Tinqui v. Nitsiza, 2015 NWTSC 71

Date: 2015 01 05
Docket: S-0001-FM-2014-000-008

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

FREDDI TINQUI

Applicant

-and-

MARY LOUISE WARREN NITSIZA

Respondent

REASONS FOR JUDGMENT

Background

[1] On this application, counsel seek determination of a point of law, set out as follows in the Respondent's notice of motion: whether the child support obligation of a person who adopted a child in accordance with aboriginal customary law, and recognized by the *Aboriginal Custom Adoption Recognition Act*, S.N.W.T. 1994, c. 26 ("ACARA"), is governed by the *Children's Law Act*, S.N.W.T. 1997, c. 14 ("CLA"), or the applicable aboriginal customary law.

[2] Although the Applicant's two affidavits inexplicably contradict each other, it appears that neither the Applicant nor the Respondent is the biological parent of the child, B., for whom support is sought. The biological mother of B. is a former partner of the Applicant, with whom he has other children. There is no evidence before me as to the identity of the biological father of B.

[3] B. was born on November 23, 2008. The Applicant and the Respondent, who were then in a common law relationship, adopted B. in April 2009 when he was approximately five months old. B. had been apprehended by the Director of

Health and Social Services from his biological mother because she was unable to care for him as a result of her own medical issues.

[4] The adoption of B. by the parties was recognized as an aboriginal custom adoption pursuant to the ACARA, as evidenced by the certificate of a custom adoption commissioner signed April 6, 2009 and filed with this Court on April 8, 2009.

[5] The Applicant states in his Supplementary Affidavit that at the time of the adoption his understanding, which he believes the Respondent and the biological mother shared, was that he and the Respondent were breaking all ties, custodial and financial, with the biological mother of B. The Respondent, on the other hand, says in her Supplementary Affidavit that there was no discussion at the time of the adoption as to whether custodial and financial ties with B.'s biological mother would be broken. She says that she believed she was simply assisting the Applicant and the biological mother in keeping B. with the family and community rather than with Social Services.

[6] The parties do not agree as to whether the biological mother had any involvement with B. after the adoption. They appear to agree that while they were together, the Respondent was B.'s primary caregiver.

[7] B. lived with the parties, along with a daughter of the Applicant. The Applicant and the Respondent separated sometime in 2010, within a few months of the one year anniversary of the adoption. The Respondent says she has not seen B. since then. The Applicant says that he has been B.'s primary caregiver since the separation, while the Respondent says that the Applicant was in jail for extended periods of time and that at one point B. was living with one of the Applicant's daughters at his biological grandmother's.

[8] The Applicant filed an application for child support from the Respondent in January 2014.

Positions of the Parties

[9] The Applicant takes the position that the Respondent comes within the definition of "parent" in the CLA and therefore has an obligation to provide support for B. The Respondent takes the position that her obligation, if any, to pay child support must be determined according to aboriginal customary law pursuant

to the ACARA and the way that statute has been interpreted in certain decisions of this Court, referred to further on.

The Law and Analysis

[10] In Canada, both federal law pertaining to divorce and provincial/territorial law pertaining to situations where the parents of a child are not married, provide for the obligation of a parent to support his or her child. In the Northwest Territories, that obligation is set out in s. 58 of the CLA, which provides that, "A parent has an obligation to provide support for his or her child where the parent is capable of doing so".

[11] Section 57 of the CLA defines parent as follows:

> "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.

[12] The Applicant argues that the adoption of B. has made the Respondent a parent to him, either because she has become so under the ACARA, or because she has stood in the place of a parent for him.

[13] The Respondent, however, relies on *Kalaserk v. Strickland*, 1999 CanLII 6799 (NWTSC), a decision in which I reviewed the ACARA in the context of an application that raised the question whether s. 37 of the *Adoption Act*, S.N.W.T. 1998, c. 9 applies so as to relieve a parent from the duty to pay child support for his biological child when that child has been adopted by someone else in accordance with aboriginal custom, outside the regime in the *Adoption Act*. Section 37 of the *Adoption Act* provides that an 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. The argument made was that section 37 should apply to a parent whose child has been custom adopted by someone else.

[14] I concluded in *Kalaserk* that s. 37 of the *Adoption Act* does not apply to an aboriginal custom adoption and that the legal consequences of an aboriginal custom adoption are governed by aboriginal customary law; that law was to

determine whether, in the *Kalaserk* case, the biological father of the adopted child had an obligation to provide child support to the adoptive mother.

[15] The parties in *Kalaserk* had not obtained a certificate recognizing the adoption under the ACARA, which came into force in 1995, several years after the child was given by his biological mother to her parents. Nor had the parties obtained an order from the Supreme Court recognizing the custom adoption, which was the procedure used prior to the ACARA, as explained in *Kalaserk*. The parties to the application, both the biological father and the adoptive mother, took the position that there was in fact an aboriginal custom adoption. The ACARA was relevant in assessing the law prior to and under the ACARA as to the consequences of such adoptions and whether s. 37 of the *Adoption Act* applied.

[16] Ultimately, the *Kalaserk* case was transferred to Nunavut and a trial was conducted. Browne J. held that what had occurred in that case according to traditional Inuit law was a "practical custom adoption" which had not extinguished the right of the adoptive mother to seek child support from the biological parent. Accordingly, she ordered that the biological father pay child support: *S.K.K. v. J.S.*, 2002 CanLII 53332 (NUCJ).

[17] Another case involving the obligation to pay child support in the context of an aboriginal custom adoption is *Bruha v. Bruha*, 2011 NWTSC 44. Like *Kalaserk*, the issue was whether the biological father had an obligation to pay child support in a situation where the child had been custom adopted. In that case, the custom adoption was recognized by a certificate issued under the ACARA. However, the issue was not pursued and there was no determination whether the biological parent had an obligation to pay child support to the adoptive parent under the applicable aboriginal customary law.

[18] Both *Kalaserk* and *Bruha* should be distinguished from the case before me. Both *Kalaserk* and *Bruha* involved a child being custom adopted by adoptive parents from a biological parent or parents. The adoptive parents took upon themselves the care of the child in question. The question that had to be decided was whether, despite the adoption, the biological parent had an obligation to provide support for the child. Had the adoption been completed under the *Adoption Act*, s. 37 of that Act would operate to absolve the biological parent of any child support obligation. The question was whether an aboriginal custom adoption would have the same effect.

[19] In *Kalaserk*, I considered the preamble of ACARA, the relevant parts of which are 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;

[20] The aboriginal customary law that is referred to in the preamble is the law "respecting adoptions". The ACARA recognizes that aboriginal customary law respecting adoptions exists and does not purport to change it. The ACARA provides a means of recognizing a custom adoption; it does not specify the consequences of such adoptions. However the ACARA itself clearly contemplates that a person who has adopted a child in accordance with aboriginal custom is a parent to the child, as section 2(2)(b) requires that the custom adoption commissioner be provided with "a statement by the adoptive parents". In addition, the prescribed form of certificate that is issued by the custom adoption commissioner under s. 3(2) of the ACARA refers to the child having been adopted by the adoptive parents "as their child" in accordance with aboriginal customary law.

[21] In the case before me, the custom adoption has taken place and has been recognized under the ACARA. The adoptive parents took on responsibility for the child as parents to him. The adoptive parents have separated, but that has nothing to do with the custom adoption. It is an event occurring outside and unrelated to the adoption itself. Their separation does not change the fact that the Applicant and the Respondent custom adopted B. and took on responsibility for him.

[22] Having taken on responsibility for the child, neither adoptive parent can be free from that responsibility, except by way of an adoption of the child by someone else under the *Adoption Act*. Whether a custom adoption of that child by someone

else would also have that effect, may depend on aboriginal customary law, however I need not decide that for purposes of this application.

[23] As stated, the separation of the parties and the Respondent's decision to leave the child in the care of the Applicant is an event unrelated to and distinct from the custom adoption itself. The question of the Respondent's obligation to pay child support must therefore be governed by the CLA.

[24] I have not overlooked the affidavit of Mary Beauchamp, filed by the Respondent. Ms. Beauchamp deposes that she has been a custom adoption Commissioner since 2002 and that she has a thorough knowledge and understanding of the Aboriginal customary law in Yellowknife and the surrounding communities. She signed the custom adoption certificate in this case. Her affidavit contains the following statement about custom adoption generally:

> 11. During the commissioning of a custom adoption, there is no discussion or determination of any legal consequences like access rights or maintenance obligations. These issues are not a part of the custom. Arrangements around visitation or financial support are usually made informally and by the parties' mutual agreement.

[25] After deposing that she recalls the circumstances of the custom adoption in this case, Ms. Beauchamp states that, "this custom adoption was a practical solution to avoid the child's placement into the Department's permanent care". She also says, "There was no discussion or agreement made at the time of the adoption in regards to the custodial or financial consequences of the adoption".

[26] Ms. Beauchamp states further:

> 14. I have never heard of or encountered a situation where the custom adoptive parents, who have since separated, pursue one another for child support. I do not believe this sort of legal claim exists under the presiding Aboriginal customary law.

[27] In my view, Ms. Beauchamp's evidence does not change the legal result. Her statement that maintenance obligations are not a part of the custom indicates, if anything, that aboriginal customary law does not deal with the issue of child support. Therefore, the general laws of the Northwest Territories must be applied

to fill that gap. Child support is the right of the child. In the case of an adoption under the *Adoption Act*, the adoptive parents have an obligation to support their adopted children whether the parents remain together or separate. It would put children adopted by aboriginal custom at a disadvantage, and treat them unequally and to their detriment vis à vis other children, to hold that their adoptive parents do not have such an obligation.

[28] The CLA, which came into force after ACARA, includes in its preamble the following statements:

> Whereas it is desirable to confirm the status of children within their families whether they are born inside or outside of marriage or are adopted;
> ...
> And whereas it is desirable to provide for the mutual obligations of parents to care for and support their children whether or not the parents cohabit;
> ...

[29] The first part of the preamble quoted above does not distinguish between adoptions made under the *Adoption Act* and adoptions recognized under the ACARA. Nor does it distinguish between children who are adopted and children whose parents are biologically related to them. It puts all children on an equal footing when it comes to child support. The CLA imposes on those who come within the definition of "parent" the obligation to support their children, whether or not the parents cohabit.

[30] For the above reasons, in my view, the point of law raised and set out in paragraph one of these Reasons for Judgment must be answered as follows: the child support obligation of a person who has adopted a child in accordance with aboriginal customary law, and recognized by the ACARA, is governed by the CLA.

[31] I referred earlier to the definition of "parent' in s. 57 of the CLA. Quite apart from whether the custom adoption itself makes her a parent, as opposed to a person standing in the place of a parent, the Respondent's own evidence as to her role as primary care giver for B. makes her, at the time the family was together, a person standing in the place of a parent. If she is found to stand in the place of a parent, her obligation for child support is to be determined under s. 7 of the *Child Support Guidelines* under the CLA. As explained in *Zoe v. Kent*, 2007 NWTSC

86, s. 7 gives the Court some discretion as to the amount of support. Whether the length of time the Respondent cared for the child, the purpose of the custom adoption and other factors should have any bearing on the amount of support she should pay, are matters that were not addressed before me.

[32] Accordingly, if they are unable to resolve the issue, counsel may bring this matter back on for a determination as to the amount of child support to be paid by the Respondent. That issue may be heard by any judge of this Court.

V.A. Schuler
J.S.C.

Heard at Yellowknife, NT, the
18th day of August, 2014

Dated at Yellowknife, NT, this
5th day of January, 2015

Counsel for the Applicant: Paul Parker

Counsel for the Respondent: Hayley Smith

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