

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *R. (Re)*, 2014 NSSC 100

Date: 2014-03-14

Docket: Halifax No. SFHCFSA-070704, SFHMCA-42577

Registry: Halifax

In the Application of N. L. R. and W. H. J. R. to adopt the person whose birth is registered as No. [...]
by the Registrar General of Nova Scotia

and

In the matter of the *Children and Family Services Act* being Chapter 5 of the Statutes of
Nova Scotia, 1990.

And Also in the Matter Between:

I.R.R.

Applicant

v.

N. L. R. and W. H. J. R.

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.”

Editorial Notice- Identifying information has been removed from this electronic copy of the judgment.

Judge: The Honourable Justice Douglas C. Campbell

Heard: January 2, 2014, in Halifax, Nova Scotia

Counsel: Fergus Ford, for the Applicants
I.R., Respondent

By the Court:

[1] These matters involve an application by the biological mother and her current husband, the child's so-called "stepfather", for an order for Adoption of the child named therein. The biological father is the applicant in the matter brought by him pursuant to the *Maintenance and Custody Act*, Chapter 160 of the revised statutes, 1989 amended 1990, c. 5, s. 107; 1994-95, c. 6, s. 63; 1997 (2nd Sess.), c. 3; 1998, c. 12, s. 2; 2000, c. 29, ss. 2-8; 2012, cc. 7, 25 hereinafter referred to as ("the MCA") in which he seeks an order for access to the child. The biological mother responded by resisting that application.

[2] She also seeks, in the alternative to an adoption, a change of the child's surname pursuant to the Change of Name legislation which could only be done in conjunction with a dispensation of the biological father's consent. In the event that the adoption is granted, the change of name application would become redundant since an adoption would involve a surname change routinely.

[3] The applicants in the adoption proceeding are hereinafter referred to as "the mother" or the "stepfather", respectively or as the "proposed adoptive parents", collectively. The applicant in the MCA proceeding who is contesting the adoption order in the adoption proceeding is hereinafter referred to as the "father".

[4] The mother and the father were never married. The mother and the stepfather were married on August [...], 2009. The subject child was born on January [...], 2004. She is now more than nine years of age.

[5] In her affidavit, the mother stated that she had little contact with the father during the pregnancy, that he was not present at the child's birth, that he met the child when she was about one month old and that the father saw the child on a casual basis during the first two years (approximately) of the child's life. She states that as of the date of her affidavit, being November 7, 2013, the father had no contact with the mother or the child for roughly six years.

[6] By contrast, the father says his contact in those early years of the child's life was much more frequent.

[7] The mother moved with the child for an academic pursuit in [...] and returned to Nova Scotia soon thereafter. The father said that this caused him to have no ability to contact the mother or the child and that his absence in the child's life is explained by his inability to locate them.

[8] In her affidavit, the mother offered a number of facts which would confirm the father's ability to locate her which included, for example, the name and telephone number of the facility where she was studying, a letter from an aunt and uncle showing the address where she was staying and a corresponding phone number. In addition, she stated that the father was aware of the names and locations of her close relatives. She offered other facts.

[9] The father disputes his ability to have contacted the mother during that time frame and suggests that the mother had been making a concerted effort to conceal the child's whereabouts from him.

[10] By July 2006, before the move to [...] occurred, the father had made an application to court for parental access and obtained an order in 2007 for supervised access managed through [...], which is an institution that provides professional supervision for parental access with a child.

[11] That order called for a gradualized increase in access times. The mother confirms that the father exercised a few hours of access at that time under that program and then did not follow up with it. The father would suggest that the access program ended because of the mother's move to [...], above-noted.

[12] The mother states that she was then in possession of a cellular phone which had once been possessed by the father and whose calling number must have been known to him and could have provided an easy channel by which he, the father, could have contacted her, the mother. (I have no evidence to suggest that the father was aware of the fact that the cellular phone was still in existence, but I do find it to be strange that he would not have at least attempted that method of contact).

[13] While I have concluded that the mother did not attempt to conceal the whereabouts of herself and the child, I also note that she did very little, if anything, to establish contact with the father so as to promote the relationship between the father and the child. On the other hand, it is clear that she allowed (or at least acquiesced in) the disclosure of certain information that was being made available to the father that would have been helpful in his locating her (and the child).

[14] In light of the relationship between mother and father and the fact that he was not engaged in the child's life either from the point of view of access or financial support, it is not surprising that the mother made no concerted effort to place the child in contact with the father or that the mother would not feel obliged to take responsibility for achieving contact.

[15] In fact, given that there was no support being paid and no pursuit by the father of a father/child relationship, the mother cannot be faulted for operating on the assumption that the obligation rested with the father to seek out a relationship with the child, especially given his access to information that could have succeeded in her being located; a cause which the Court must assume would be earnestly pursued by a concerned Father.

[16] There was apparently no further contact between the proposed adoptive parents and the father until the mother and stepfather made application in June 2010 for adoption of the child. This event was accompanied by a requirement for notice to the father. It was then that the father expressed interest, again, in being involved.

[17] That adoption application was dismissed but the mother and stepfather were granted sole custody of the child. Counsel for the father then indicated an intention to bring an application on behalf of the father for access but this was not immediately forthcoming.

[18] The current application for adoption by the mother and stepfather which includes a request for dispensation of father's consent was made on November 7, 2013. The father contests this dispensation and seeks an order for access under the MCA. If the adoption is not granted, the father contests a request for a change of surname of the child pursuant to the Change of Name legislation.

[19] The adoption process is governed by the *Children than Family Services Act* (1990), c. 5, s. 1, (hereinafter referred to as the "CFSA"). Section 74 (3) states that:

(3)"... No order for the child's adoption shall be made, except as provided herein, without the written consent to adoption of the child's parents..."

[20] Section 67 (1) of the CFSA defines "parent" in such a way that does not automatically include a biological father. It requires that the child is "legitimate" or "legitimated" - a somewhat outdated concept that requires legal marriage between the parents before the father has the status of a "parent".

[21] These parents were never married and therefore this father does not meet the threshold definition of "parent" even though it is not disputed that he is the biological father. Further Sub-sections of that Section however would include this father if he had been providing support or exercising access to the child during the previous two years. That appears not to be the case.

[22] Nonetheless, Section 67 (1) (vi) includes within the definition of "parent":

"(vi) an individual who has acknowledged paternity of the child and who (A) has an application before court respecting custody, support or access for the child at the time the proceedings for adoption are commenced..."

[23] The father's application under MCA was filed on May 7, 2013. The application by the proposed adoptive parents was filed on December 6, 2013. Accordingly, it appears that the father meets the definition of "parent" by virtue of the last above quoted section of the CFSA and that accordingly, his written consent is required unless the court dispenses with his consent by Order.

[24] Section 75 (4) states:

"(4) where the court is satisfied that a person, whose consent is required pursuant to subsection... (3) of section 74,

(d) ... has had no contact with the child for the two years immediately preceding the adoption placement;

- (e) has failed, where able, to provide financial support for the child for the two years immediately preceding the adoption; or
- (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".

[25] It follows that the application by the proposed adoptive parents would succeed if an order is made to dispense with the father's consent based on the statutory principles above-noted. These principles have been reviewed by courts both in this province and others in recent years.

[26] I am satisfied on the facts that the father has had no contact with the child for the immediate preceding two years. I am not satisfied on the evidence as to whether or not the father would have been able to provide financial support for those two years.

[27] In the end, the analysis turns on whether or not, repeating the words of section 75 (4), "... it is in the best interests of the person to be adopted to do so [that is to dispense]".... a conclusion which would support the notion that the father "is a person whose consent in all the circumstances of the case ought to be dispensed with", taking into account, if it were true, that he had had no contact with the child for the two years immediately preceding the adoption placement.

[28] Dispensing with consent in the context of a contested adoption involving a step-parent was dealt with in *Re JSA* (1997), 160 NSR (2d) 214, [1997] NSJ No 256 (SC), where the court considered the analysis for dispensing with consent at paras 39 et seq. This discussion summarizes several earlier cases: *Wolfe v Cherrett* (1978), 28 NSR (2d) 17, [1978] NSJ No 571 (SC(AD)); *M(JJ) v L(SD)*(1992), 117 NSR (2d) 159, 1992 CarswellNS 77 (SC(AD)); *Re Nova Scotia* (Birth Registration Number 88-02-005712)(1996), 149 NSR (2d) 135, [1996] NSJ No 76 (SC); *Re FRA* (1993), 122 N.S.R. (2d) 77, [1993] NSJ No 200 (SC)(sub nom M(KAN)).

[29] The analysis originating in *Wolfe v Cherrett* was more recently endorsed by the Court of Appeal in *Re LDF*, 2005 NSCA 64:

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...

[30] The principles governing dispensation with consent in the context of a step-parent adoption were considered in *AK v AE*, 2013 (ONSC) 5421; note especially the extensive review of principles at para 15 (citations omitted):

- 15 Principles from jurisprudence as to dispensing with parental consent to an adoption include the following:
 - (1) The adopted child becomes the child of the adoptive parent and ceases to be the child of the biological parent. The adopted child ceases to be the relative of the former members of the parent's family. Adoption results in the final and irrevocable severance of the biological bond between parent and child...
 - (2) In considering the factors to determine the best interests of the child test under s. 136 (2), the court should balance what the child will gain and lose with emphasis on what the child will gain; the child's wishes, as best those can be ascertained and the child's existing family reality... There must be "cogent" benefits to the child in order to terminate the blood relationship...
 - (3) An order dispensing with parental consent should only be made in special circumstances and on the clearest possible evidence of benefit to the child resulting from such an order and evidence that detriment to the child would result if the order was refused. Consent will not be dispensed with unless there is some compelling reason such as abandonment, misconduct on the part of one parent, some real detriment to the child, or unless consent is refused out of vindictiveness or spite. The step-parent's onus is not met merely by showing that the interests of the child are enhanced by a new family relationship...
 - (4) There is some controversy about granting adoption applications in step-parent situations. Such applications should not be used to "shore up" the new family...
 - (5) The exclusive focus is the child's best interest, not the rights of the natural parent. It is no longer necessary to find parental misconduct to dispense with a parent's consent to adoption...
 - (6) Where the natural parent has shown a genuine interest in the child, even though separated, and the child has an emotional attachment to that parent, courts have been very reluctant to dispense with that parent's consent to adoption. Where the relationship with the child is non-

existent, courts are more inclined to dispense with the natural parent's consent...

- (7) In the absence of a past relationship and contact between the child and the respondent parent, there is no loss of a meaningful and positive impact on the child if parental consent to adoption is dispensed with...
- (8) The parent and step-parent cannot use the adoption process to terminate the relationship between the child and the natural parent to eliminate difficulties that relations create for the custodial parent and stepparent. The court must be mindful of improper motive in the case of step-parent adoptions...
- (9) If the adoption application is made in the early and formative stage of a new marriage or union, the courts should assessing the stability and permanence of the relationship between the step-parent and the other parent before extinguishing a biological parent's relationship with a child...
- (10) The advantages of adoption identified by the courts includes continuity of care, a positive relationship between the child an adopting parent, the similarity in family name, security at home in a family unit, benefit of stability in an inheritance or upon the death of a biological parent, confirmation of the reality of who is doing the parenting and reaffirmation of sibling relationships versus unknown, future or unlikely benefits from the biological parent...
- (11) The advantage of dispensing with consent includes the elimination of possible interference by the respondent in the parenting and stability of the child by the step-parent and custodial parent...
- (12) The rate of divorce, subsequent new parental relationships and the common unification of two families with children in today's society diminishes the risk a child will be stigmatized or emotionally harmed unless contact with a biological parent is terminated and or his or her family name is different than the adopting parent...
- (13) Courts on occasion have concluded that a child's best interest consists of the continuation of the love, care and effective parenting by the step-parent plus the love and financial support of the biological parent...
- (14) What is lost by an order dispensing with adoption consent in some cases includes the opportunity to re-establish a relationship with that biological parent, unless and until it is pursued at a later age...
- (15) If available, courts carefully consider the expressed wishes of the child regarding adoption by the applicant.

[31] I agree with the above noted list of factors and have applied them to the facts in evidence in this case. Some have greater application than others.

[32] In this case, the child has had no contact with the father for six years in the nine years since her birth and very limited contact prior to those six years. The father argues that it would be in the child's interest to have a relationship with him and to know her biological father and biological relatives. I agree that that is a positive factor but, if it were to be a governing factor, dispensing with consent would, rarely, if ever, occur.

[33] The child has come to know her step-father as her father and the step-parents as her family. The biological father is a stranger to her. The court must balance whatever benefit would come from a relationship with her biological family against whatever stresses might be created by such an introduction after so many years, factoring in as well the benefits that would come from adoption.

[34] I have approached this decision by considering the above 15 enumerated factors and weighing them against the evidence in this case in conjunction with the foregoing conclusions.

[35] I am satisfied that the father could have maintained contact with his daughter through the years. His current and earlier interest in the child's life appears to be a response to court requests made by the mother and the stepfather. He would disagree, arguing that he surfaced then to make his case only because he was theretofore denied knowledge of his daughter's whereabouts. I have already rejected that contention.

[36] When the most recent court order was made denying the adoption, the expected application by the father for access was not forthcoming for several years. It occurs to me that the expectation of such a claim would have been a major consideration by the then Trial Judge who rejected the adoption request.

[37] The father's contention that his inability to raise the funds to pay his lawyer is simply not an adequate response in this age of self representation.

[38] I do not wish for that comment to be misunderstood as suggesting that potential litigants should not expect or be entitled to legal representation. I merely mean that when facing an issue as important as a reunification between a father and a daughter, the inability to afford counsel should not be a deciding factor in a father's decision to fail to pursue that immensely important objective. That failure is a decision that measures against that child's best interest that might have been occasioned by her realization that such pursuit of reunification was earnestly pursued as opposed to having been abandoned.

[39] Considering the tests enunciated in the above-noted cases and considering all of the evidence, including those facts which were disputed in the evidence, I have concluded that it is in the best interests of this child for the Court to dispense with the father's consent and that his consent in all of those circumstances ought to be dispensed with.

[40] Accordingly, the adoption order is granted. Given the opposition by the proposed adoptive parents to access by the father, the adoption order shall not provide for access between the child and the father.

[41] The request for a name change pursuant to the *Change of Name Act* is now redundant because that surname change is inherent in the adoption process. As well, the MCA application request for access by the father is similarly redundant.

[42] The earlier submitted draft Order for Adoption will be signed, processed by court staff and issued in due course.

Douglas C. Campbell, J.