unless and until the application for adoption is dismissed, discontinued or unduly delayed.

(6) On receipt of a notice pursuant to subsection (4) from, or the expiry of the adoption agreement with, the parent from whom the child was received, the child-placing agency shall return the child to that parent unless the child is taken into care as permitted by and in accordance with Section 33.

(7) On receipt of a notice pursuant to subsection (4) from, or the expiry of the adoption agreement with, a parent who is not the parent from whom the child was received, the child-placing agency shall

- (a) declare in writing that all adoption agreements respecting the child are terminated, notifying where possible the other parties to such adoption agreements, and return the child to the parent from whom the child was received; or
- (b) take appropriate steps to have the child taken into care as permitted by and in accordance with Section 33, in which case all adoption agreements are terminated as and when the child is taken into care.

(8) Where a parent has entered into an adoption agreement, the child-placing agency shall, where the parent's whereabouts are known to the agency, advise the parent when the child has been placed in a home for the purpose of adoption or provide such information upon request by a parent.

(9) An adoption agreement shall be in the form prescribed by the regulations.

(10) Where a parent has entered into an agreement pursuant to subsection (1), the child-placing agency has all the rights, powers and responsibilities of that parent so long as the adoption agreement continues in force.

(11) Where an agency other than the Mi'kmaq Family and Children's Services has reason to believe that a child who is to be the subject of an adoption agreement is or may be an Indian child, the agency shall not enter into an adoption agreement respecting the child until fifteen days after the agency has notified the Mi'kmaq Family and Children's Services.

(12) Where, subsequent to the execution of an adoption agreement and prior to the placement for adoption of the child who is the subject of the adoption agreement, the agency determines that the child is or may be an Indian child, the agency shall, as soon as possible, notify the Mi'kmaq Family and Children's Services and shall not place the child for adoption until fifteen days have elapsed from the date of such notification.

Placement with specified person

68A (1) Where every parent of a child has entered into an adoption agreement pursuant to Section 68 and all such parents have also requested, in writing, that the child be placed with a specified person, the child-placing agency may place the child for the purpose of adoption with the specified person if

(a) the specified person has been approved by the child-placing agency as an approved adoption home;

(b) not proclaimed in force

and

(c) the child-placing agency is satisfied that adoption of the child by the specified person is in the best interests of the child.

(2) An adoption agreement entered into for the purpose of permitting a child to be placed with a specified person in accordance with subsection (1) is subject to Section 68.

(3) Where a child is in the care of a child-placing agency pending placement with a specified person and the child-placing agency determines that placement of the child with the specified person cannot occur for any of the following reasons:

(a) the specified person cannot be approved as an approved adoption home by a child-placing agency;

- (b) the specified person cannot meet the requirements necessary for approval by a child-placing agency within a period of time that serves the best interest of the child respecting the child's need to be placed for adoption in a timely manner;
- (c) not proclaimed in force

the child-placing agency shall advise the parents that placement of the child with the specified person cannot be effected.

(4) Upon being advised pursuant to subsection (3) that placement with a specified person cannot occur, a parent may

- (a) direct the child-placing agency, in writing, to place the child with a suitable adopting family approved by the child-placing agency; or
- (b) terminate the parent's adoption agreement in accordance with subsection (4) of Section 68.

(5) Where a child-placing agency has determined that placement of the child with the specified person cannot occur and the child-placing agency is unable, within three weeks, to contact a parent to advise the parent pursuant to subsection (3) that placement of the child with a specified person cannot be effected, the child-placing agency shall consider the child to be abandoned within the meaning of Section 28 and accordingly advise an agent.

(6) A parent, who enters into an adoption agreement and requests, in writing pursuant to subsection (1), that the child be placed with a specified person, may also request that, in the event that the agency determines that placement of the child with a specified person cannot occur, the agency may place the child for adoption with any other person or persons approved by the child-placing agency.

[6] Note the foregoing section 68 and section 68A provide at s.68(3) that "A child shall not be placed in a home for the purpose of adoption pursuant to an adoption agreement unless and until every parent of the child has entered into such an agreement". The state's obligations to a parent are also referenced in s.68(3) and s.68A, (see s.68(8) and 68A(1) and 68A(4), for example).

[7] Defining and determining who is or is not a parent is therefore a critical decision making point under the statutory regime governing adoptions.

[8] The definition of parent or guardian contained in s.67(1)(f) of the *CFSA* is as follows:

67 (1) In this Section and Sections 68 to 87,

(f) "parent" of a child means

- (i) the mother of the child,
- (ii) the father of the child where the child is a legitimate or legitimated child,
- (iii) an individual having custody of the child,
- (iv) an individual who, during the twelve months before proceedings for adoption are commenced, has stood in loco parentis to the child
- (v) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child and has, at any time during the two years before proceedings for adoption are commenced, provided support for the child or exercised a right of access,
- (vi) an individual who has acknowledged paternity of the child and who
 - (A) has an application before a court respecting custody, support or access for the child at the time proceedings for adoption are commenced, or
 - (B) has provided support for or has exercised access to the child at any time during the two years before proceedings for adoption are commenced,

but does not include a foster parent

[9] As stated, the mother's statutory declaration dated March 30, 2016 accompanied a Notice of Proposed Adoption, also dated March 30, 2016.

[10] The language of the mother's statutory declaration mirrors the language of s.67(1)(f) of the *CFSA* with the obvious objective being to establish that no one, other than the mother, is a parent of the subject child. The language of the mother's statutory declaration is as follows:

I, A.M.R., of Dartmouth, in the County of Halifax, and Province of Nova Scotia, do solemnly declare:

1. I am the mother of O.R. (hereinafter called the "child"), who was born at the IWK Hospital, in Halifax, HRM, Province of Nova Scotia, on the 7th day of March, 2016.
2. I am not now married and have never been married.
3. The father of the child has not been identified by me.
4. Neither the father of the child nor any man claiming to be the child's father has, to my knowledge, an application before a Court respecting custody, support or access for the child.
5. Neither the father of the child nor any man claiming to be the child's father has provided support for or has exercised access to the child since her birth.
6. No person other than me (and The Department of Community Services) has, or has had custody of the child at any time from March 7th, 2016 to the date of this document. [I understand that a person having custody of the child is a person who has had actual custody of the child during the time referred to above, or, is a person who has custody of the child either by written agreement or court order. To my knowledge, there is no person with custody of the child by written agreement or court order].
7. During the last twelve month, no individual has stood in loco parentis to the child. [I understand that an individual stand in loco parentis to a child when that individual cohabits with a common law partner who is the father or mother of the child while that father or mother has custody of the child, and furthermore, the individual contributes to the financial support of the child.]

8. There is no person who, under a written agreement or a court order, is required to support the child or has a right of access to the child.

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

[11] Finally, the court received a recommendation dated September 12, 2016 in support of the adoption from the Department of Community Services, pursuant to s.76(1)(b), 77(2) and 76(2) of the *CFSA*.

Issue

[12] The issue for the court at this juncture of the process is whether notice of this proceeding must be provided to the child's father or whether these circumstances require an explanation for why notice to the father has or has not been provided. Notice of this proceeding would, at a minimum, provide an opportunity for a father to establish that he is a parent. Is it illogical to assert that a father who may not be aware his child has been born is not a parent because he has not paid child support or visited the child, for example? Is this circular reasoning?

Discussion

[13] The Applicants must be confident the order of adoption they seek will be secure. The court explained its concern in this respect when they appeared.

[14] If the court were to concern itself solely with what appears to be the established practice associated with adoption agreements pursuant to s.68 of the *CFSA*, then there is no need for the Applicants to be concerned that their adoption order might not be secure. However, not all established administrative practices survive scrutiny once subject to over sight.

[15] The issue of notice of child protection matters was commented upon by me in a recent decision, *Nova Scotia (Community Services) v. K.C-S. and C.T.*, 2016 NSSC 280. Justice Gregan also discussed the notice requirements of the *CFSA* in *Re: Adoption of I.F.M.*, 2016 NSSC 83.

[16] Whether a parent must receive notice of a legal proceeding that may impact on a father or mother's parental rights is a basic question, which in my view needs to be addressed. The court is aware of the decision of our Court of Appeal in *T.(D.) Re*: [1992] N.S.J. 289.

[17] Jurisprudence and societal attitudes about the rights and responsibilities of biological parents have been evolving.

[18] The discussion of Justice Dunlop in *Manitoba (Director of Child and Family Services) v. H.H. and C.G.*, 2016 NBQB 138 is a helpful review of the constitutional rights that are often in jeopardy when the state is involved in a process that will result in the diminution or elimination of parental rights.

[19] The preamble to the *CFSA* contains the following *inter alia*:

.....

AND WHEREAS children have basis rights and fundamental freedoms no less than those of adults and a right to special safeguards and assistance in the preservation of those rights and freedoms;

.....

AND WHEREAS the rights of children, families and individuals are guaranteed by the rule of law around intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law;

AND WHEREAS the preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the child.

.....

[20] Further, the *CFSA* requires the court to make adoption orders or determinations in the best interests of a child:

s.3

(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.

[21] I am inviting the Minister of Community Services to answer the question(s) raised in paragraph 12 *supra*. The opportunity for the Minister to be heard is contemplated by s.4 of the *CFSA* which reads as follows:

s.4(1) The Minister has the general supervision and management of this Act and the regulations.

(2) The Minister may appear and be heard in any court with respect to any matter arising pursuant to this Act.

ACJ