COURT OF APPEAL OF YUKON

Citation: *S.St.C. v. S.C.*,
2017 YKCA 7

Date: 20170615
Docket: 16-YU803

Between:

S.St.C. and C.C.

Applicants/Respondents
(Petitioners)

And

S.C. and S.P.

Respondents
(Respondents)

And

The Director of Family and Children's Services

Applicant/Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

On appeal from: An order of the Supreme Court of Yukon, dated March 2, 2017 (Whitehorse Docket 16-B0055).

S. St.C., appearing in person

No one appearing for S.C. or S.P.

Counsel for the Director of Family and Children's Services: L. Whyte

Place and Date of Hearing: Whitehorse, Yukon
May 18, 2017

Place and Date of Judgment: Vancouver, British Columbia
June 15, 2017

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Madam Justice Tulloch

Summary:

The Director of Family and Children's Services brings an appeal and, if leave is required, an application for leave to set aside an adoption order on the basis that the adoption procedure did not engage the powers and duties of the Director under the relevant statute. A representative of the Director's office advised the adoptive parents that their case fell outside the legislative scheme. Held: leave to appeal is required and is refused. Unless the statute provides for a right of appeal, a non-party to the original proceeding requires leave to bring an appeal. The primary factors on such a leave application are the nature of the applicant's interest and, where a child is involved, the best interests of that child. Leave is refused because the proposed appeal is contrary to the child's best interests, would not address the internal management issue that caused the problem and amounts to an abuse of process.

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] The Director of Family and Children's Services brings an appeal, and if leave to appeal is required, an application for leave, to set aside an adoption order made by Mr. Justice Veale on 2 March 2017 in respect of a child, N.P., born 19 May 2006, hereafter "the child". The ground of the appeal is that the adoption procedure in this case did not engage the powers and duties of the Director to assess the application and to make a recommendation for or against the adoption, and therefore the order did not comply with the *Child and Family Services Act*, S.Y. 2008, c. 1 [the *Act*].

[2] The adoptive parents contest the Director's status as a party having a right of appeal and seek an order quashing the appeal. They take this position because prior to the adoption they sought advice and direction from the Director's office on how to adopt the child given the complexities of the case (which will be discussed later). They were told by a person in authority that their case fell outside the scheme of the *Act*, and accordingly they should proceed with a "private" adoption. They had already obtained an order of custody of the child from Veale J. They applied for and received the impugned adoption order. When the Director became aware that the order had been granted, she filed an appeal.

[3] The adoptive parents have travelled a long and difficult path to provide the child with a stable, loving home, and they argue the Director's about-face is contrary to the best interests of the child. They say the proposed appeal is an abuse of process.

[4] At the conclusion of the hearing, we found that the Director had standing to bring the application for leave and that leave was required. Leave was refused for reasons to follow. These are the reasons.

Factual Background

[5] The child was born 19 May 2006 in California. Her natural mother suffers from a serious mental illness. Her natural father obtained custody of the child and her siblings. During the four years they were in his custody, they were sexually abused by him. He is now serving a 55-year prison sentence in California for criminal convictions arising from the abuse. The mother is presently under a committal order related to her illness and is not competent to consent to an adoption. The adoptive mother is her sister.

[6] The adoptive mother's efforts to rescue the child from this difficult situation were made more onerous because of the vexatious attempts of the natural father's sister to obtain control over the child's care. This resulted in litigation costing the adoptive parents about $100,000. After investigation by child protection authorities in California, the Probate Division of the Superior Court of California, County of Riverside, awarded the adoptive mother guardianship of the child and gave her approval to bring the child to Canada. The adoptive parents have settled in a place located off the grid on the Atlin Road, Yukon. The child is homeschooled. Given the turmoil in her young life, the child requires psychological care. The adoptive mother is a counselling psychologist and looks after the child's needs in that regard.

[7] The child is in Canada on a visitor's visa which has been renewed from time to time. Residence status requires an adoption order. The proposed appeal questioning the validity of the order puts the child's immigration status in doubt.

[8] On 8 December 2016, Veale J. granted an order of custody in these terms:

> THIS COURT ORDERS THAT:
>
> 1. The Plaintiffs shall have custody of the child [N.P.], born 19 May 2006.
> 2. This Order shall be served on both Defendants.
> 3. The requirement for the Parties to sign this Order is waived.

[9] As mentioned, the adoptive parents sought advice from the Director's office on how to get an adoption order. Ultimately, the advice was in the following email message:

> Hi S….,
>
> I have done some consulting within our unit and legal counsel.
> The route that is the most probably [*sic*] for the situation is private adoption.
> This would mean retaining a lawyer to assist with the adoption process.
>
> Therefore you will not have to apply to our program or meet with me.
>
> If you have any questions please do not hesitate to call me.
>
> Cleo Smith
> Adoptions Coordinator/Supervisor – Family & Children Services
> Health & Social Services H-10, YTG

[10] The adoptive parents put together an application. Veale J. made the following order on 2 March 2017:

> AND UPON IT APPEARING that it is proper and in the best interests of the Child to be adopted and that the adoption should take place.
>
> 1. IT IS HEREBY ORDERED that the consent of the natural father, …, be dispensed with.
> 2. IT IS HEREBY ORDERED that the consent of the natural mother, …, be dispensed with.
> 3. AND IT IS FURTHER HEREBY ORDERED that the application for adoption be granted, and that the Child, Birth Registration Number …396, born 19 MAY 2006 in HEMET CALIFORNIA USA, be and is hereby adopted as the child of the petitioners….
> 4. AND IT IS FURTHER HEREBY ORDERED that the relationship of parent and child between [the petitioners], and the child, [N.P.], Birth Registration Number …396, born 19 May 2006 in HEMET CALIFORNIA USA, shall continue.
> 5. AND IT IS FURTHER HEREBY ORDERED that [the petitioners] are the legal parents of the child, Birth Registration Number …396, born in HEMET CALIFORNIA USA.

6. AND IT IS FURTHER ORDERED that the name of the child be and is hereby changed from [N.P.] and that the child shall be known as [N.P.].

* * *

PARTICULARS

1. NAME OF CHILD: [N.P.]
2. DATE OF BIRTH: 19 May 2006
3. SEX OF CHILD: Female
4. PLACE OF BIRTH: Hemet California USA
5. BIRTH REGISTRATION NUMBER: …396
6. DATE OF REGISTRATION OF BIRTH: May 26, 2006
7. DATE OF ADOPTION: *March 2, 2017*
8. NAME AND SURNAME OF CHILD BY ADOPTION: [N.P.]
9. ADOPTING FATHER:
   NAME AND SURNAME: …
   PLACE OF BIRTH: Montclair, CA, USA
   CITIZENSHIP, RACIAL ORIGIN: Cherokee, Irish, Greek
   DATE OF BIRTH: July 1, 1980
   TRADE, PROFESSION OR KIND OF WORK: Business owner
10. ADOPTING MOTHER:
    NAME AND SURNAME: …
    PLACE OF BIRTH: Montclair, CA, USA
    DATE OF BIRTH: November 22, 1977
    CITIZENSHIP, RACIAL ORIGIN: Mexican and Persian
    TRADE, PROFESSION OR KIND OF WORK: Business owner

[11] After the order was perfected, the court registry asked the Director if she wanted a copy. The Director filed a Notice of Appeal.

[12] Nothing in the Director's material supporting the application for leave contradicts or explains the puzzling behaviour of her office. Neither does it offer anything to ameliorate the inconvenience, cost and distress caused by the proposed appeal. The adoptive parents cannot afford more litigation.

[13] When asked at the hearing, counsel for the Director said that her client has no reason to believe that the orders of custody and adoption were other than in the best interests of the child. Counsel explained that the appeal is motivated by the felt need of the Director to carry out the mandate under the *Act* and to preserve the integrity of the adoption scheme.

Issues

1. Does the Director have standing?
2. If so, does the Director have the same right of appeal as an original party or must she obtain leave?
3. What are the factors on leave?
4. Should leave be granted?

Discussion

Standing

[14] The *Act* specifically addresses standing:

> Appearance in court
>
> 151 The director of family and children's services has standing to appear before the court and take part in any adoption proceeding.

[15] The Director plainly has standing to be heard on an adoption matter. The question on this is whether she can "take part" by launching this appeal.

Is Leave Required?

[16] Appellate courts have jurisdiction to permit a non-party to commence an appeal. Generally speaking, persons not party to the original action require leave to appeal. The guiding authority on this issue is *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549. This was a constitutional case involving French language instruction in New Brunswick schools. An association of parents attempted to intervene at trial and sought to appeal to the New Brunswick Court of Appeal. Wilson J., writing for the full Court on this point, addressed the inherent power of appeal courts in this way at 593–594:

> A number of cases cited in these texts were relied upon by La Forest J.A. in support of the Court's inherent jurisdiction. The most frequently cited authority is the following passage from the decision of Lindley L.J. in *Re Securities Insurance Co.*, [1894] 2 Ch. 410 at p. 413:

> Now, what was the practice of the Court of Chancery before 1862, and what has it been since? I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a *prima facie* case why he should have leave he will get it; but without leave he is not entitled to appeal.

The case involved an attempt by a non-party who could have been present at the original proceeding to appeal a decision without leave being granted. Kay L.J., concurring with Lindley L.J., commented at p. 414:

> I think that the 124th section shews that the practice to be observed in winding-up cases must be the same as the practice of the same Court in cases of appeal in matters other than a winding-up, and I think it was the invariable practice of the Court of Chancery, where a person was not a party on the record, to treat him as not entitled to appeal against an order made in the cause or matter, although he was aggrieved by it, without getting leave; but if he is aggrieved by it it is very easy for him to obtain leave.

[17] In this case, the source of appellate jurisdiction is found in the *Court of Appeal Act*, R.S.Y. 2002, c. 47, s. 1:

> There shall be a Court of Appeal in the Yukon called the Court of Appeal which shall be a superior court of record and shall have the same powers, jurisdiction and authority in relation to matters arising in the Yukon possessed immediately before January 1, 1971 by the Court of Appeal for British Columbia in relation to matters arising in British Columbia in the exercise of its ordinary jurisdiction…

[18] The British Columbia statute in force at the relevant time, namely, the *Court of Appeal Act*, R.S.B.C. 1960, c. 82, included a provision substantially similar to that at issue in *Société des Acadiens*, being s. 8:

> The Court of Appeal further has and shall exercise such original jurisdiction as may be necessary or incidental to the hearing and determination of any appeal.

[19] However, the Director submits that she is entitled to appeal as of right. Her case begins with the contention that although the *Act* creates participatory rights and obligations for the Director with respect to adoption, she was unable to exercise

these rights or fulfill her responsibilities because she was not given notice of the application as required by the *Act*:

> Notice of application
>
> 117 (1) At least 30 days before the date set for hearing an application for an adoption order, the applicant shall give written notice of the application to a director or an adoption agency.
>
> (2) The notice to the director or adoption agency shall be accompanied by documents or information to be filed with the court under section 119.

[20] Section 119 states that an application for adoption is to be accompanied by, among other documents, a post-placement report filed by the Director or an adoption agency where required by s. 120. This report is to include a recommendation that the adoption order should or should not be made. Section 120 requires such a report except where the application is brought by an adult to jointly become a parent with a birth parent of the child, which is not this case. These sections were not complied with.

[21] The Director cites *L.S.O. v. S.O.*, 2016 SKCA 151, for the proposition that it follows from a grant of standing that the party has a right of appeal. In *L.S.O.*, an appeal from a protection order for six children was heard in the absence of counsel appointed for one child and without fully hearing counsel appointed for two other children. Wilkinson J. (*ad hoc*), writing for the Court, framed the problem in the case:

> [22] The essence of the concern raised by this appeal is a represented child's right to be heard, and to have a legitimate voice in child protection proceedings in matters that implicate the child's best interests. The fact that the appeal was disposed of in the absence of Ms. Lawrence and without hearing fully from Ms. Lapointe, the legal representatives for the three children, is the disquieting aspect. Section 6.3(7) of *The Public Guardian and Trustee Act* makes it clear that, on appointment, counsel for a child has the right to participate in all matters relating to the protection hearing, to address the court, to file written submissions, and to call, examine and cross-examine witnesses. In other words, despite non-party status, a child's right to participate through a designated legal representative is both broad and meaningful.

[22] The court's conclusion contained a proposition which the Director argues has general application and should govern its claim to a right of appeal in the present case:

> [28] The decision to dismiss the appeal without hearing from Ms. Lawrence, and the children she represented, constituted error in principle. A right to be heard necessarily implies sufficient standing to appeal in circumstances where that right has been supplanted. Otherwise, it is a barren privilege. Considerations of fairness and fundamental justice compel the result that counsel for children seek, namely, that the matter be returned to the Court of Queen's Bench for hearing of the appeal. The Ministry does not oppose their request.
>
> [Emphasis added.]

[23] This is a very different case from *L.S.O.* There, the children's representatives were denied a right to participate in the proceedings. At bar, the Director's representative told the adoptive parents to proceed privately. The concern for the Court is not that the Director was denied participation in the process but that the child's best interests are affected by the Director's late assertion of her authority.

[24] In my opinion, the opportunity for a non-party to appeal is a matter of discretion for the Court of Appeal and is not necessarily an incident of standing or a logical corollary of standing granted by statute. Unless the statute confers an express right of appeal, it depends on the justice of the case and, where children are involved, their best interests, as discussed below.

[25] This case illustrates the need for the Court to require leave when a non-party asserts the right to appeal. Were the appeal to be automatic, these adoptive parents would be dragged through a lengthy appeal and frustrated in their goal of providing a stable life for the child. The child would face yet one more period of uncertainty while the case was pending. All this suffering would have to be endured even though the moving party in the appeal created the problem in the first place.

What Factors Govern Leave?

[26] The *Société des Acadiens* case sets out the factors governing leave applications where a non-party seeks to bring an appeal at 594–595:

> A review of the cases listed in the English Manual indicates that in a proper case the practice of the Court of Chancery was to permit a grant of leave to appeal to a person not a party to an action. The test applied in order to determine when a case was a proper case for leave was whether the applicant would have been a proper, if not a necessary, party to the action. A number of factors which affect the exercise of a court's discretion on such an application are reflected in the cases. An appellant should be able to show, for example, (a) that its interest was not represented at the proceeding; (b) that it has an interest which will be adversely affected by the decision; (c) that it is, or can be, bound by the order; (d) that it has a reasonably arguable case; and (e) that the interests of justice in avoiding a multiplicity of proceedings would be served by the grant of leave. Many of these elements are present in any judicial determination as to the appropriate parties to a lawsuit. As pointed out in *Daniell's Chancery Practice*, [8th ed., 1914], vol. I, c. III, at p. 147:
>
> > It was the aim of the Court of Chancery to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who were compelled to obey it, and to prevent future litigation. For this purpose, it was necessary that all persons materially interested in the subject should generally be made parties to the suit, either as plaintiffs or defendants.
> >
> > [Emphasis added.]

[27] The primary factors are the nature of the applicant's interest in the subject matter and, where a child is the central figure in the matter, as here, the best interests of that child.

[28] The *Act* indicates the force of the best interests criterion. Under the heading "Guiding principles", s. 2(a) provides as follows:

> 2 This Act shall be interpreted and administered in accordance with the following principles
>
> > (a) the best interests of the child shall be given paramount consideration in making decisions or taking any action under this Act;

[29] This principle is given expression in s. 128(1)(b):

> When an adoption order may be set aside
>
> > 128 (1) No adoption order may be set aside except
> >
> > …
> >
> > (b) as a result of fraud, but only if the court considers it to be in the child's best interests to set aside the order.

[30] So it can be seen that even if the adoption order had been procured by fraud, it could not be set aside unless it were in the child's best interests. Here we have an anomalous order. It is anomalous because the Director's office sent the adoptive parents down the wrong path. By extension of s. 128(1)(b), an order obtained in good faith, arguably irregular but in accordance with the child's best interests, must not be disturbed.

Should Leave be Granted?

[31] Were it not for the bizarre facts of this case, the Director's position would be unassailable. The Director's purpose in bringing the appeal is to carry out her mandate and defend the integrity of the statutory scheme. However, since the Director's office abjured its jurisdiction in the first instance, hopefully for the last time, it seems to me that the problem with the scheme and the Director's administration lies in internal management rather than setting aside the adoption order. To grant leave would visit the Director's mistake on the child and her adoptive parents. The proposed appeal is contrary to the child's best interests, would not address the root cause of the problem in this case, and amounts to an abuse of process.

Conclusion

[32] The Director required leave to appeal and leave was refused.

_____
The Honourable Mr. Justice Donald

I agree:

_____
The Honourable Chief Justice Bauman

I agree:

_____
The Honourable Madam Justice Tulloch