In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CIVIL APPEAL 2015: NO. 29

IN THE MATTER OF THE CHILDREN ACT 1998

AND IN THE MATTER OF THE ADOPTION OF CHILDREN ACT 2006 REGARDING THE MINOR C ("THE CHILD")

(RE C: ADOPTION-APPLICATION FOR CUSTODY BY BIOLOGICAL MOTHER)

JUDGMENT (REDACTED)

(In Court)[1]

Adoption-application for custody by biological mother-applicable legal principles-admission of expert evidence for one side after joint expert instructed- overriding objective-importance of level playing field

Date of hearing: June 7, 2016

Date of Judgment: June 24, 2016

Mr Ray De Silva, Moniz & George Ltd., for the Appellant
Mr Jai Pachai, Wakefield Quin Limited, for the Respondents

Background

1. The Appellant signed formal consent form for the Respondents to adopt her child approximately five months after the birth of the child ("C"), as did C's father. Consent was also given by the child's biological father. Some three months after the expiration of the statutory time limit for revoking consent, the Appellant's counsel informed DCFS that she wished to revoke her consent to the adoption. Counsel subsequently informed the Court of her intention to apply for custody, care and control the day before the Respondents, the couple in whose care C had been from

[1] The Judgment was handed down without a hearing as foreshadowed at the conclusion of the appeal.

birth, formally applied to adopt C. The Appellant's custody application was first heard on May 20, 2015 when the Court gave directions for:

(a) expert psychological evidence to be adduced, including reports on the Prospective Adopters, the child and the Appellant;

(b) a social inquiry report ("SIR") on the circumstances of the child and the Appellant;

(c) the filing of factual evidence by the parties.

2. At a subsequent directions hearing on July 1, 2015 an expert initially proposed by eth appellant was jointly appointed by the Court by consent. The matter was heard before the Family Court (Wor. Nicole Stoneham and Panel) over four separate days in July to August 2015. On the first day of the effective hearing of the custody application, for reasons which were not apparent on the face of the appeal record, the Family Court granted an application by the Respondents to adduce their own psychologist's report. This report was admitted over the objections of the Appellant's counsel.

3. On September 8, 2015 the Family Court made an Order refusing the Appellant's custody application and granting full custody care and control and all resultant parental responsibility to the Respondents. Reasons for the September 8, 2015 decision were not given until February 19, 2016[2].

The Decision of the Family Court

4. In a clear and careful judgment, the Learned Magistrate set out the history to the custody application and then defined the issue before the Family Court as follows: "…*whether, on the particular circumstances of this case, the welfare of* [C] *would best be met by granting custody, care and control to…his biological mother.*"

5. After listing some 13 of the many cases cited by counsel, the judgment records that Mr De Silva's central legal argument was that deference should be given to ensuring a child is raised by his biological parents unless good cause is shown for not seeking to achieve this end: article 8, European Convention on Human Rights ("ECHR"- the right to family life); the Canadian "*Trilogy*" cases. Mr Pachai's response was that this approach was outdated, and that more modern Canadian case law required the Court to give primary weighting to the best interests of the child: *King-v-Low* [1985] 1 SCR 87.

[2] The delay is regrettable as in custody cases in particular, justice delayed can often mean justice denied. Fortunately in the present case the delay had no impact on the disposition of the present appeal.

6. The judgment then summarises the evidence, firstly noting that the SIR had recommended that if a decision was to be made by the Court before psychological assessments were carried out, temporary custody care and control should be awarded to the Appellant. It is explained that the Panel decided not to make any interim decision prior to receipt of the psychological reports. The Panel was clearly impressed by and greatly assisted by the jointly appointed expert who gave oral evidence before the Court.

7. Two key aspects of the joint expert's evidence mentioned in the judgment were findings that: (1) C would be harmed ('broken attachment') if he was moved from his current home and (2) Appellant was incapable of meeting C's parenting needs. The Panel unanimously found that preserving C's attachment to the Prospective Adopters were in the best interests of the child.

Findings: did the Family Court adopt the wrong legal approach?

8. Mr De Silva was bound to concede that under the Adoption of Children Act 2006 section 3(a), "*the best interests of the child shall be the paramount consideration*". The same governing principle applies under section 6 of the Children Act 1998 which provides that "*the welfare of the child shall be the paramount consideration*". And the Minors Act 1950 also provides:

> "6. *Where in any proceedings before any court the custody or upbringing of a minor, or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.*" [Emphasis added]

9. So if the Appellant's application was viewed narrowly as a custody application or broadly as a custody application closely linked with an adoption application, the Family Court clearly applied the right legal test in being guided by the overarching welfare principle. The complaint made about the Panel's decision was that it adopted the wrong approach in applying the correct guiding principle. Mr De Silva argued that the Panel ought to have given more weight to the importance of the right of the child to be raised by his biological parents, as recognised in English case law.

10. I reject Mr Pachai's invitation to view the present application narrowly as merely a custodial one. Mr De Silva indicated that the Appellant was unlikely to renew her attempts to gain custody of C by opposing the adoption application in the event that the present appeal failed. The custody application was for all practical purposes an attempt by the Appellant to withdraw her consent to the adoption process that she herself had put in train by placing C in the care of the Respondents shortly after the

child was born. Both she and the biological father had both freely consented to C being adopted and the statutory time for withdrawing that consent had expired. In these respects, therefor, the factual matrix of the present case was quite different to the position in the English cases to which the Appellant's counsel referred.

11. For instance, in *A and B-v-Rotherham Metropolitan Borough Council* [2014]EWFC 47, the baby was removed from its mother at birth and placed in foster care, with a care and placement order being made. At seven months, the baby was placed with prospective adopters who three months later applied to adopt him. In response to this application, a man unexpectedly proven to be the true biological father came forward. The English court decided (after the baby had been with A and B for 20 months) that he should be raised by his biological aunt rather than adopted by A and B. In this case there was independent support for both sides but the local authority and the child's guardian both supported the child being raised by his aunt. The biological father's parental rights were deferred to not simply because credible evidence suggested this was in the best interests of the child. The father and aunt were black; the child was mixed race while the proposed adopters were both white. More importantly still, the *Rotherham* case was also a case where neither biological parent had at the outset consented to adoption. As Holman J noted early on in his judgment:

> "*5. It is accepted by all concerned in this case that if the father had come forward and the true paternity had been established at any time up to the moment when the child was actually placed with A and B, then he would not have been placed with them and, after due assessment of her, would almost certainly have been placed with the aunt.*"

12. The expert evidence accepted in that case cannot be used to impugn the reliability of expert evidence adduced through live witnesses before the Family Court in the present case. It is true that the English courts have considered the interaction between article 8 of ECHR and adoption rights. Article 8 rights are most sharply engaged in the context of public law adoptions where the consent of the biological parents has never been obtained: *In re P (A Child) (Adoption: Step-parent's Application)* [2015] 1 WLR 2927 (CA, at paragraph 57). In this context, the need arises to consider whether the State's interference with the biological parents' article 8 rights by placing their child for adoption without their consent is proportionate or not.

13. In the present case, both biological parents had freely consented to a private adoption and the mother subsequently changed her mind. These features were present in *King-v-Low* [1985] 1 SCR 87, where the Supreme Court of Canada upheld the decision to refuse the mother's custody application, holding that "*the welfare of the child*" was "*the predominant factor*" (McIntyre J, at paragraph 34).

14. I am bound to find that the Family Court did not adopt the wrong legal approach, having regard to the applicable statutory and factual context of the present case. It is in any event likely to be the exceptional case where the merits of a decision relating to

the welfare of a trial can be successfully undermined on purely technical legal grounds.

Did the Family Court misdirect itself as to the evidence?

The admission of further expert evidence for the Respondents

15. No explanation appears in the Reasons for Decision (or elsewhere in the Record) for the Panel's decision to permit the Respondents to adduce their own expert evidence on the first day of the substantive hearing over the objections of the Appellant's counsel. I find, in the absence of any explanation, that the Family Court erred in this regard.

16. Mr De Silva complained that this decision was unfair bearing in mind the earlier decision that the parties should jointly instruct one expert and the fact the Report was admitted at a date which made it impossible for the Appellant (without delaying an important and urgent hearing) to consider filing evidence in response to. Mr Pachai could only justify the application by reference to the fact that the Respondent's additional expert had been retained before the parties agreed to jointly instruct the same expert. This was in no meaningful sense responsive to the main thrust of the complaint. The complaint was that the Appellant had come to Court anticipating that the only expert psychological evidence would come from a jointly instructed witness and the admission of further expert evidence against her created an uneven playing field, one which was tilted in the Respondents' favour. It is impossible to avoid concluding that the Respondents' decision to seek to adduce further expert evidence, essentially confirmatory of the testimony of the joint expert, amounted in objective terms to little more than 'over-egging the pudding'.

17. I do not ignore the deep discomfiture the Respondents must have felt at the prospect of having C removed from their care, having had the child in their care effectively from birth. It is understandable that they should wish to strain every sinew to retain care and custody of C. However, the Appellant's application for custody of a child she had previously agreed to put up for adoption was quite obviously motivated by emotions of the most intense kind. She was, by all accounts, a comparatively vulnerable woman, litigating against prospective adoptive parents who had been selected because of their superior social and economic stability and status.

18. In my judgment, these considerations created a heightened need for the Family Court to ensure that the proceedings were conducted in a manner designed to avoid any appearance of unfairness to the weaker party. The first-listed example of the requirements of dealing with a case justly under Order1A rule 2 is the following:

"*(a) ensuring that the parties are on an equal footing…*"

19. Order 1A/3 obliges the parties to assist the Court to achieve the overriding objective. The admission of further expert evidence in 'trial by ambush' circumstances was manifestly unfair. The Family Court ought to have declined to admit the evidence of the Respondents' expert. This appeal accordingly stands or falls on the basis of all other evidence. I have already indicated that it is obvious that the Family Court placed primary reliance on the evidence of the joint expert.

Did the Family Court err by effectively putting the Appellant on trial?

20. Mr De Silva's submissions on the sense of grievance his client felt about the way she had been characterised in the expert evidence which was accepted by the Family Court were eloquently poignant indeed. The annals of family law are however, inevitably, littered with cases in which justice fails to meet the expectations of the emotionally deserving. As Holman J observed in the opening paragraph of his judgment in *A and B-v-Rotherham Metropolitan Borough Council* [2014]EWFC 47:

> "*I know, and deeply regret, that my decision will cause intense grief. After hearing all the evidence and argument, and after due consideration, I am, however, clear as to the outcome, which I do not reach narrowly or marginally.*"

21. Those sympathetic words, expressed by Holman J in a case where the evidence clearly supported a result which favoured the biological family over the adoptive family, apply with equal force to the present case where the result is the reverse. In the present case it is the biological mother who has undoubtedly been left with a sense of intense grief by the result. In addition, the Appellant has the unpleasant burden of being found to be an incapable parent to bear. It was however inevitable (and entirely consistent with Mr De Silva's thesis that good cause was required to justify depriving a mother of the right to raise her child) that the Court should bring scrutiny to bear on whether C's welfare would be best served by being placed in the Appellant's care. That necessitated a critical assessment of her parental capacity.

22. The contentions that the Family Court erred in its approach to the evidence were unsustainable. The expert evidence from the jointly appointed expert supported only one judicial outcome. There was, nevertheless, force to the broad and tacit complaint that the Family Court had (in my view quite unintentionally) displayed insufficient sympathy for the Appellant's plight. This falls short of an admissible ground of appeal as this Court itself is required to treat the welfare of the child as the paramount consideration. The Family Court was bound to record findings which were painful to the Appellant as C's biological mother. I unequivocally confirm the crucial findings made by the Family Court although I would restate those findings in a way which is more empathetic to the mother's position.

Conclusion

23. The appeal is accordingly dismissed. Nevertheless, although this did not undermine the validity of the decision itself, the admission of the Respondents' own expert evidence after a joint expert had been agreed compromised the fairness of the proceedings before the Family Court. This unnecessary application by the Respondents clearly contributed to some extent to the Appellant's motivation to bring this appeal. Unless either party applies within 14 days by letter to the Registrar to be heard as to costs, no Order shall be made as to the costs of the appeal.

Dated this 24th day of June 2016 _____

IAN RC KAWALEY CJ