1957

*Nov. 28, 29
Dec. 19

IN THE MATTER OF an application by Helen May Agar for a Writ of Habeas Corpus;
AND IN THE MATTER OF Donald Cletus Agar, an infant.

RAYMOND SAMUEL McNEILLY AND DORA LOUISA McNEILLY (*Respondents*) ..... APPELLANTS;

AND

HELEN MAY AGAR (*Applicant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Infants—Custody—Right of natural parents—Withdrawal of consent to adoption—Illegitimate child.*

The mother of an illegitimate child, who is of good character and is able and willing to support it in satisfactory surroundings, is entitled to the custody of that child notwithstanding that other persons who wish to do so could provide more advantageously for its upbringing and future. This is true notwithstanding the fact that the mother has signed a consent to the adoption of the infant if, at the time she seeks the custody, the adoption has not yet been completed. *Re Baby Duffell; Martin and Martin v. Duffell,* [1950] S.C.R. 737; *Hepton et al. v. Maat et al.,* [1957] S.C.R. 606, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wilson J.[2]. Appeal dismissed.

*J. D. Pickup, Q.C.,* for the respondents, appellants.

*P. B. C. Pepper* and *H. W. Rowan,* for the applicant, respondent.

THE CHIEF JUSTICE:—There is no question but that the appellants are fit and proper persons to have the custody of the child and that they would bring it up in a proper and becoming manner, giving it advantages that the child's mother may not be able to afford and continuing to extend to it that love and affection which they have shown to it up to the present time.

I have read the entire record and have considered everything advanced by counsel on behalf of the appellants. After anxious consideration, I agree with the reasons for judgment of a unanimous Court of Appeal, to which I have nothing to add, except to mention the argument that that Court was not justified in interfering with the trial judge's discretion. Reference was made to the judgment of the Judicial Committee in *McKee v. McKee*[1], where it is stated at p. 360:

> Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

The general rule there set forth is well known and understood, but difficulties may arise in applying it, as is evidenced by the conflict of judicial opinion in the *McKee* case in the Ontario Courts and in this Court. Bearing in mind this rule, I have come to the conclusion that the Court of Appeal was justified, for the reasons given by it, in allowing the appeal to it.

I would dismiss the appeal and, in accordance with the agreement of counsel, without costs.

TASCHEREAU J.:—I fully agree with the reasons of Mr. Justice Roach who delivered the unanimous opinion of the Court of Appeal[2].

Although I am convinced that the appellants are proper and fit persons to care for the child, no grounds for the disqualification of the mother to his custody have been shown to my satisfaction.

[1] [1951] A.C. 352, [1951] 1 All E.R. 942, [1951] 2 D.L.R. 657.
[2] [1957] O.R. 359, 8 D.L.R. (2d) 353.

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Having regard to the welfare of this child, and being convinced of the ability of the mother to educate and support him in proper surroundings, I do not think that her wishes should be disregarded.

I would dismiss the appeal without costs.

RAND J.:—I agree with the reasoning and conclusion of my brother Cartwright and have only a paragraph to add.

Here, as in the case of *Hepton et al v. Maat et al.*[1], there is the disturbing circumstance of a concealment of the child's whereabouts notwithstanding that, within a month and a half of its being handed over to the foster parents, the welfare agency, and within six months, those parents, knew the mother was seeking its return. It must, I think, be recognized that for the period of at least one year the transferred custody is provisional; until an order of adoption is made there is no obligation on the foster parents to keep the child nor on the part of the parent or parents to acquiesce in the new relationship. The consent of the latter to adoption may, by an order of the Court, be dispensed with, but until that is done there is always the possibility of the child's return. In that situation an aggravation of the conditions that would surround that possibility is to be highly deprecated. If the provisional character of the period is fully appreciated then the breaking of any ties between the child and the persons seeking adoption will cause them much less distress. More important, however, is the possible temporary effect upon the child. It would seem to me to be obvious good sense that once the issue is raised it should be disposed of as quickly as possible. If the welfare of the child is in reality the object of the social organizations and the parties desiring to adopt, under the existing statutory provisions there will be no delay in facilitating that determination.

LOCKE J.:—In *Re Baby Duffell; Martin and Martin v. Duffell*[2], it was decided by this Court that the consent of an unmarried mother to the adoption of her child may be revoked by her at any time prior to the making of an adoption order under the provisions of *The Adoption Act*, R.S.O. 1937, c. 218, and that the consent referred to in s. 3

[1] [1957] S.C.R. 606, 10 D.L.R. (2d) 1.

[2] [1950] S.C.R. 737, [1950] 4 D.L.R. 1.

is one which is effective as of the date of the application. In that case, our brother Cartwright stated the law in the following terms (p. 746):

> 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 *Hepton et al. v. Maat et al.*[1], a case relating to a child born in wedlock, Cartwright J. stated the law in similar terms.

In the interval between the disposition of these two cases, the case of *McKee v. McKee*[2], was decided by the Judicial Committee on an appeal taken from a judgment of this Court[3]. In that case Lord Simonds said in part (p. 365):

> It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody; . . . To this paramount consideration all others yield.

This, in my opinion, states the rule in more positive terms than it was stated in the judgment of Viscount Cave in *Ward v. Laverty et al.*[4].

It must be taken that this passage from the judgment of the Judicial Committee in *McKee's Case* was considered by the majority of the Court in *Hepton's Case* and that they were of the opinion that it did not represent any change in what had been decided to be the law in *Duffell's Case.*

In the present matter the rights of the parties are, in my opinion, to be tested as of the time in February 1956 when the writ of *habeas corpus* was issued at the instance of the respondent. At that time the infant child was 14 months old. I have examined with care the evidence given in this case and, while of the opinion that the child would be more likely to have a successful and happy life if left in the custody of the appellants, I have come, with regret, to the con-

[1] [1957] S.C.R. 606, 10 D.L.R. (2d) 1.
[2] [1951] A.C. 352, [1951] 1 All E.R. 942, [1951] 2 D.L.R. 657.
[3] [1950] S.C.R. 700, [1950] 3 D.L.R. 577.
[4] [1925] A.C. 101 at 108.

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Locke J.

clusion that, applying the rule as stated in the decisions of this Court in the cases of *Duffell* and *Hepton,* it has not been shown that the mother should be refused custody.

I would, accordingly, dismiss this appeal. I would make no order as to costs.

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Wilson J.[2] and directing that the appellants deliver the infant Donald Cletus Agar into the custody of the respondent at the city of Toronto.

Counsel for the appellants in the course of a full and able argument put forward everything that could be said in support of the appeal. Since the hearing I have had an opportunity of considering the entire record and having done so I find myself so fully in accord with the reasons of Roach J.A., who delivered the unanimous judgment of the Court of Appeal[1], that I simply express my agreement with his reasons and conclusion.

Counsel stated that, whatever the result of the appeal, the parties did not ask for costs. I would therefore dismiss the appeal without costs.

*Appeal dismissed without costs.*

*Solicitors for the appellants: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.*

*Solicitors for the respondent: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.*

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*PRESENT: Kerwin C.J. and Rand, Cartwright, Fauteux and Abbott JJ.

[1] [1957] O.R. 359, 8 D.L.R. (2d) 353.

[2] [1957] O.W.N. 49, 7 D.L.R. (2d) 502.