

1935

* June 13.

THE ST. VINCENT DE PAUL CHILDREN'S AID
SOCIETY OF TORONTO *v.* SPENCE

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infant—Custody—Child placed by unmarried mother with a Children's Aid Society, and placed by it in care of defendants—Defendants failing to observe agreement to bring up child in Roman Catholic faith—Child never made a ward of the Society—Issue between Society and defendants to determine right to child's custody—Children's Protection Act, R.S.O. 1927, c. 279.

An unmarried mother of an infant placed him, shortly after his birth, with the plaintiff, a Children's Aid Society approved as such under the *Children's Protection Act*, R.S.O. 1927, c. 279, and the plaintiff placed him in the care of defendants on the agreement that the child should be brought up in the Roman Catholic faith, which agreement the defendants did not observe. When the child was about ten years old, the present action was tried to determine who was entitled to custody of him. The child had never been made a ward of the plaintiff. Kingstone J., and the Court of Appeal for Ontario (by a majority) held in favour of defendants. On appeal to this Court:

Held: (1) The appeal should be dismissed; under said Act the plaintiff had not a legal right to call upon the court *ex debito justitiæ* to deliver to it the custody of the child; and this Court saw no reason to disagree with the views expressed in the Courts below that it was not in the child's interests to deprive defendants of custody of him.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing (Latchford C.J. dissenting) its appeal from the judgment of Kingstone J.

By an order made in the Supreme Court of Ontario by McEvoy J. on October 18, 1932, it was directed that an issue be tried to determine the party entitled to the custody of the infant in question.

The issue was tried before Kingstone J. who held that the defendants were entitled to the custody of the infant.

The plaintiff is a Society approved by the Lieutenant-Governor in Council as a Children's Aid Society under the provisions of the *Children's Protection Act*, R.S.O. 1927, c. 279, and amendments thereto. The defendants are husband and wife.

* PRESENT:—Duff C.J. and Cannon, Crocket and Davis JJ., and Dysart J. *ad hoc.*

The following paragraphs are taken from the judgment of Kingstone J. (delivered orally) in which he deals with the facts and questions to be considered.

This is an action arising from an issue directed by the Hon. Mr. Justice McEvoy as to the custody of a young boy of some ten years of age.

It appears that his mother, an unmarried woman, placed him in the plaintiff institution, known as St. Vincent de Paul Children's Aid Society, in Toronto some time in 1923. This is a Catholic society formed and existing under the statute, and has the care and custody of children.

The defendant, Mrs. Spence, who had just lost her own child—her only child at that time—was desirous of adopting a child, and went to see a priest who lived in the vicinity where she and her husband were farming, some time in February, 1923. The priest—Father McReavy I think was the name—wrote a letter to the plaintiff society on the 6th of February, 1923. The letter is directed to Mr. McCabe of the society, and states that the bearer of the letter, Mrs. Spence, wishes to adopt a baby, and further states,—

"I spoke to you over the 'phone concerning this matter. So far as I know, I think that she would be kind and good to the child and would rear it a Catholic. I also met Mr. Spence and I was favourably impressed with him."

No doubt the society relied to a considerable extent on the information contained in the letter. The officials interviewed Mrs. Spence and consented to hand over this child. In my opinion the understanding between them at the time quite clearly was that the child was to be brought up by Mrs. Spence in the Catholic faith, and she undertook to do that.

She also expected—and I think that was part of the understanding between them—that in two years' time, or that in less than two years' time, she was to get adoption papers, all predicated on her bringing the child up in the Catholic faith.

Apparently according to the evidence some conversation took place as to her connection with the Catholic church, and I think she gave them to understand that she had been a member of that church, as she had been, for some four years. She did tell them, that her husband at the time was what she described as a staunch Presbyterian.

She took the custody of the child. The application form was filled out afterwards in typewriting, but taken from notes supplied by Mrs. Spence at the time of the application to the official, whose name at the moment I have forgotten, but I think it fairly accurately represents the information they had from Mrs. Spence as to the family relations. The husband, I see, is described as Non-Catholic and the wife as Catholic. The occupation is described as farming, and so on.

Mrs. Spence apparently stayed for some time in this farming district near Acton, Ontario, where she was at the time she got the child, and moved later on to Hamilton and Burlington. For some time she reported to the society, but when she moved to Burlington and to Hamilton she ceased to do so, and I think from then on lost all interest in bringing the child up in the Catholic faith, as she had represented she was going to do, and on which they relied.

Officers of the society visited her, or made efforts to get in touch with her, from time to time, and finally did see her in Burlington, and I think it was made pretty fairly clear to them then that she was not living

1935
 ST. VINCENT
 DE PAUL
 CHILDREN'S
 AID SOCIETY
 OF
 TORONTO
 v.
 SPENCE.

1935
 St. VINCENT
 DE PAUL
 CHILDREN'S
 AID SOCIETY
 OF
 TORONTO
 v.
 SPENCE.

up to the arrangement as they understood,—in other words, that she was not giving the child, or indeed intending to give the child, the instruction in the Catholic faith that they thought was necessary. They then I think became alarmed as to the situation and desired to get the custody of the child back.

An agreement was entered into on the 21st of June, 1923. That agreement evidently was made prior to her going to Burlington, and was the agreement on which they relied for her carrying out the arrangement and understanding that was come to when she got possession of the child. This agreement provides,—

“It is also agreed that this child shall be instructed in the principles of the Roman Catholic faith, and sent to the Catholic Separate School if there be one in the district.”

That was in June, 1923. As I say, that agreement was not observed, and in 1931, in the month of May, another agreement was made. This agreement is very vigorously attacked by Mrs. Spence's counsel, on the ground that it was obtained by undue influence and by threats and so on. I have not the slightest doubt that when this agreement was signed Mrs. Spence had formed a very strong attachment for this child, as she naturally would, and was unwilling to part with it, and that she did, perhaps very grudgingly finally sign the document, but I do not think that any duress or improper influence was exercised. She was paid the sum of \$85 at the time she signed this document. It was not signed by her husband apparently. It provided that the plaintiff society should board the boy with the party of the second part, Mrs. Spence, for a period of twelve months. It also provided that the boy should be taken to the nearest separate school on all school days, and to the nearest Catholic church on all Sundays and holy days, and that she should provide the boy with a good and sound home life, and she was to be paid by the society for these services the sum of \$20 per month. Each party was given the right to cancel this agreement.

Up to this time the child had never been made a ward of the society under the Children's Protection Act, though an application had been made to Judge Mott. By reason of the fact that Mrs. Spence had moved out of the city of Toronto, the Judge held that he had no jurisdiction to deal with the application, and nothing further was done. As the child was not made a ward of the society no adoption papers were made out.

The result is that the society had, I think, the right to control the custody of this boy in the first instance, but having parted with the possession of the boy, the point arises whether they have the right to insist on re-possessioning themselves of this child.

The child under a further agreement signed in June, 1932, was handed over by the Spences to the custody of this society, and they received the sum of \$100. The society, having regained possession under the terms of this agreement, boarded the child out with a Mrs. Finnegan. Subsequently in September of the same year the child of its own volition came back to its foster parents on the 20th of September, 1932; and the foster parents then declined to deliver the child up, and these proceedings have resulted.

There is the question of the wardship which the society did not secure, but the most important point, and the ground on which I am going to decide this case, is, what is in the best interests of this child? The welfare and the happiness of the child, as has already been said in many cases, seems to be of paramount importance. Notwithstanding these

agreements what the Court is asked to dispose of is the custody, control and possession of a human being and not a mere chattel. He has a right to live his life. The child is well cared for and is in apparently a congenial and happy home. The home surroundings, I am satisfied from all the evidence, are everything one could reasonably expect. The child is being brought up in another faith—a faith different to that of its mother, and different to that of the society in which the mother placed it.

But is that to be considered of such importance that this child should be taken from the home and surroundings in which he has been brought up, handed back again to the society, and placed out with somebody else where the situation may be quite different?

The boy is now ten years of age. He has obviously formed an affection for his foster parents, and they for him. There are two other children there that have come since, and they all appear to be a very happy family.

Under the law as I understand it, it is my duty to consider, first of all, in a matter of this kind, what is in the best interest of the child. I have made up my mind that the proper thing for me to do, having regard to the child's future welfare, is to direct that the child remain under the custody and control of Mrs. Spence and her husband, and I give judgment accordingly.

The judgment at trial declared that the defendants were entitled to the care, custody and control of the infant; that the plaintiff was not entitled to the issue of a writ of Habeas Corpus in respect of the infant; that the moneys paid into court to the credit of the cause (\$185 paid by the plaintiff to the defendant Mrs. Spence and brought into court with the defence for the purpose of having the same repaid to the plaintiff) be paid out to the plaintiff. The court made no order as to costs.

The Court of Appeal received and admitted as further evidence on the appeal certain affidavits and exhibits with regard to matters discovered by the plaintiff since the appeal was first heard.

The Court of Appeal dismissed the appeal with costs (1). The plaintiff appealed to this Court.

W. B. McHenry for the appellant.

R. R. McMurtry for the respondents.

After hearing argument of counsel, the Court delivered judgment orally, dismissing the appeal with costs.

DUFF C.J.—We do not think it necessary to reserve consideration of this appeal.

1935
ST. VINCENT
DE PAUL
CHILDREN'S
AID SOCIETY
OF
TORONTO
v.
SPENCE.

1935
 ST. VINCENT
 DE PAUL
 CHILDREN'S
 AID SOCIETY
 OF
 TORONTO
 v.
 SPENCE.
 Duff C.J.

In the first place, we are quite satisfied that under the Statute, the *Children's Protection Act*, which has been discussed, the appellant has not a legal right to call upon the court *ex debito justitiæ* to deliver to it the custody of the child.

That disposes of the case, so far as the Statute is concerned.

We express no opinion upon the technical point passed upon by Mr. Justice Fisher—as to whether the Society has any status to make an application. We merely say that under the Statute the Society has no right which the court is bound to recognize *ex debito justitiæ* to have delivered to it the custody of the child.

Then, on the other branch of the case—We have had an opportunity of considering the case and considering the judgments below. We see no reason to disagree with the views upon which Mr. Justice Kingstone and the majority of the Judges in the Court of Appeal acted, to the effect that it is not in the interests of the child that the application of the appellant should be granted.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. B. McHenry.*

Solicitors for the respondents: *Nesbitt, McMurtry & Ganong.*
