Bruha v. *Bruha*, 2009 NWTSC 44

Date: 2009 07 09
Docket: S-1-CV 2004000347

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TINA BRUHA

Applicant

- and -

PAUL BRUHA and MABEL BRUHA

Respondents

MEMORANDUM OF JUDGMENT AND DIRECTIONS

[1] The application before me is for an order canceling a certificate issued under the *Aboriginal Custom Adoption Recognition Act*, S.N.W.T. 1995, c. 26 (*"ACARA"*) and directing that the Registrar of Vital Statistics remove all references to the Respondents from the birth record of the child in question and restore the birth record to its original state.

[2] This application gives rise to a number of complicated and somewhat novel issues.

Background

[3] The background to this matter is as follows. The Applicant, Tina Bruha, is the daughter of the Respondents. Tina Bruha gave birth to a child on November 5, 1998. On March 15, 1999, a certificate (the "adoption certificate") declaring that the Respondents had adopted the child in accordance with aboriginal custom was issued by a custom adoption commissioner under *ACARA*. The certificate was filed in the Supreme Court in accordance with s. 3(2)(b) of *ACARA* on June 14,

1999. The child's birth certificate was subsequently changed to show the Respondents as his parents.

[4] The Applicant says she did not consent to an adoption and was unaware of the adoption certificate until December 1999. The biological father of the child also says he did not consent to an adoption and was unaware that the Respondents claimed to have adopted the child until the Applicant told him about it in December 1999.

[5] In November 2004, the Applicant commenced these proceedings, seeking an order canceling the adoption certificate and giving her custody of the child. An order was made on December 3, 2004 granting the Applicant interim care of the child with the Respondents to have interim access. The balance of the relief sought was adjourned *sine die*.

[6] No further steps were taken on the record until March 2008, when a consent signed by the Respondent Mabel Bruha together with a certificate of independent legal advice was filed. The consent states that Mabel Bruha consents to cancellation of the adoption certificate and the issuance of a new birth certificate showing the biological parents as the child's parents.

[7] In November 2008, the Applicant filed a notice of motion seeking an order canceling the adoption certificate and instructing the Director of Vital Statistics for the Northwest Territories to change the records of the child's birth to delete any reference to the Respondents and to restore the original birth record of the child.

[8] The proceedings have since been adjourned from time to time so that the Respondent Paul Bruha could retain counsel and because of uncertainty about the nature of the proceedings. Ultimately, counsel for the Applicant elected to argue that the adoption certificate is void on its face and should be set aside; if that argument fails, the Applicant intends to make other arguments, including that her constitutional rights were denied in the process that resulted in the adoption certificate.

[9] Although Paul Bruha has not been successful in obtaining counsel, and his affidavit material has not been filed due to various problems, it is clear from what

he has said in Court that he opposes the Applicant's application and alleges that the Applicant and the biological father were aware of and consented to the adoption.

The legislation

[10] I had occasion to make some observations about *ACARA* in *Kalaserk v. Strickland,* CV 08090, August 11, 1999 (unreported). *ACARA* sets out a procedure for the recognition of aboriginal custom adoptions. Prior to *ACARA* coming into force in 1995, this Court had established a procedure by which adoptions according to aboriginal custom could be recognized by the Court based on an application and evidence presented to it.

[11] Under *ACARA,* however, 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. The certificate recognizes an adoption that has already taken place, it does not create an adoption. Custom adoption commissioners are appointed by the appropriate government Minister under s. 6 of *ACARA*, which gives the designated Minister 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.

[12] Upon receiving an application, a custom adoption commissioner is to determine whether the prescribed information is complete and in order. 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 with the Supreme Court, whereupon, under s. 4, 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.

[13] Section 5(1)(a)of *ACARA* provides that a certified copy of the filed certificate is to be transmitted to the Registrar General of Vital Statistics who must then register the adoption and substitute a new registration of birth for the original registration of birth of the person adopted.

[14] Section 2(2) of *ACARA* sets out the information that a person applying for an adoption certificate must provide to the custom adoption commissioner. The

information is to consist of, with respect to the child, his or her birth and current name, date of birth and of adoption, place of birth, sex and the names of the mother and father so far as is known: s. 2(2)(a). Pursuant to s. 2(2)(b), the person applying for a certificate must also provide a statement by the adoptive parents and any other person who is, under aboriginal customary law, interested in the adoption that the child was adopted in accordance with aboriginal customary law. On receipt of the information required under s. 2(2) and a certified copy of the birth registration, the custom adoption commissioner shall determine whether the information is complete and in order. If it is, he or she is to prepare a certificate in the prescribed form, recognizing the custom adoption and recording any change made to the adopted child's name and file it in the Supreme Court: s. 3(2).

[15] The custom adoption commissioner must decline to issue a certificate where he or she is of the opinion that the required information has not been provided or is not complete, or he or she is not satisfied that the child was adopted in accordance with aboriginal customary law: s. 3(4).

[16] Apart from what is referred to above, *ACARA* does not prescribe any particular procedure to be used by the custom adoption commissioner in carrying out his or her duties and making the determination whether a child has been adopted in accordance with aboriginal customary law. Of particular relevance to this case is that *ACARA* does not contain any requirement that the biological parents or anyone else be given notice of the application for the adoption certificate. The only requirement is that the applicant for the certificate provide a statement from any other person who is, under aboriginal customary law, interested in the adoption: s. 2(2)(b). Presumably that law could vary from one region to another or depend on the circumstances of the case.

[17] *ACARA* does not provide for any appeal from the custom adoption commissioner's decision or any other mechanism for review of that decision. It appears that this is the first time that a challenge to a certificate issued under *ACARA* has been pursued in this Court.

The Applicant's submissions as to the nature of the proceedings in this Court

[18] In the absence of a statutory appeal from the decision of a custom adoption commissioner, what recourse does an individual have to challenge that decision?

[19] The Applicant argued that the circumstances of this particular case allow for review and cancellation of the adoption certificate by this Court under its power to control its own process. The basis upon which the Applicant makes that argument is the same as her main argument, which is that the adoption certificate is void on its face and should be set aside. I find no merit in these arguments, for the reasons that follow. In my view, and the Applicant effectively conceded this, the application should be by way of judicial review.

[20] I will deal first with the argument that the adoption certificate is void on its face. The Applicant's argument is actually not so much that the adoption certificate is void on its face but that there are defects on the face of the application form submitted to the custom adoption commissioner, which in turn affect the validity of the certificate. The Applicant submits that because of those defects, the adoption certificate should not have issued.

[21] First, the Applicant points out that the application form contains only the name of Paul Bruha as the adoptive father and omits the name of the adoptive mother, yet the adoption certificate recognizes that both Paul and Mabel Bruha adopted the child as theirs in accordance with aboriginal customary law.

[22] A close examination of the application indicates, however, that the date of birth, address and ethnic origin information were provided in the portion of the application that asks for information about the adoptive mother. One could reasonably conclude that it was contemplated that Mr. Bruha would not be the only applicant and that further information was to be obtained regarding the other applicant's name. Based on the birth date and address given for the other applicant, one could also reasonably conclude that it was intended to be Mr. Bruha's spouse. The explanation for the omission of the name might be found in the record, if there is one, kept by the adoption commissioner. In any event, as the application form clearly contemplates that Mr. Bruha was not the sole applicant, the omission of Mabel Bruha's name in the application form is not an error that renders the certificate void on its face.

[23] The Applicant also points to the fact that the application form submitted to the custom adoption commissioner was not signed by either Paul or Mabel Bruha. Although the Applicant concedes that neither *ACARA* nor the regulations made

under it prescribe the form of application, she submits that the application form used is clearly defective due to the absence of a requirement of the signature of the person or persons applying for a custom adoption certificate.

[24] No authority was submitted for the proposition that to be a valid application, the form must be signed. Although other types of applications may require, either by statute or practice, the signature of the applicant or applicants, that does not in itself amount to a general rule. Perhaps surprisingly, *ACARA* does not actually require any application form at all; it simply requires that the applicant provide the prescribed information and the birth registration of the child and it permits the custom adoption commissioner to act if he or she determines that the information is complete and in order.

[25] There being no requirement in *ACARA* for a signed application, I am unable to find that absence of the Respondents' signatures on the application form that was used renders the adoption certificate void on its face.

[26] The Applicant also argues that because s. 4 of *ACARA* deems an adoption certificate to be an order of this Court for all purposes, this Court can and should, under its power to control its own process, cancel the adoption certificate. However, notwithstanding s.4, the adoption certificate represents not a decision of this Court, but of a statutory decision-maker. It becomes an order of this Court only by operation of law, not because of anything done by a judge of this Court. Therefore, I doubt that the adoption certificate can be considered an aspect of the Court's process. The cases relied on by the Applicant are distinguishable. *Re Sproule*, (1886) 12 S.C.R. 140 dealt with the setting aside of an order of a judge which the Court held should never have been made for want of jurisdiction. *In Re Estate of Grant, Insolvent* (1879), 12 N.S.R. 538 (C.A.), the issue was the ability of a judge to re-open his own order discharging an officer of the court on the basis that the officer had overcharged the commission to which he was entitled in an insolvency. In this case, on the other hand, the Court is dealing not with its own order, but with a certificate issued by a decision-maker which is deemed by statute to be an order of the Court. In my view it cannot simply be declared void by this Court and the way to challenge it must be by judicial review.

Directions as to further steps in this case

[27] The application to declare the adoption certificate void on its face is dismissed. The Applicant conceded that an order under Rule 605 is appropriate, directing that this proceeding be continued as an application for judicial review; an order to that effect will issue. Pursuant to Rule 605(3), I will provide further directions as set out below.

[28] Part 44 of the Rules of Court governs proceedings by way of judicial review. Rule 595 in Part 44 requires that an applicant for judicial review serve a notice with a prescribed endorsement requiring the return of the record by the decision-maker. Rule 597 requires service of the notice, endorsement and affidavit material on the tribunal (as defined in Rule 591) in respect of whose decision, act or omission relief is claimed. Pursuant to Rule 598, the decision-maker is to make a return of the record with a prescribed certificate or explain why he or she cannot make a return.

[29] To date, however, the Applicant has not served the custom adoption commissioner who issued the certificate. Although the Applicant takes the position that service on the Commissioner of the Northwest Territories or agents of the Government of the Northwest Territories is sufficient, Rule 597 clearly requires service on the decision-maker herself.

[30] The Applicant also seeks the setting of a 3 or 4 day hearing for the judicial review application and the calling of *viva voce* evidence. As I understand the Applicant's position, it is that the evidence would be about how the adoption certificate came to be issued, whether the Applicant's constitutional rights were denied and whether there ever was in fact an adoption in accordance with aboriginal customary law.

[31] The first step that must be taken by the Applicant is the filing of a notice of motion for judicial review of the custom adoption commissioner's decision; that notice of motion must also contain the endorsements required by Rule 595. The endorsement required by Rule 595(1)(b) is to be amended so that it begins, "You are required within 30 days after service of this notice ...". In other words, there will be a 30 day time limit from the date of service within which the custom

adoption commissioner is to respond to the endorsement by filing the record or explaining why it cannot be filed.

[32] I further direct that the notice of motion is to be returnable before me on a Special Chambers date which counsel will obtain from the Registry, on consultation with the other parties as to their availability. The date set will have to allow sufficient time for the custom adoption commissioner to file the record or other return and for the parties to review what she files and be prepared to address the issues that are referred to below.

[33] The notice of motion and all supporting documentation will have to be served on the custom adoption commissioner and the other parties in compliance with Rule 597.

[34] The record, or a return indicating that there is no record, may give rise to other issues which are unlikely to require *viva voce* evidence. Therefore, on the return date of the motion, the parties should be prepared to address the following:

(a) the Rule 596 limitation period referred to by counsel for the Registrar of Vital Statistics and which has been the subject of jurisprudence in this jurisdiction [for example, *Wilman v. Northwest Territories (Commissioner)*, [1997] N.W.T.J. No. 17 (S.C.)];

(b) the legal result or recourse if there is no record available for the Court to review;

(c) the standard of review;

(d) notwithstanding the applicable aboriginal customary law, whether a duty of procedural fairness arises in the *ACARA* process under the principles set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and other jurisprudence on administrative law; and if such a duty exists, what is the content of that duty and is there evidence in the record that the duty has been fulfilled;

(e) if at some point there is to be a trial with *viva voce* evidence, what are the issues to be tried? Since *ACARA* gives the custom adoption

> commissioner, and not the Court, the task of determining whether a custom adoption has taken place, it may be that this Court should not decide that issue, but rather remit the matter back to a custom adoption commissioner for a new decision if the challenged certificate is quashed on judicial review.

[35] I expect that the parties may want to raise other issues and the list is not meant to be exhaustive.

[36] In Chambers on June 23, it was submitted by counsel for the Applicant that if the application to find the adoption certificate void on its face is dismissed, the matter should be set for a 3 or 4 day trial. He also indicated that he might seek to call the custom adoption commissioner as a witness at trial. In my view, it would be premature to set a trial before the issues listed have been addressed. As I have said, I expect that much will depend on the nature of any record returned by the custom adoption commissioner. A judicial review is normally a review on the record of the tribunal that made the decision. While there may be circumstances justifying amplification of that record, it would be unusual to have the decision-maker provide evidence as a witness other than to simply present the record and that would normally be done by way of affidavit.

[37] Some concern was expressed by counsel for the Applicant about the role of the Government of the Northwest Territories and that to date counsel now appearing for the Registrar of Vital Statistics has taken the position that the custom adoption commissioner is at arms length from the Government, which has no duty to assist in obtaining any evidence or a record from her. The affidavit of Ms. Comishen filed by legal counsel for the territorial Department of Justice clearly indicates that the Department of Health and Social Services provides general support to the custom adoption program as well as a handbook on administrative procedures to those nominated as commissioners. I would expect that support might include assisting the custom adoption commissioner in this case to obtain legal advice should she wish to do so or assisting her to file the record or the Rule 598(3) explanation or even an affidavit. Unlike other statutory decision-makers whose decisions are frequently the subject of challenge, this may well be the first time that a custom adoption commissioner under *ACARA* is served with an application for judicial review. It would be of great assistance in these proceedings if she were given some assistance in responding to it, especially in light of the serious issues raised. I leave that in the hands of counsel.

[38] Finally, Mr. Bruha indicated to the Court that he wants to have counsel in this matter but does not have the resources to retain counsel and was denied legal aid. I am not aware of the reasons or reasons for the denial, however, it is apparent that the nature of this matter has changed from the Applicant's initial Chambers application to a judicial review application with some complicated and novel legal issues, along with the possibility of a trial on some issues. Mr. Bruha and the proceedings generally would benefit if he has counsel. Assuming that Mr. Bruha re-applies for legal aid, he will also likely be at a disadvantage in trying to explain how the case has changed, due to his lack of legal knowledge and the fact that English is not his first language. So that the Director of Legal Aid may be aware of the complexity of the case in considering any further application by Mr. Bruha, I direct that a copy of this Memorandum of Judgment be sent to her.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
9th day of July 2009.

Heard at Yellowknife, June 23, 2009.

Counsel for the Applicant: Donald Large.

Counsel for the Director of Adoptions and
the Registrar of Adoptions: Shannon Gullberg.

Counsel for the Registrar of Vital Statistics: Karen Lajoie.

The Respondent Paul Bruha appeared in person.
No one appearing for the Respondent Mabel Bruha.

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