RE BABY DUFFELL:

1950

*June 22, 23
*June 26

RAYMOND A. MARTIN AND MYRTLE P. MARTIN (RESPONDENTS) ..... } APPELLANTS;

AND

LILY AVES DUFFELL, (APPLICANT) ...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Infant—Adoption, illegitimate child—When mother's consent revocable—Custody, Surrogate Court's jurisdiction—The Adoption Act, R.S.O., 1937, c. 218—The Infants Act, R.S.O., 1937, c. 215—The Surrogate Court Act, R.S.O., 1937, c. 106.

The mother of an illegitimate child a month after its birth surrendered custody of the infant to proposed foster parents and at the same time signed a consent in the form of a statutory declaration headed "In the Matter of The Adoption Act", a printed form supplied by the Department of Public Welfare, which administers the Act, declaring that she of her own free will consented to an Order of Adoption and understood that the effect of such Order would be to permanently deprive her of her parental rights. Some two months later she changed her mind and sought to regain custody of the child from the foster parents.

Held: That the consent required by the Adoption Act must exist at the moment the order of adoption is made. Re Hollyman [1945] 1 All E.R. 290, followed. At any time prior to the making of an order of adoption the wishes of the mother of an illegitimate child as to its custody must be given effect unless very serious and important reasons require that, having regard to the child's welfare, (the first and paramount consideration), they must be disregarded. *Re Fex* [1948] O.W.N. 497 referred to and questioned: *Reg.* v. *Barnado* [1891] 1 Q.B.D. 194; *Barnado* v. *McHugh* [1891] A.C. 388 and *In Re J. M. Carroll* [1931] 1 K.B. 317 followed.

*PRESENT: Kerwin, Rand, Kellock, Estey and Cartwright JJ.

1950

RE BABY DUFFELL MARTIN v. DUFFELL

Per: Rand and Kellock JJ.—So far as *Re Fex* may be taken to hold that a consent as given here is irrevocable except only on proof that the foster parents are unfit for the custody, dissented from. In *Re Agar-Ellis* 24 Ch. D. 317; *In Re J. M. Carroll* [1931] 1 K.B. 317 referred to; In *Re Hollyman* [1945] 1 All E.R. 290, approved; *Re Sinclair* 12 O.W.N. 79 and *Re Chiemelski,* 61 O.L.R. 651, distinguished.

Held: Further, that the Surrogate Court of the county in which an illegitimate infant resides has upon the application of the mother of such infant jurisdiction under s. 1 of The Infants Act to deal with its custody.

APPEAL from the judgment of the Court of Appeal for Ontario, (1) reversing the decision of Macdonell J., of the Surrogate Court of the County of York dismissing a mother's application for custody of her illegitimate child.

Arthur Maloney for the appellants.

B. J. Mackinnon for the respondent.

The judgment of Kerwin, Estey and Cartwright JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal for Ontario reversing the decision of His Honour Judge Macdonell, Judge of the Surrogate Court of the County of York, and awarding the custody of an infant boy to the respondent.

At the opening of the appeal it was submitted by counsel for the appellants that the Surrogate Court was without jurisdiction. It is said that the jurisdiction of the Surrogate Court to deal with the custody of infants is purely statutory being derived from s. 1 of *The Infants Act,* R.S.O. 1937, c. 215 and that, properly construed, this section confers jurisdiction only in the case of a legitimate child.

While ordinarily this Court would hesitate to entertain a ground of appeal raised here for the first time and not taken before the trial Judge or before the Court of Appeal either on the hearing of the appeal or on the motion for leave to appeal to this Court, I think it necessary to consider this objection because if it should prove valid the result might well be that the order now in appeal is a nullity and the rights of the parties remain undecided.

(1) 1950 O.R. 35.

On consideration, I do not think that the objection is well taken. The relevant words of Section 1 of *The Infants Act* are:—

* * * The surrogate court of the county in which the infant resides, upon the application of * * * the mother of an infant, who may apply without a next friend, may make such order as the court sees fit regarding the custody of the infant * * *

I cannot find anything in the rest of the Act to cut down the ordinary meaning of the word "mother" or of the word "infant". It is clear that the infant whose custody is in question was resident in the County of York at all material times and that the respondent who was the applicant in the Surrogate Court is his mother. In my view the Surrogate Court had jurisdiction to deal with the application.

The infant is the illegitimate child of the respondent. He was born at the city of Toronto on March 3, 1948. The home of the respondent is in England. She was visiting Ontario on a holiday in the year 1947, and there met the father of the infant. It appears that there is no intention of the respondent and the father of the infant being married. The respondent came to Toronto some months before the infant was born and secured employment there for a time. She is a comptometer operator and appears to have no difficulty in obtaining employment. The father of the infant gave some financial assistance while the respondent was unable to work. The respondent attended the Yarmey Clinic in Toronto for pre-natal care and was looked after by Doctor Stark who was then a member of the clinic. Mrs. Martin, one of the appellants, was a laboratory technician at the clinic, and she and the respondent became friendly. The respondent had not advised her parents in England of her condition and was in doubt as to whether she should try to keep her baby after it was born or whether she should make arrangements to have it adopted. Before the birth of the baby she had discussions as to this with Doctor Stark and others. The respondent's health was bad for some weeks after the birth, but she completely recovered and is now in good health.

While the respondent was in hospital following the birth, Mrs. Martin visited her and they had some discussion as

(1) [1948] O.W.N. 497.

1950

RE BABY DUFFELL MARTIN v. DUFFELL

Cartwright J.

to whether the respondent would let Mrs. Martin adopt the boy, the appellants being then anxious to adopt him. On the 31st of March, 1948, the respondent signed a form of consent to the adoption of the infant. This consent is in the form of a statutory declaration headed "In the matter of the Adoption Act", and reads in part as follows:

(1) That I am the unmarried mother of the said unnamed male infant who was born at the Grace Hospital, Toronto, in the County of York on the 3rd day of March, 1948.

(2) That of my own free will and accord I hereby consent to an Order of Adoption with respect to the said child under the provisions of the said The Adoption Act.

(3) That I fully understand the nature and effect of an Adoption Order in that all rights, duties, obligations and liabilities of the parent or parents of the adopted child in relation to the future custody, maintenance and education of the adopted child shall be extinguished, and that the effect of such Adoption Order will be permanently to deprive me of my parental rights in respect to the said child, and that, unless the Adoption Order otherwise provides, the child assumes the surname of the adopting parent.

We were informed by counsel that the original of this declaration is on a printed form which is supplied by the Department of Public Welfare which administers the Adoption Act; but no form of consent is prescribed by that Act or by the regulations made thereunder.

The infant was handed over to Mrs. Martin on April 1, 1948 and has since that date been in the custody of the appellants. It is conceded that they have looked after the infant in an admirable manner, that they are devoted to him, and are in a position to give him a good home and a suitable upbringing.

Not very long after the infant had been given to the appellants, the respondent regretted her decision. On the 18th of June, 1948 she wrote a letter to Doctor Stark, who had advised her from time to time in a friendly way, asking him to use his best efforts to get her baby back for her. She also took the matter up with the officials of the Children's Aid Society. The respondent says that she approached Mrs. Martin in the matter as well as the Children's Aid Society, and while her evidence in this regard is not entirely free from ambiguity I read it as meaning that Mrs. Martin told her that the appellants would give the baby back if the respondent obtained a letter from her parents, with a witness, saying that they

would provide a home for him. The date of this interview is not fixed but it appears to have been in the autumn of 1948. Mrs. Martin gave evidence, but she was not asked anything about this statement either in examination-in-chief or in cross-examination. In the view that I take, it is not of importance to determine whether the suggestion as to obtaining the letter from the respondent's parents was made by Mrs. Martin or by an official of the Children's Aid Society. The respondent did obtain a letter dated the 28th of December 1948, signed by her father and mother and by a witness, stating that her parents wished to adopt the baby.

Following the receipt of this letter, it was ascertained that the appellants were not willing to give up the infant. The application to the Surrogate Court followed. The affidavit of the respondent in support of the application was sworn on the 13th of January, 1949, and the notice of motion is dated the 5th of February 1949. The matter was heard before His Honour Judge Macdonell on the 12th of April 1949.

According to the respondent's evidence, which was accepted by the learned trial judge, the parents of the respondent are about fifty-five years of age. They are both in good health. The father is a retired sergeant of police, is in receipt of a pension and is gainfully employed as a civil servant. They live in a suburb of London in a comfortable home, which they own clear of encumbrance. They are willing and anxious to receive the respondent and infant and to adopt the infant.

At the conclusion of the hearing the learned trial judge dismissed the application, holding himself bound by a passage which he quoted from the judgment of McRuer C.J.H.C. in the case of *Re Fex* (1), at page 499, which was not in terms either rejected or adopted by the Court of Appeal in affirming such judgment. The passage referred to is as follows:

> Where a parent has signed a solemn consent to adoption under the provisions of The Adoption Act and the foster parents have taken the child and assumed their parental duties with a view to fulfilling the probationary requirements of the Act, I do not think that a child is to be restored to the natural parent on the mere assertion of that parent's

(1) [1948] O.W.N. 497.

1950

RE BABY DUFFELL MARTIN v. DUFFELL

Cartwright J.

right. I think the parent must go further and show that "having regard to the welfare of the child" it should not be permitted to remain with the foster parents.

The learned trial judge interpreted this as laying down the rule that under the circumstances outlined the Court must not deprive the foster parents of the custody of the child unless it be affirmatively shown that it would be detrimental to its welfare to remain with them. His Honour stated that, by reason of the decision in *Re Fex,* it was unnecessary for him to make the difficult choice as to which of the two proposed homes would be better for the infant.

In the Court of Appeal (1), Aylesworth J.A. with whom Bowlby J.A. agreed, did not agree with the interpretation placed by the learned trial Judge upon *Re Fex.* He says:

> I think it is clear from the judgment in that case, of not only the Chief Justice of the High Court before whom it came on to be heard in the first instance, but from the judgment of this Court on appeal, that the welfare of the child is the first and paramount consideration.

Laidlaw J.A. dealt with the matter as follows:

> However, the facts that the mother of a child has voluntarily given the custody of it to others, and has consented of her own free will and accord to an order of adoption under the provisions of The Adoption Act with a full understanding of the nature and effect of an adoption order, do not in every such case prevent her from regaining custody of the child before an adoption order is made by the Court. The Court may, in the exercise of a discretionary power possessed by it, restore the custody of a child to its mother at any time before an adoption order has been made, notwithstanding the fact that she has given the custody of it to others in that manner and under those circumstances. On the other hand, the mother is not entitled in law to an order of the Court restoring the custody of her child to her in such a case upon proof only of the fact that she is the mother of the child. The paramount consideration and the question which the Court must decide in each particular case according to the circumstances is, "What is best for the welfare of the child?"

The Court of Appeal were unanimously of opinion that, although it is a case of great hardship so far as the appellants are concerned, under all the circumstances the welfare of the child will be best served by directing that he be returned to the respondent. I respectfully agree with this conclusion, and observe that the learned trial judge, who has had great experience in such matters, and who had the advantage, denied to the Appellate Courts, of hearing and observing all the parties, did not express any contrary view.

(1) [1950] O.R. 35 at 42.

It is now necessary to examine the argument of counsel for the appellant that even if the court should reach such a conclusion the appeal should nonetheless succeed. It is said that when consideration is given to the provisions of *The Adoption Act* (R.S.O. 1937, c. 218, amended 1949 Statutes of Ontario c. 1) the proper conclusion is that the respondent, by signing the consent of March 31, 1948 referred to above, forfeited any natural rights she might have had to the custody of her child, and contemporaneously with the surrender by her of her natural rights, by this free act of her own volition, new and important rights were acquired by the appellants who assumed their duties as foster parents of the child and were awaiting the expiry of the probationary period prescribed by *The Adoption Act*.

It is urged that the scheme of adoption established in Ontario contemplates a probationary period of two years during which time the conduct of those who apply for custody of a child, with a view to its adoption, and the conditions under which the child is living are under the scrutiny of the Provincial Officer (section 3*e*); that the consent of the respondent, as mother of her illegitimate child, which is required (by section 3*b* (1) and (2) and section 4 (*a*)) before an adoption order can be made, shall be executed before the commencement of the probationary period, and that after the expiration of the probationary period a final order of adoption may be made on the production and filing of such consent.

It is argued that the probationary period is not prescribed for the purpose of enabling a mother who has already executed a valid consent as required by section 3*b*(2) to regain custody of her child or to change her mind about its adoption but rather for the purpose of enabling the proper authorities to determine whether or not the adopting parents, and the conditions under which they live are satisfactory, having regard to the future welfare of the child.

It is said, if upheld, the decision in appeal will endanger the whole scheme of adoption, not only in Ontario but in other provinces in which legislation similar to that in Ontario is in force. Reliance is placed upon the decision in

1950

RE BABY DUFFELL MARTIN v. DUFFELL

Cartwright J.

Re Fex (*supra*). It is argued that the learned trial judge correctly interpreted that decision and that it should be followed. Reference is made to a passage in the judgment of McRuer C.J.H.C. which follows immediately the passage quoted by the learned trial judge:

> Otherwise, the whole scheme of The Adoption Act may be undermined and persons of good will and affection who are willing to open their homes to unfortunate children may hesitate to do so if, after the adoption agreement has been signed and a child has been with them for nearly two years, the parent still has a paramount right in law to obtain its custody by a mere assertion of a parent's right.

and to the statement of Middleton J. in *Re Sinclair* (1), decided before the enactment of *The Adoption Act*:

> Few would care to adopt a child if it may be taken from them without any fault on their part.

It is, I think, perfectly clear on the evidence, and on the findings of the learned trial judge and of the Court of Appeal that no fault is imputable to the appellants and that the home and upbringing which they are able and anxious to provide for the infant would be eminently satisfactory. If therefore the above argument is well-founded the appellants would be entitled to succeed.

In my opinion the argument must be rejected. It is, I think, well settled that the mother of an illegitimate child has a right to its custody, and that, apart from statute, she can lose such right only by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her. There is no suggestion in the case at bar that the respondent abandoned the child or that her conduct and character are other than excellent.

It is also clear that the mother of an illegitimate child cannot bind herself by an agreement to deliver up her child to a stranger, and that the Court will, on her application, compel the return of a child delivered pursuant to such an agreement. As stated by Lindley, L.J. in *Regina* v. *Barnardo* (2) at page 211:

> The Court will not interfere with her (the mother) arbitrarily and will support her and give effect to her views and wishes unless it becomes the duty of the Court towards the child to refuse so to do. Taking this view of the mother's rights and of the duty of the Court, I see no reason why a mother should not from time to time change her mind as to where, how, or by whom her child shall be brought up, nor why the Court

(1) (1917) 12 O.W.N. 79. (2) [1891] 1 Q.B. 194.

should interfere with her or refuse to support her, unless circumstances be proved which satisfy the Court that its duty to the infant requires it to act contrary to her wishes.

This judgment was affirmed sub. nom. *Barnardo* v. *McHugh* (1).

As was pointed out by Scrutton L.J. in *In re J. M. Carroll* (2), the circumstances which will move the Court to refuse to support the mother on the ground that her wishes are detrimental to the child must constitute "a matter of essential importance" or be "very serious and important".

It is urged that, in Ontario, these well settled rules are modified by the provisions of *The Adoption Act,* that the mother's consent to adoption once voluntarily given is, in effect, irrevocable, or at all events that her withdrawal of such consent can and should be disregarded by the Court unless it appears to be in the best interests of the child that she should be allowed to withdraw it. Reliance is placed upon the reasoning of the United States Court of Appeals in *In re Adoption of a Minor* (3). The judgment in that case is, I think, distinguishable by reason of certain differences between the wording of the statute there under consideration and that of the Ontario Adoption Act. I prefer to follow the judgment of the Court of Appeal in England in *re Hollyman* (4). The wording of the English Act dealt with in that case is I think similar in all relevant respects to that of the Ontario Adoption Act and I am of opinion, for the reasons stated by the Master of the Rolls, that the consent required by section 4 of the Ontario Act must exist at the moment the order of adoption is made. Of course, as is pointed out in that case, a consent once given remains operative unless revoked. The construction for which the appellants contend would bring about the result that the mother is bound by her consent from the moment of giving it, while the appellants remain free, up to the making of the order of adoption, to change their minds, leaving the obligation of the mother to maintain her child still in existence. The supposed danger of the purposes of *The Adoption Act* being defeated by the construction which I think is the proper one is met to a

(1) [1891] A.C. 388.
(2) [1931] 1 K.B. 317 at 336.
(3) (1944) 144 Fed. 2d. 644.
(4) [1945] 1 All E.R. 290.

1950

RE BABY DUFFELL MARTIN v. DUFFELL

Cartwright J.

limited extent by the provisions of section 3*d* of *The Adoption Act* which permit the Court to dispense with the consent of the parents of a child if, having regard to all the circumstances of the case, the Court is of opinion that such consent may properly be dispensed with. This will be a safeguard in a case, for example, where a consent voluntarily given at the commencement of the two year probationary period is sought to be capriciously withdrawn at its termination, and there are in the Court's opinion matters of essential importance having regard to the welfare of the infant which require that it be left with the foster parents. Should the view which I have expressed above as to the proper construction of *The Adoption Act* not be in accordance with the true intention of the Legislature such intention could, without difficulty, be expressed as an amendment to the Act. In the present state of the law as I understand it, giving full effect to the existing legislation, the mother of an illegitimate child, who has not abandoned it, who is of good character and is able and willing to support it in satisfactory surroundings, is not to be deprived of her child merely because on a nice balancing of material and social advantages the Court is of opinion that others, who wish to do so, could provide more advantageously for its upbringing and future. The wishes of the mother must, I think, be given effect unless "very serious and important" reasons require that, having regard to the child's welfare, they must be disregarded.

In this case, the question which the Court has to decide is whether the child should remain with his foster parents or return to his mother, when it appears that there is every probability that he will be loved, well cared for and properly brought up in either situation. I agree with the Court of Appeal that the child should be returned to his mother.

Counsel for the respondent stated that in the event of the appeal failing, the respondent would not ask for costs. It is a noteworthy feature of this case that in spite of the very strong desire of both parties to have the child, they have throughout treated each other with the utmost consideration and respect. There has been a complete

absence of recrimination and each has conceded throughout that the child would be well cared for by the opposite party.

Before parting with the matter I would like to express appreciation of the assistance which we received from counsel, both of whom argued the case with great frankness and ability.

The appeal should be dismissed without costs.

The judgment of Rand and Kellock, JJ. was delivered by

RAND J.:—I agree with the reasons and conclusion of my brother Cartwright, but I desire to add the following observations to what he has said on the language of McRuer C.J.H.C. in *re Fex* (1), quoted by him. The Chief Justice treats as similar to his own, views expressed by Middleton J. in *re Sinclair* (2), and in *Re Chiemelewski* (3). If his language is intended to mean, as the judge of first instance here thought it did, that after the mother of an illegitimate child, with a view to adoption, has transferred custody to another under a formal declaration of consent to adoption, she must, in order to recover the child, show in effect that the foster parents are unfit for further custody, in other words, treating the preliminary consent as irrevocable; then, with the greatest respect, I must dissent from it. In the settled formula, the welfare of the infant is the controlling consideration: that is, the welfare as the court declares it; but in determining welfare, we must keep in mind what Bowen L.J., in the case of *In re Agar-Ellis* (4), as quoted by Scrutton, L.J. in *In re J. M. Carroll* (5), says: "* * * it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." Only omniscience could, certainly in balanced cases, pronounce with any great assurance for any particular custody as being a guarantee of ultimate "benefit" however conceived. The successful administration of *The Adoption Act* requires, admittedly, an adequate appreciation of the interest of the person proposing to adopt, but in the light of the

(1) [1948] O.W.N. 497 at 499.
(2) (1917) 12 O.W.N. 79.
(3) (1928) 61 O.L.R. 317.
(4) (1883) 24 Ch. D. 317.
(5) [1931] 1 K.B. 317 at 334.

1950

RE BABY DUFFELL MARTIN v. DUFFELL

Rand J.

corresponding law in England, I doubt that the fears expressed are of real dangers. In *Re Hollyman* (1), in which it was held that the consent of the parent to adoption must be operative up to the moment of making the order, and that it might be withdrawn at any time before that, Lord Greene, M.R., uses this language:

> The rules merely provide for the method of proving the consent which under the statute is necessary. If the rules had purported to dispense with the consent which the statute required, they would have been *ultra vires*. They merely provide for the method of proof, and all that the consent exhibited to the affidavit proves, is the fact that consent has been given. Of course, that consent remains operative unless revoked, but in my opinion no rule could have laid it down that the consent once given could not be retracted, for the simple reason that the Act requires, as I have said, that the consent shall be operative at the very moment when the order is made.

Section 3 of that statute provides that the Court making the adoption order must be satisfied, that:

> (*a*) every person whose consent is necessary * * * has consented to and understands the nature and effect of the adoption order for which application is made * * *

That is the substance of the language of the statute of Ontario. The form of consent used in *Re Fex* and here is not statutory: it is departmental; and its effect is no more than evidence of the consent required by the statute when the order is made.

The situation in *Re Sinclair* and *Re Chiemelewski* was different: in them, the child had been given to foster parents by a Children's Aid Society. The distinguishing circumstance is that in such cases the State, for good reasons, has stepped in and asserted its paramount interest: and that the relations of foster parents so arising should not be "lightly disregarded" or "lightly ignored" without fault on their part, to use words of Middleton, J., is undoubted. In this case the State has not stepped in nor can I agree that we can properly assimilate the two situations. The question here is what, in the light of all circumstances, does the benefit of the child, in the broad sense indicated, call for.

Appeal dismissed without costs.

Solicitors for the appellants: *Edmonds and Maloney.*

Solicitors for the respondent: *Hooper and Howell.*

(1) [1945] 1 All E.R. 290.