Date:
Docket:

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF an Application for Custody and Child Support pursuant to the provisions of the Children s Law Act, S.N.W.T. 1997, c.14, as amended;

BETWEEN:

SALOME KUTLAQ KALASERK

Applicant

-and-

JOE STRICKLAND

Respondent

REASONS FOR JUDGMENT

[1] This application raises the question whether s. 37 of the Adoption Act, S.N.W.T. 1998, c. 9 applies to aboriginal custom adoptions so as to relieve a biological father from the duty to pay child support.

[2] The background may be stated very briefly. The Applicant is the maternal grandmother of 12-year-old Curtis. The Respondent is the biological father of Curtis.

[3] A few days after Curtis birth, his biological mother asked the Applicant to adopt him. The Applicant and her husband, who is now deceased, agreed to adopt Curtis and he was raised in their household. No court order was ever sought to recognize the adoption. Both parties take the position that there was an aboriginal (Inuit) custom adoption of Curtis by the Applicant and her husband and so for purposes of this application, I will assume that to be the case. The Applicant now seeks child support for Curtis from the Respondent.

[4] The relationship between Curtis biological parents was a brief one and although some of the facts are in dispute, it is clear that the Respondent has not been involved in Curtis life for many years. He takes the position that the result of the custom adoption is the same as if this had been an adoption under the Adoption Act, by s. 37 of which he would have ceased to be Curtis parent and would therefore have no further obligations to Curtis.

[5] The Applicant takes the position that the adoption is irrelevant to the issue of child support as it does not sever all ties with the biological parents.

[6] Section 37 of the Adoption Act reads as follows:

37. (1) For all purposes, as of the date of the making of an adoption order,

(a) the adopted child becomes the child of the adoptive parent and the adoptive parent becomes the parent of the adopted child as if he or she were the natural parent; and

(b) the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child.

(2) Paragraph (1)(b) does not apply to the person who was both a parent of the adopted child before the adoption order was made and the spouse of the adoptive parent.

(3) The relationship to one another of all persons, whether the adopted child, the adoptive parent, the kindred of the adoptive parent, the parent before the adoption order was made, the kindred of that former parent or any other person, shall for all purposes be determined in accordance with subsections (1) and (2).

[7] This matter came before me in Chambers on an interim application. I raised with counsel the question whether it should be dealt with on an interim basis at all or whether it should await a trial, where evidence about the characteristics and consequences of aboriginal custom adoption could be presented.

[8] Counsel submitted that such evidence is not necessary in order for me to answer the following question: Is an aboriginal custom adoption an adoption as contemplated by the Adoption Act of the Northwest Territories? They proposed that if the answer to that question is negative, then the Respondent as the biological father of Curtis has the obligation to pay child support.

[9] Upon reflection, however, I think the question is better posed this way: Does s. 37 of the Adoption Act apply to an aboriginal custom adoption? If it does, then by its operation the Respondent has ceased to be a parent of Curtis and is not liable to pay child support. If s. 37 does not apply, the next question is what are the legal consequences of an aboriginal custom adoption.

[10] This application for support is brought under the Children s Law Act, S.N.W.T. 1997, c. 14, as amended. The relevant provisions are as follows:

57. In this Part,

...

parent, in relation to a particular child, includes a person who stands in the place of a parent for the child, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

58. A parent has an obligation to provide support for his or her child where the parent is capable of doing so.

59. (1) A court may, on application, order a parent to provide support for his or her child and determine the amount and duration of such support.

(2) An application for an order under subsection (1) may be made by

(a) another parent or a person who has lawful custody of the child or with whom the child lives;

...

[11] No issue is raised as to the Applicant s standing to bring this application.

[12] As to the status of children, the Children s Law Act provides:

2(1) Subject to subsection (2), for all purposes a person is the child of his or her natural parents and his or her status as their child is independent of whether he or she is born within or outside of marriage.

(2) Where an adoption order has been made under the Adoption Act or any predecessor Act, the child is the child of the adoptive parents as if they were the natural parents.

....

[13] I proceed on the basis that the term natural parents is simply another term for biological parents.

[14] The above-referenced section 2 is consistent with s. 37 of the Adoption Act. After an adoption order issues under the Adoption Act, the biological parents have no obligation to provide support for the child. The adoptive parents become the only parents of the child.

[15] Adoption is a creature of statute in Canada. However, the history of the legal recognition in the Northwest Territories of aboriginal custom adoption goes back to Re Katie s Adoption Petition (1961), 38 W.W.R. 100 (N.W.T.T.C.), where Sissons J. stated that the Court should recognize the centuries-old adoption customs of aboriginal people and referred to the desirability of having a court record establishing the adoption and proving it for purposes of family allowances, school registration, succession and to avoid dispute or question. Sissons J. relied on s. 103 of the Child Welfare Ordinance, N.W.T.O. 1961, 2nd Sess., ch. 3, which then provided that every adoption before then made according to the laws of the Northwest Territories had for all purposes in the Northwest Territories the same effect as an adoption made in accordance with the adoption provisions of the Child Welfare Ordinance.

[16] Sissons J. decided that adoptions made according to the laws of the Northwest Territories included adoptions in accordance with aboriginal custom. He also decided that the particular adoption he was dealing with has for all purposes in the Territories the same effect as an adoption made in accordance with this Part , that being Part IV of the Child Welfare Ordinance dealing with adoptions. He made an order declaring that the adoption had taken place and that it was as effective as if made under the Ordinance.

[17] The Respondent relies on the above in arguing that the aboriginal custom adoption in this case has the same effect as if Curtis had been adopted by the Applicant under the Adoption Act. In my view, however, when one looks at the later development of the law, that does not follow.

[18] Subsequent reported cases considered Re Katie s Adoption Petition but, without specifically addressing the point, did not go so far as to rule on the effect of an order declaring that an adoption in accordance with aboriginal custom had taken place. In Re Deborah E4-789, [1972] 5 W.W.R. 203 (N.W.T.C.A.), the Court of Appeal upheld the order of Morrow J. declaring simply that the child was custom adopted by the adoptive parents. Similarly, in Re Wah-Shee (1975), 57 D.L.R. (3d) 743 (N.W.T.S.C.), Morrow J. ruled that there would be an order declaring, ordering and adjudging that the petitioners adopted the child in accordance with native custom .

[19] In Re Tagornak Adoption Petition, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.), Marshall J. reviewed the earlier cases and stated that the Court s role is declaratory, certifying that an adoption by native custom has indeed taken place. Similarly, in D.(C.A.) v. G.(V.), [1992] N.W.T.R. 236, Vertes J. of this Court pointed out that unlike statutory adoptions, where the Court decides whether an adoption order should be granted based on assessments and recommendations of child welfare authorities, in custom adoptions, the Court s role is simply declaratory and the applicants need only satisfy the Court that an adoption by way of native custom has taken place.

[20] Indeed, for many years, the standard form of order made by this Court in custom adoption cases was just a declaration that the child had been adopted by the petitioners as their child in accordance with native custom and that since the date of the adoption the child had been known by a specified name.

[21] In 1995, the Aboriginal Custom Adoption Recognition Act, S.N.W.T. 1995, c.26 (ACARA) came into force. It sets out a procedure for the recognition of aboriginal custom adoptions. The legislature has accordingly stepped in where before the Court had established a way in which aboriginal custom adoptions could be recognized and documented, beginning with Re Katie s Adoption Petition.

[22] The preamble to ACARA begins as follows:

Whereas aboriginal customary law in the Territories includes law respecting adoptions;

And desiring, without changing aboriginal customary law respecting adoptions, to set out a simple procedure by which a custom adoption may be respected and recognized and a certificate recognizing the adoption will be issued having the effect of an order of a court of competent jurisdiction in the Territories so that birth registrations can be appropriately altered in the Territories and other jurisdictions in Canada;

...

[23] The preamble thus indicates that the legislature s purpose was not to change aboriginal customary law respecting adoptions. The recitation in a preamble to legislation is an accepted manner of indicating legislative purpose: Western Minerals Ltd. v. Gaumont, [1953] 1 S.C.R. 345. The preamble to ACARA indicates that the effect of a custom adoption and its consequences for the biological parents depend on aboriginal customary law, not on statute law such as s. 37 of the Adoption Act.

[24] The legislature has effectively given two options to those adoptive parents who are entitled to rely on aboriginal custom. One is to have the aboriginal custom adoption recognized under ACARA. The other, which can also apply to what began as an aboriginal custom adoption, is to petition for an order under the Adoption Act. The two procedures are very different and there is no reason why they should give rise to identical consequences when one considers that ACARA seeks to preserve aboriginal customary law with its own rules and consequences.

[25] The provisions of ACARA should also be considered. ACARA provides, in s. 2(1), that a person who has adopted a child in accordance with aboriginal customary law may apply to a custom adoption commissioner for a certificate recognizing the adoption. Such commissioners are appointed by the appropriate government Minister, who is given the power to appoint persons who, in the opinion of the Minister, have a knowledge and understanding of aboriginal customary law in the community or region in which they reside (s. 6).

[26] Upon receiving the application, the custom adoption commissioner determines whether the prescribed information is complete and in order and if it is, he or she prepares a certificate in prescribed form, recognizing the custom adoption and recording any change made to the adopted child s name [s. 3(2)]. The custom adoption commissioner also files the certificate in the Supreme Court. Section 4 provides that where a certificate is so filed, it shall, for all purposes, be deemed to be an order of the Supreme Court. ACARA does not provide for any review or confirmation of the certificate by a judge before filing. It does not state what the effect of the order is, nor that it is deemed to be or to have the effect of an adoption order or an order under the Adoption Act.

[27] Section 37 of the Adoption Act states that certain consequences come into effect as at the date of the making of an adoption order. It seems to me that adoption order must refer to an adoption order made by a court which hears an adoption petition under s. 34 of the Adoption Act. A custom adoption commissioner does not make an adoption order; he or she issues a certificate under ACARA. Section 4 simply says that the certificate, once filed, is deemed to be an order of the Supreme Court. As I have already pointed out, it does not deem the certificate to be an order under the Adoption Act, as it could have done if that was the intent.

[28] It is also significant that s. 2(2) of the Children s Law Act, which states that a child is t he child of the adoptive parents as if they were the natural parents, prescribes that result only where an adoption order has been made under the Adoption Act or any predecessor Act. This is consistent with ACARA in distinguishing between adoptions under the Adoption Act and aboriginal custom adoptions and not legislating the consequences of the latter.

[29] What is deemed an order by s. 4 of ACARA cannot, in my view, go beyond what is in the certificate itself, which recognizes that the child was adopted by the named individual or individuals as their child in

accordance with aboriginal customary law on or about a certain date and that since the adoption the child has been known by a certain name. The s. 4 order simply recognizes or declares that this has taken place. It does not purport to change or substitute anything for what the consequences of the adoption may be under aboriginal customary law.

[30] I return to the preamble to ACARA, which says that the legislative desire was not to change aboriginal customary law respecting adoption, indicating that the consequences of such an adoption will depend on aboriginal customary law. Those consequences may in fact be the same as the consequences provided under s. 37 for an adoption under the Adoption Act or they may be different. They may also vary as between the various communities or regions of the Northwest Territories. Section 6 of ACARA appears to contemplate differences in the law as it refers to the appointment of custom adoption commissioners having a knowledge and understanding of aboriginal customary law in the community or region in which they reside.

[31] For the above reasons, I have concluded that s. 37 of the Adoption Act does not apply to an aboriginal custom adoption. Instead, aboriginal customary law applies.

[32] Counsel for the Applicant filed with his brief an excerpt from a paper entitled Inuit Adoption by Lee Guemple (Canadian Ethnology Service Paper No. 47; National Museum of Man Mercury Series: Ottawa, 1979). Counsel for the Respondent objected to the paper being used as expert evidence of the characteristics of Inuit custom adoption. Accordingly, I will not rely on the Guemple paper, except to note that its author points out that not all aboriginal communities have had the same adoption practices, which simply confirms that to determine the consequences of an adoption will require evidence as to the customary law of the community or region in which the adoption took place.

[33] The only other relevant evidence is found in paragraph 11 of the Applicant s affidavit as follows:

That, in the Inuit culture, it was very common for daughters to give their children to their parents for adoption. In those days, we lived together and the parents of the child were responsible for providing food and shelter and providing for the child s day to day needs.

[34] This statement is the opinion of a party to the action. It was not presented as expert evidence, there being no information as to the deponent s knowledge of custom adoption or aboriginal customary law. It is also not clear to me whether the second reference to parents in the paragraph cited is meant to be the adoptive parents or the biological parents.

[35] As a result, there is no evidence before me as to whether, under aboriginal customary law, there is a complete severance of the ties between the child and the biological parents, as there is pursuant to s. 37 of the Adoption Act , or whether the biological parents maintain any responsibility for the adopted child s support.

[36] The cases cited by the Respondent in support of the proposition that the custom adoption should be considered the same as an adoption under the Adoption Act and therefore subject to s. 37 are, in my view, distinguishable. For example, in Re: B.C. Birth Registration No. 1994-09-040399, [1998] 4 C.N.L.R. 7 (B.C.S.C.), the Court was dealing with s. 46 of British Columbia s Adoption Act, R.S.B.C. 1996, c. 5, which provides that on application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under that Act. There is no such provision in the Northwest Territories Adoption Act. Instead, ACARA clearly indicates that the legislature has sought to preserve aboriginal customary law on adoptions.

[37] In Casimel v. Insurance Corp. of British Columbia (1993), 106 D.L.R. (4th) 7 20 (B.C.C.A.), decided before the enactment of s. 46 referred to above, the Court decided that the custom adoption by the plaintiffs of their grandson should be recognized as conferring on them status as his parents and therefore status as dependent parents for purposes of a claim for no-fault death benefits under the relevant motor vehicle insurance legislation. Once the plaintiffs status as parents was recognized, there was no issue as to what the consequences were.

[38] The case which is most similar is Collins v. Hawke, [1992] 3 C.N.L.R. 20 (B.C.S.C.), where the issue was the legal consequences of a custom adoption for child support and custody. The Court declined to make that determination on an interim basis.

[39] To conclude, in answer to the question posed at the commencement of this judgment, for the reasons set out above, I rule that s. 37 of the Adoption Act does not apply to an aboriginal custom adoption. The legal consequences of an aboriginal custom adoption are governed by aboriginal customary law. That law must be applied to determine whether the Respondent has any obligation to pay child support for Curtis. There being no evidence before me as to the aboriginal customary law applicable to this issue, it will have to be determined on the evidence at trial. Accordingly, this application for interim support is dismissed.

V.A. Schuler
J.S.C.

Heard at Yellowknife, NT
on the 29th day of July, 1999.

Counsel for the Applicant: James D. Brydon
Counsel for the Respondent: Sarah A.E. Kay