In The Supreme Court Of Bermuda

APPELLATE JURISDICTION
2022: No. 9

B E T W E E N:-

F

Appellant

-and-

MFP

First Respondent

and

FFP

Second Respondent

and

DIRECTOR OF CHILD & FAMILY SERVICES

Third Respondent

Before: Jeffrey Elkinson (Assistant Justice)

Appearances: Bruce Swan of Bruce Swan & Associates for the Appellant
Saul Dismont of MDM Limited for the First and Second Respondents
Brian Moodie of Attorney-General's Chambers for the Third Respondent

Date of Hearing: 22nd December 2022

Date of Judgment: 13th January 2023

JUDGMENT

ELKINSON AJ

1. This is an appeal under section 53 of the Adoption of Children Act 2006 ("the Act") of the adoption order made by Acting Magistrate, Rachel Barrett, sitting in the Family Court on 27th January 2022. The Family Court is a Special Court established under Section 12 of the Magistrates Act 1948 and is referred to as the Family Court when exercising jurisdiction under the Children Act 1998. It is the court to exercise jurisdiction under the Act.

2. The first and second respondents had the care of "P" for four years before making the application to adopt "P". "P" had been born prematurely on 22nd November 2012. At the time of birth, both natural parents were unemployed and living in emergency housing and had a strained relationship. "P" was at risk for those matters set out at section 3(k) of the Children Act 1998. When he was discharged from hospital, he had been placed with his first foster family. The third respondent, the Director of Child and Family Services ("the Director"), who under section 4 of the Act is responsible for the administration of adoptions in Bermuda, thereafter made annual applications for care orders as it was and remains his position that neither natural parent is suitable to provide full-time care of "P". The Acting Magistrate noted that on each occasion when the court granted the care order that it had been satisfied that there continued to be significant risk of harm to "P" as that term is used in the Children Act 1998.

3. The Family Court determined that it was in the best interests of "P" to make the adoption. On this appeal it is sought to overturn that order. It is to be noted that the natural mother, who had been a named party in the hearing below, takes no part in this appeal as her position is that she has no objection to the adoption order and in any event now lives abroad. Mr Dismont, on behalf of the foster parents who are the respondents to this appeal, takes the point that the appellant as the natural father of "P" has no standing to make the appeal. He submitted that section 55 of the Act sets out those persons who may appeal to the Supreme Court. This is a limited class of persons which includes those who have been denied an adoption order and then any person whose consent has been dispensed with by the court under section 19 of the Act.

The appellant was not a person whose consent was required. This was a public law adoption as "P" was under a care order pursuant to section 25 of the Children Act 1998. "P" was deemed to be in the continuing custody of the Director further to section 15 (5) and (6) of the Act. Mr. Dismont on behalf of the respondents referred to the British Columbia Adoption Act 1996 which he informed the court is the statute on which the Act is based. Similarly, our Children Act 1998 is based on the Child, Family and Community Service Act [RSBC 1996] as enacted in British Columbia. The terms of the similar provisions give the same result in both jurisdictions such that the natural parent, or natural parents as the case may be, lose the right to withhold or give consent to an adoption. The point that the appellant has no standing is unanswerable and I find that the appellant does not have standing to bring this appeal. In the event that I am wrong on that, I shall deal with the submission made by Mr. Swan in respect of the alleged breach of section 38 (3) of the Act, which he submitted was such as to render the adoption order nugatory.

4. Section 38 (3) of the Act requires that no adoption order should be made if the post-placement report, the contents of which are set out in section 32 of the Act and which requires a recommendation as to whether the adoption order should or should not be made, is completed more than three months before the date of the hearing of the application. It was submitted to the court that the breach of the Act is not remediable and the adoption should be revoked. It was submitted that this was a point which was raised before the court below and not dealt with there. Mr. Swan submitted that the requirement as set out in that Act should be strictly followed.

5. Section 38 (3) of the Act provides as follows:-

> *"If the post-placement report was completed more than 3 months before the date of hearing the application, no adoption order shall be made until the applicant files with the court a written certificate of the Director confirming or modifying the report."*

6. Mr. Swan cited the case of **Somerset County Council v. NHS Somerset Clinical Commissioning Group and others [2022] EWFC 31**, a Judgment delivered by the President of the Family Division, Sir Andrew MacFarlane. Mr. Swan sought to persuade this court that the *ratio decidendi* of that case was that courts should be vigilant to be satisfied that requirements relating to adoptions have been complied with before an application is granted; that this overrides the long established line of authority, including what was actually determined in that case, and that those authorities should be ignored.

7. In my view it is very clear that the Family Division of the English High Court adopts the established principle that an adoption order, once made, will only be set aside or revoked in "*wholly exceptional circumstances.*" At paragraph 61 of that Judgment it is stated that:-

> *"Where an adoption has taken place, the established authorities indicate that it will only be in wholly exceptional circumstances that an existing adoption order will be set aside. It is difficult, if not impossible, to contemplate circumstances relating to the child's health, which were not known to the court when the adoption order was made, being of sufficient weight to meet that very high test."*

8. The issue there related to the health of the child. In this appeal, the issue is whether or not the post-placement report was completed more than three months before the date of hearing the application.

9. The post-placement report was dated 5th November 2019 and received by the Family Court on 18th August 2021. The adoption application hearing was finally heard in the afternoon of 1st December 2021 and all day on 3rd December 2021. There is a rather tortured history relating to the Director believing he didn't have to give his consent as required by section 15(5) of the Act and applying for his consent to be dispensed with. Section 15 of the Act expresses that the consents of the parents of the child shall be required and also that of the child if over 12 years of age but not if he/she is in the continuing custody of the Director. If the child is in the continuing custody of the Director, which "P" was, the Director must consent (Section 15(5)).

Section 19 of the Act allows that consent may be dispensed with but this does not appear to be applicable to the Director. There were various hearings in the course of 2021 after the adoption application had been filed on this point. The adoption application had been filed on 22nd December 2020 after approval of the Director of the respondents as suitable persons to adopt "P". It then took nearly one year for the actual adoption application to be heard. Up to that time, there were at least three hearings in the Family Court on the issue of the Director's consent.

10. The Director was wrong to have sought such dispensation, which error was accepted by his counsel on this appeal. It was said on his behalf that for reasons unrelated to the welfare of the child he did not want to give it and his preference was to have his consent dispensed with. Mr. Moodie, on behalf of the Director, informed this court that the Director always supported and continues to support the adoption but had an issue with giving consent. This was explained by Mr. Moodie by sharing with the court that the Director's issue lay with the smallness of the community and the Director did not want to give the impression that he controlled people's lives by giving away their children.

11. It goes without saying that this is a duty which he has, imposed by statute, which he must comply with. One can sympathize, in the circumstances of the smallness of the community, with the Director's concern that he may be subject to criticism. However, the statute is clear as to the process and if he believes that it is appropriate in the circumstances of any particular adoption to give consent, then he must do so. It is noted that Bermuda's legislation in this area is substantially adopted from that of British Columbia where the problem which the Director in Bermuda has to confront would not be that of his counterpart in such a substantially populated province of Canada.

12. In any event it remained the fact that the mother of "P" was fully supportive of the adoption. Oral evidence was given by Mr. Sijan Casey, the acting court social worker, who read in the guardian ad litem report which strongly recommended the approval of the adoption application, and Ms. Terry-Lynn Richardson, the adoption social worker. All strongly supported the adoption. It was the father of "P" who objected and who has now brought this appeal. For the

reasons given by the Family Court, it was clear to them that it was appropriate to make the adoption order, not least given that the appellant had stated that he was not in a position to have "P" in his care as he was only receiving disability payments, unable to work and did not have a room for "P" in his shared residence. He had sought to identify a family member who would be willing to take "P" into her home but this would only be a kinship placement and there would be no permanent plan for "P". "P" had expressed that he would like to be adopted by his foster parents. They are educated professionals, financially stable, own a home where "P" has his own room and have a close family network.

13. The objective of a post-placement report, which is defined in Section 32 of the Act, is primarily to make a recommendation as to whether the adoption order should or should not be made. I have no doubt and so find that this was an adoption which was made with regard to the best interests of "P". The appellant seeks to have that set aside on the basis of the post-placement report having been completed more than three months before the date of the hearing of the application in circumstances where there was no written certificate of the Director confirming or modifying the report.

14. The question of when is the "*the date hearing the application*" as required by section 38(3) of the Act is not to be answered by simply looking at the date when the court first has the matter before it. All manner of applications and issues may be dealt with before matters of substance are dealt with. The court was engaged for nearly one year on a technical issue before it reached the point of determining the substantial issue of whether the adoption is in the best interests of the child. This provision clearly is intended to ensure that where there is a substantial delay in the actual hearing of the issues concerning the adoption not least when the court is provided with up-to-date evidence of the position of the child and whether there is any reason to vary the recommendation whether the adoption order should or should not be made. In the circumstances of this application I find that the three month period had not been complied with. The substantive hearing of the adoption application only took place on 1st and 3rd December 2021, over one year from the filing of the adoption application. The hearings which occurred before then only related to the issue of whether the consent of the Director was required or

could be dispensed with. The question of when is the "*the date hearing the application*" is answered by saying that the hearing of the application is a reference to the substantive hearing.

15. I find that whilst the adoption order should only have been made further to the filing of a written Certificate of the Director confirming the report, which is the remedial step where the post-placement report was made over three months from the date of the hearing, from the evidence it was clearly the Director's position that the adoption should take place. It was confirmed by his counsel at this hearing that this remains his position. I find that the breach of this requirement is not an impediment to sustaining the adoption order. This determination follows the English authorities which I was referred to and in particular Mr. Swan's authority of **Somerset County Council v. NHS Somerset Clinical Commissioning Group.** This makes it clear that there has to be wholly or highly exceptional circumstances in order for this court to interfere with any adoption order already made. On the facts that are before me on this appeal, I find that there are no such circumstances. All the factors point to this being in the best interests of "P", one of which is that "P" had been living with his new family for over 4 years at the time of the hearing below.

16. Section 43 (1) of the Act, as helpfully pointed out by Mr. Dismont, provides as follows:-

> *"No adoption order may be revoked except –*
>
> *a. As a result of an appeal of the decision of the court; or*
>
> *b. If the Order was obtained as a result of fraud, but only if the court considers it to be in the child's best interest to revoke the order."*

17. There was certainly no fraud involved here. What took place was a procedural misstep in that the Director should have provided a written certificate confirming the post-placement report. The Family Court was aware that the Director supported the adoption as of the date of the hearing and, given the overwhelming factors which I find show that the adoption was in the best interests of the child, as recited by the Family Court in its judgment, this clearly was an appropriate adoption order to have been made. This court cannot possibly consider that it would be in "P's" best interests to revoke the order. On the contrary, the court finds that it is

in "P's" best interests to maintain the order. The case law makes it clear that an order will not be set aside unless it is so "*fatally flawed*" as to amount to a fundamental breach of natural justice – see **Re K (Adoption and Wardship) [1997] 2 FLR 221**.

18. For the reasons set out above, I dismiss the appeal and I will hear the parties as to costs.

Dated this 13th day of January 2023

JEFFREY ELKINSON (ASSISTANT JUSTICE)
SUPREME COURT OF BERMUDA