

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Birth Registration No. 82-035748 (Re)*
2004 YKSC 18

Date: 20040308
Docket No.: 03-B0083
Registry: Whitehorse

IN THE MATTER OF THE *CHILDREN'S ACT*, R.S.Y. 2002, C.31, and amendments thereto;

IN THE MATTER OF THE APPLICATION BY PETITION OF A-M.H. AND D.J.H. OF THE CITY OF WHITEHORSE, IN THE YUKON TERRITORY;

FOR AN ADOPTION ORDER IN RESPECT OF THE MALE PERSON BORN, September 27, 1982, with Birth Registration No. 82-035748

Appearance:

Kathleen M. Kinchen

Petitioners

Before: Mr. Justice L.F. Gower

MEMORANDUM OF RULING

[1] The petitioners wish to adopt an adult male child and to change the surname of the child to their own.

[2] I have initialized the names of the petitioners in the style of cause to avoid identifying the child, consistent with s. 173(2) of the *Children's Act*, R.S.Y. 2002, c.31 (the "*Children's Act*").

[3] The specific issues before me are whether the consent of the natural father of the child is required for this adoption and, in any event, whether the natural father is entitled to notice of this application.

[4] The male child was born on September 27, 1982, in the Province of British Columbia. The natural mother, now one of the petitioners, and natural father were divorced in 1988. The mother was granted sole custody of the child, who has since remained in her care.

[5] The mother alleged that the natural father was physically abusive towards her and the child and also sexually abusive towards the child during the marriage. As a result, the divorce court ordered supervised access for the natural father. Over the next four years the natural father exercised access on only two occasions.

[6] The mother married the co-petitioner in 1992 and moved to Whitehorse. Since then, the natural father has made no attempt to contact the child. However, he did continue to pay child support until the child turned 19 years of age.

[7] Both the mother and the child are concerned that if notice of this proposed adoption is provided to the natural father, he may retaliate against them in some way and generally cause difficulties. One of the reasons for the mother's fear in that regard is that, when she moved to Whitehorse in 1992, she wrote to the natural father asking for his consent to change the child's last name to her maiden name. Apparently, the natural father refused to consent and advised her that he intended to reopen the issue of the alleged sexual abuse by insisting that the child be tested by a psychologist. The mother retained counsel and agreed to a psychological assessment, providing that the natural father paid the associated costs. However, the natural father has not been in further contact with either the mother or the child since then.

[8] This application is brought pursuant to the *Children's Act*. Part 3 of that *Act* deals with adoptions, but not specifically with adult adoptions. "Child" is not defined by the *Act*. Two possible interpretations arise from the ordinary meaning of the word. The first would be a classification of a person based upon their age, such that anyone under the age of majority would be considered a child. The second interpretation would be to reflect the relationship between the parent and the child, regardless of the child's age. The *Children's Act* appears to use "child" in both senses. For example, sections 81 and 82 appear to use the word as though it were a synonym for "minor", whereas s. 101(1) appears to use the word in its relationship context.

[9] With that in mind, I will address the issue of consent by the natural father. Section 83(3) requires the consent of the "child's parents" if the child is under the age of majority, but is silent for a prospective adoptee over the age of majority. I interpret this to mean that parental consent is not required for persons over the age of majority. If such consent was required, one would expect the legislation to have expressly said so.

[10] The remaining issue is whether the natural father is entitled to notice of this application for adoption. I raised this issue with counsel for the petitioners and she provided the court with the case of *Birth Registration No. 74-09-024793 (Re)*, [1994] *B.C.J. No 594*, a decision of Master McCallum of the British Columbia Supreme Court. That case was very similar to the current one in that it was also an application to adopt an adult person commenced under Rule 10 of the *Rules of Court*. In British Columbia, although the legislation defined "child" as an unmarried person under the age of 19, the consents of the parents of prospective adult adoptees were not required. However, the court noted that Rule 10(5) [now Rule 10(4)] of the *Rules of Court* is mandatory and

requires service of the petition and copies of all affidavits on all persons whose interests may be affected by the order sought. Master McCallum concluded (at paragraph 16) that natural parents of an adult adoptee do have an interest which may be affected by an adoption:

... it appears to me that the parents of an adult who is the subject of an application for adoption are persons entitled to notice. They have legal rights which are limited but do exist. The adoption order will irrevocably alter the parents [as written] legal position and they ought to have the opportunity to be heard before such an order is made.

Ontario Birth Registration No. 66-05-035455 (Re), [1993] B.C.J. No. 1350 (B.C.S.S.) comes to the same conclusion.

[11] In any event, the requirement of notice to an interested party is an elementary principle of natural justice: *Children's Aid Society of Toronto v. Lyttle*, [1973] S.C.R. 568 (S.C.C.); *Walters v. Phillips*, [1955] 3.D.L.R. 840 (Man. C.A.).

[12] The need for notice to such parents is not vitiated by the fact that s. 92(2) of the *Children's Act* states that the natural parents of an adult adoptee are not among those persons who have a right to be present at the adoption proceedings (since their consent is not required). Section 92(3) allows the court to permit other people to be present at such proceedings, *including* the natural parents of an adult adoptee. Notice provides such parents with an opportunity to seek the court's permission to be present and voice their opinion on the adoption.

[13] I therefore decline to grant the orders sought and direct that the petitioners provide notice of their application to the natural father.

GOWER J.