IN THE SUPREME COURT OF NOVA SCOTIA
Citation: K. v. D., 2004 NSSF 115

Date: 20041217
Docket: SFHMCA 31774
Registry: Halifax

Between:

J.K.

Applicant

v.

S.M.D.

Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on May 30, 2008.

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	October 6, 2004, in Halifax, Nova Scotia
Counsel:	Joseph Cooper, Q.C., for the Applicant Gordon Kelly, for the Respondent

By the Court:

[1] The respondent seeks on a preliminary motion to dismiss the application for child support contending that the applicant is barred from making such an application because:

1. his consent to adoption terminates the support obligation;
2. that the adoption consent can be interpreted as an adoption agreement which rescinds the court's jurisdiction;
3. the existing court order terminates the respondent's parental rights (and therefore obligations);
4. the existing order implies that the respondent is not the father of the child;
5. that the principle of *res judicata* applies.

[2] The applicant is the mother of a female child born [in 1996], currently 8 years of age. The respondent is alleged by the mother to be the father of the child. The parties were not married.

[3] A few months after the birth of the child, the mother brought an application for an order for custody and maintenance in respect of the child and for access by the father to be denied. In her affidavit, the mother recalls that at the time she simply wanted the father to be out of her life and the life of her daughter and that the respondent had indicated that he did not want a relationship with the child and he continued to deny paternity.

[4] These positions paved the way to a consent order which was granted on the 12th day of June, 1997 on somewhat unusual terms. Pursuant to it, the mother was granted sole care, custody and control of the child; it was ordered that the respondent shall have no access to the child and that he "shall not have any right to make further application to seek custody of or access to the said child..."; that the respondent shall provide a written consent to adoption forthwith; and that the respondent shall consent to any future application for adoption of the child should his further consent be needed.

[5] There was no plan for adoption of the child at that point in time or at any time. The mother had no intention of placing the child for adoption nor did she have or contemplate a new partner with whom she would join in an adoption application. In fact, it is her evidence that the then current and future adoption consents were entirely the brainchild of the respondent volunteered by him to strengthen his position that no child support would be payable. The order was silent with respect to child support and although the

applicant had pleaded for child support, her counsel noted on the record at the time of the consent order that her application for child support was withdrawn.

[6] Subsequent to the taking out of the order, the respondent on July 31st, 1997 signed a document entitled "Consent to Adoption" as contemplated by the order. In addition to the usual provisions for consent, waiver of notice, and a statement of its voluntary nature and known legal effect, it contained a provision that the respondent's consent is given "...knowing that it can be interpreted as an adoption agreement, giving up the adoptee to ... an agency involved in the process of an adoption".

[7] For the first several years of the child's life, the father was either incarcerated locally or living in western Canada. His parents have maintained regular contact with the child. The respondent recently returned to live in Nova Scotia and through visits with the paternal grandparents, the respondent has had some contact with the child. She has been told that he is her father. He has not taken on the role of father however.

[8] In May 2004, the applicant filed an application for child maintenance, custody and a denial of access, under the *Maintenance and Custody Act*, S.N.S. 2000, c.29.

THE ISSUE:

[9] As a preliminary issue, the respondent seeks a declaration that the application should be dismissed because:

1. his consent to adoption terminates the support obligation;
2. that the adoption consent can be interpreted as an adoption agreement which rescinds the court's jurisdiction;
3. the existing court order terminates the respondent's parental rights (and therefore obligations);
4. the existing order implies that the respondent is not the father of the child;
5. that the principle of *res judicata* applies.

[10] In approaching the issue, counsel for the alleged father draws a useful distinction between the termination of parental rights and the termination of the exercise of those rights. I agree that the termination of parental rights (in the

sense he uses those words) must result in a termination of parental obligations. The obvious example of this reality is adoption. An adoption clearly terminates all parental rights and therefore the maintenance obligation is extinguished. No such release of maintenance obligations would occur if, in another setting, the mere exercise of those rights were terminated or suspended. The latter regime can be varied after a change in circumstance; the former cannot.

IMPACT ON MAINTENANCE OBLIGATION OF ADOPTION CONSENT:

[11] The alleged father relies on the case of *Wagstaff v. Wagstaff* (1981), 48 N.S.R. (2d) 466(F.C.) in which the court noted that the signing of a consent to adoption operates so as to terminate the child maintenance obligation. The court stated at paragraph 11:

> "If a court dispenses with the parent's consent under the *Children's Services Act,* section 17, it is my view the parent has been denied any parental relationships with the child by court order and consequently the effect of the order is to cancel any maintenance or other obligations the parent has at that time. It would appear to be against logic that, on the one hand, the court could remove all rights of a parent to a child, give the child to another person, then in the absence of specific legislation require the parent to continue supporting the child. The silence of section 17, on the ability of the court to order maintenance after consent has been dispensed with in my view clearly maintains the policy that, once consent is granted either by court order or voluntarily, the obligation to maintain the child is as a general rule, removed."

[12] At paragraph 12, the court continued:

> "While this section does not clearly state that the giving of a consent to adoption relieves the parent of all obligations and it could be interpreted to mean that the understanding of the deprivation of parental rights takes effect on the issuing of the adoption order, it is my view that section 21(b) entitles a parent who consents to the adoption of his child to believe he has given up permanently all parental rights and any obligations as well, by so consenting. "

[13] In *Fletcher v. Bourgeios* (2004), 222 N.S.R. (2d) 224 (SC), Justice Gass refused to allow an application to enforce child support retroactive to the date when the consent to the adoption was signed by the father even though there had been a four year lapse from the date the consent was given until the adoption was granted. She stated at paragraph 15:

> "There is no question that the obligation ends with adoption. Does it also end when a consent to adopt has been signed? The *Children and Family Services Act*, S.N.S. 1990, c.5 as amended provides grounds for dispensing with a person's consent to adopt where a person is divorced, is without custody and is not contributing to the support of the child. If this had been the case, it would be incongruous to then turn around and enforce the very support, the lack of which is relied upon to dispense with consent, especially support accumulating after the court dispensed with consent. Here the consent was given; it is equally as incongruous to then seek the continued enforcement of maintenance after the consent is given as it would be where consent is dispensed with. The very act of consenting is the giving up of all rights and obligations with respect to the children..."

[14] It appears that it is settled law that parental rights and therefore obligations end with a signing of a consent to adoption, generally speaking (see the approval of *Wagstaff* in *Walsh v. Walsh* (1987), 80 N.S.R. (2d) 350 (F.C.).

[15] However, in every case that has been cited to me adopting that principle, the context has been that there was a completed adoption. That context is critical. In typical cases where the adoption has been contemplated, it is not difficult to appreciate that in making the statement that adoption consent results in a release of the child support obligation, a court would not be thinking about whether that principle applies to the highly unlikely context of the consent to adoption being granted when there is no adoption in contemplation.

[16] Here the consent to adoption appears to have been volunteered unilaterally by the alleged father in order to bolster his desired escape from child support obligations. If that strategy can succeed, every payor parent who wishes to emancipate himself from his child support obligation could, so long as he is not interested in pursuing his parental rights, volunteer an adoption consent, with or without the mother asking for it. It would be unthinkable that such unilateral action could deprive a child of the right to support when the child does not have the benefit of an adoption to replace the father's obligation.

[17] I would add in parentheses that I have serious reservations as to whether the document which purports in this case to be a consent to adoption actually constitutes a true and reliable adoption consent. A consent to adoption would normally occur in the course of an actual adoption proceeding having been commenced. The parent who gives that consent is assigning to the authorities his consent to the custody parent's placement of that child for adoption, very often with proposed adoptive parents having been then

identified by the Director or by the birth mother. It occurs to me that a generic consent to adoption "*in vacuo*" may not be valid. If I am correct in that regard, the question of release of the child support obligation on that ground does not arise.

[18] There is some authority in the cases to support my conclusion that a consent to adoption has the impact of terminating parental rights and therefore parental obligations only in a context where there is an actual adoption that ultimately happens. I appreciate that that conclusion begs the question of how and when the support obligation would be recreated if the adoption does not finalize within some period of time (and what would that period be?). With the luxury of being able to consider the context of a consent to adoption "*in vacuo*", I would take the opportunity to restate the legal principle with that context in mind.

[19] In the context of a contemplated adoption, a consent to adoption has the impact of suspending (as opposed to terminating) the child support obligation and the granting of the adoption has the effect of terminating the obligation retroactively to the date of the consent. If for some reason the adoption is not eventually granted, the court can reinstate the child support. Whether or not it does so retroactive to the date of the consent would be within the discretion of the presiding judge. If it appears to the court that the payor parent could be said to have reasonably relied on the proposed adoption as ultimately relieving his obligation, retroactivity would be unlikely.

[20] In the further context of a consent to adoption being signed at a time when no adoption is contemplated, even if requested by the custodial parent and certainly when volunteered by the non-custodial parent, the child support obligation has not been extinguished. This is so either because the consent is not valid or for the other reasons given above. Depending on the facts, such a consent may impact negatively on the judge's decision to order child support retroactively between the maintenance application date and the consent date.

[21] Support for this conclusion is found in the following cases. In *Wagstaff, supra*, Judge Daley states at page 468:

> "First the consent of the parent to the adoption must be obtained either voluntarily or by court procedures under the *Children's Services Act*, S.N.S. 1976 (c.8) sec. 17, which enables a court to dispense with that parent's consent. The practical effect of either

procedure is to remove the parent from any future right to the child unless the adoption is overturned on appeal, the adoptive parents do not complete the adoption, or the Agency fails to place the child for adoption..." (emphasis added).

[22] In *Prince Edward Island (Director of Child Welfare) v. S.M.A.* [1985] P.E.I. J. no. 25), the court concluded that a consent to an intended adoption which did not take place did not affect parental rights.

[23] In *Aken v. Aken* (1988) B.C.J. No. 1723, the court held that the consent to adoption in circumstances where the adoption was not completed did not relieve the father of his responsibilities. At page 10:

> "...the agreement in substance was that in consideration of the release of the husband's support obligations under my order he would, by signing a consent to adoption, surrender his parental rights to his children so as to permit the wife and Mr. Post to eventually adopt the children. In my view the court cannot support an agreement whereby the wife purports to bargain away the husband's obligation and the children's right to support in this matter. The children were not parties to the agreement".

[24] Again at page 12, Justice Perry stated:

> "In *Richardson v. Richardson*[1987] 7 R.F.L. (3d) 304 (S.C.C.) Madame Justice Wilson delivering a majority judgement of the Supreme Court of Canada stated at page 312 to 313:
>
> > "The legal basis of child maintenance is a parent's mutual obligation to support their children according to their need...for this reason a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child...the duty to support the child is a duty owed to the child, not to the other parent."

[25] In *Waschenfelder v. Szarkowicz* (1994) 127 Sask. R. 75 (QB) the court held that a previously given consent to adopt did not bar a father from seeking custody when it became apparent that the mother was incapable of parenting. After learning of child protection intervention, the father validly revoked his consent and brought an application for custody of the children. The court stated at page 76:

> "In fact, no adoption proceedings were ever undertaken and the document, when revoked by the father was properly revoked. It would be inappropriate to conclude that such a consent, executed in the absence of proceedings for adoption could claim the protection of the restrictions in the Act. The purpose of the Act is of

course to prevent the obvious disruptive effects of a birth parent reclaiming custody of a child after adoption proceedings have been taken.

Until an adoption order issues, the birth father is for all purposes the child's father and he has both the rights and obligations attended upon that status."

WHETHER THE ADOPTION CONSENT IS AN ADOPTION AGREEMENT AND, IF SO, WHETHER THAT BARS THE APPLICATION:

[26] As referred to above, the purported consent to adoption contains the following words:

"The respondent gives ...this consent freely and voluntarily knowing that it can be interpreted as an adoption agreement, giving up the adoptee to the Minister of Community Services or an agency involved in the process of an adoption."

[27] At the time, the *Family Maintenance Act*, Stats. N.S. 1980 c.6 was in force. Section 18 of that Act defined "parent" as including the father of a child of unmarried parents, and provides for the court, upon application of a parent, to make an order for custody or respecting access of a parent. Subsection 3 of Section 18 states:

"This section does not apply

(a) where there is an adoption agreement respecting a child pursuant to the *Children and Family Services Act* that has not expired or been terminated except with leave of the court upon application of a parent who is not a party to the adoption agreement"

[28] Counsel for the alleged father argues that the above noted provision in the adoption consent constitutes an adoption agreement, the effect of which is to render Section 18(2), which creates custody and access jurisdiction, inapplicable. If the parental rights are not available, it follows that the parental obligations are terminated. For various reasons, I do not accept that argument.

[29] Section 68 of the *Children and Family Services Act*, S.N.S. 1990, c.5 states:

"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..."

[30] I have concluded that the consent to adoption does not constitute an adoption agreement pursuant to the above section for the following reasons:

1. The section contemplates an agreement between a parent and a child-placing agency. The consent to adoption is signed only by the respondent and is not an agreement at all. Agreements have more than one party.

2. The reference in the section to "parent" is a reference to the parent who has either in law or in fact the custody of the child and therefore the ability to give the child up. The other party is asked to consent, as opposed to entering an agreement. In this case, the only agreement that could qualify under section 68 would be an agreement between the agency and the mother. There was no such agreement.

3. A valid agreement pursuant to that section expires after one year. Even if the consent to adoption constituted an adoption agreement, it would have expired many years before this application was commenced.

4. Section 18(3) of the *Family Maintenance Act*, *supra*, renders the court's jurisdiction inoperable with respect to the custody and access of a child in respect of whom the custodial parent has entered an agreement with the agency to adopt. The purpose is clearly to shift the determination of custodial rights to those principles that govern adoptions. This may include a voluntary consent by the other parent or a dispensation of consent by the court. In either event, the jurisdiction under the *Family Maintenance Act*, *supra* needs to be secondary only when there is an adoption occurring. No such adoption was occurring in the subject case.

[31] Accordingly, I would conclude that the provision in the consent to adopt which suggests it be interpreted as an adoption agreement has no bearing on the alleged father's support obligations.

WHETHER THE EXISTING COURT ORDER BARS THE CHILD SUPPORT OBLIGATION:

[32] Counsel for the alleged father argues that the words of the consent order presently governing the parties go beyond a termination of the exercise of

parental rights by the father and actually permanently terminate those rights including the right to make a future application to reintroduce those rights. In that regard, the words in the order are as follows:

> "It is further ordered that the respondent, ...will not have any access to ...(the child);
>
> It is further ordered that the respondent,... shall not have any right to make further application to seek custody of or access to the said child..."

[33] Those words, taken literally, might be said to permanently terminate parental rights. However, that could only be so if there is authority in the court or an ability of the parties to create such a permanent and irreversible status.

[34] In my view, orders taken by consent are merely agreements between the parties which have the endorsement of the court to the extent that the court has jurisdiction to do so. In *Bank of Nova Scotia v. Golden Forest Holdings Ltd.* (N.S.C.A.[1990] N.S. Judgements No. 230 N.S.C.App.Div.) Hallet, J.A. stated at page 4:

> "A consent order may only be set aside or varied by subsequent consent or upon the grounds of common mistake, misrepresentation or fraud or any other ground that would invalidate a contract."

[35] In *Huddersfield Banking Co. v. Henry Lister and Son Ltd.* [1895] 2 ch. 273. C.A. Lindley, L.J. held that a consent order could be impeached on any ground (including fraud) that would invalidate the agreement giving rise to the consent order.

[36] The parties attempted to bargain away the child's right to support by virtue of the mother's action in withdrawing her claim and by using words of finality. The adoption consent was given with the intention of cementing that goal for the support-silent order. Based on case authorities that I will refer to below, parents do not have the authority to bargain away their child's right to child support. It follows from this fact that the agreement of the parties is not enforceable and therefore the consent order which endorsed it is similarly unenforceable because it is only as valid as the agreement it endorses.

[37] In addition, a consent order is not enforceable if it contains provisions that go beyond the jurisdiction of the court. In the subject case, the consent order is made pursuant to the then *Family Maintenance Act, supra*. There is no provision in that Act that provides expressly for the court to permanently

deny a parent the right to make future applications for custody or access to a child. There is no provision in the Act that allows the court to permanently terminate parental rights. Even if either of these authorities existed, these provisions in the order would be subject to variation pursuant to Section 37.

[38] I can think of only three situations in which courts are authorized to terminate parental rights(as opposed to the exercise of them). They are:

1. The signing of a consent to adoption in circumstances where the adoption order is later granted.
2. An order of a court dispensing with a parent's consent to adoption in circumstances where the adoption order is later granted;
3. The granting of a permanent care order pursuant to the *Children and Family Maintenance Act, supra*, for so long as such order is outstanding.

[39] It is not infrequent that consent orders are later impeached for having been made in the absence of jurisdiction in the court. Examples are given below in the two Nova Scotia Court of Appeal decisions cited together. I have therefore concluded that the permanency provisions in the subject consent order are not enforceable and have no force or effect. It follows that the parental rights were not extinguished by that order and that it had no impact on the child support obligation.

WHETHER THE ABSENCE OF A CHILD SUPPORT PROVISION IMPLIES A FINDING AGAINST PATERNITY:

[40] Counsel for the alleged father argues that, because section 18 of the then *Family Maintenance Act, supra,* defines "parent" to include a father of an illegitimate child and entitles that parent to apply for custody and access and because a possible father can be ordered under section 11 to pay child support, the absence of a child support order in the previous proceeding should lead me to conclude that the child maintenance issue cannot now be brought forward. He suggests that there was an inherent finding by the court that the respondent is neither a parent or a possible father. In my view, the existing order is silent as to child support for the simple reasons that the mother withdrew her claim and that the inclusion of a child support waiver would not pass the scrutiny of the court which is obliged to ensure reasonable arrangements for the child. The trade off of support rights for access rights might have been endangered by that inclusion.

WHETHER PARENTS CAN BARGAIN AWAY THE CHILD'S RIGHT TO SUPPORT:

[41] It is my view that I am bound by and the reasoning in the two Nova Scotia Court of Appeal decisions in *Mackay v. Butcher*, 2001 N.S.C.A. 120 and *M.(P.I.) v. (M.R.)* 2002 NSCA 26**.**

[42] These cases have similar facts. In both cases, the child was conceived through a dating relationship. The parents in both cases agreed upon a terminal amount of child support comprised mostly of lump sums. In both cases the mothers were motivated to some extent by a desire to terminate the fathers' access and were willing to exchange an ongoing support regime to achieve that. In the latter case, reference to the trial decision would indicate that words of absolute finality and permanency were employed in the court's order. Nonetheless, the Court of Appeal in both cases reintroduced periodic child support; in the later case some 18 years later.

[43] In the former case, Bateman, J.A., writing for the majority stated at paragraph 14:

> "It has long been established that the court is not bound by child support agreements made by their parents.

[44] In support of that proposition she cited the Supreme Court of Canada decisions in *Pelech v. Pelech*, [1987] 1 S.C.R. 801 and the other two cases often referred to as "the trilogy". She quotes from the *Pelech* decision at page 845 as follows:

> "...while it is fairly clear that a parent cannot barter away his or her child's entitlement to parental support, and thus the courts may always intervene to change agreed terms relating to child support..."

[45] Bateman, J.A. notes that this principle was affirmed by the Supreme Court of Canada in *Willick v. Willick* [1994] 3 S.C.R. 670. She quotes from Sopinka, J. who in turn quotes from page 869 of the *Richardson v. Richardson* [1987] 1 S.C.R. 857 as follows:

> "...for this reason a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child..."

[46] If court ordered terminal child support cash settlements involving clear words of finality can be set aside and replaced with an ongoing periodic child support as was done in the two Court of Appeal decisions referred to together above, it occurs to me that it would be inconsistent to allow the parties in this case to bargain away child support. The words of finality and the literal attempt to permanently terminate parental rights here can be no more successful and are not a bar to the application. Child support is always open for review by a court. Custody and access arrangements, including termination thereof, even when done by the use of the words that exist in this order are subject to variation. If anything, the mothers in the two Court of Appeal decisions referred to together above had weaker claims for child support because they had received what they believed to be sufficient compensation by way of lump sum toward the child support obligation. In the subject case, no contribution was made.

[47] A preliminary dismissal of this application would fly directly in the face of the Court of Appeal rulings in *MacKay, supra* and *M.(P.I.), supra*.

DOES THE PRINCIPLE OF RES JUDICATA APPLY?

[48] Counsel for the alleged father suggests that the application should be dismissed by reason of the principle of res judicata. Rather than repeat the extensive case law on this subject, I will dismiss this suggestion based on the fact that the Court of Appeal in the two decisions mentioned together above, did not conclude that it was bound by that principle. If anything, there would be stronger reasons in those cases to apply the principle because at least there, the order dealt with child maintenance and it was paid. In the present case the question of maintenance was withdrawn and no child support was paid.

[49] In conclusion, I find that there is no statutory or other bar to the mother's application for child support. I will direct that the matter be set down for organizational pre-trial for the purpose of organizing hearing dates. In the event that either party wishes to address the court on the issue of costs of this application, that party shall, within 30 days of this decision, notify the scheduler in writing requesting a one half hour appearance on my docket in which to do so, failing which there would be no costs.

Douglas C. Campbell, J.