

(Samedi Division)

20th December, 1988.

Before Mr. V.A. Tomes, Deputy Bailiff
Jurat the Hon. J.A.G. Coutanche
Jurat J.J.M. Orchard

Re T. (An Infant) (Adoption and Access Applications)

Advocate S.A. Meiklejohn for the Applicants
Advocate G.R. Boxall for the Intervenor
Crown Advocate Miss S.C. Nicolle for Children's Officer as Guardian ad litem

Mr. and Mrs. A. apply for an adoption order in respect of T. the infant child of Mrs. A. The intervenor is the natural father of the child.

The report of the guardian ad litem is an excellent one and, in the ordinary way, the application would be a non-contentious one, which would have been granted "sur le champ".

However, the intervenor prays that the application be refused and that he be granted access (including staying access) to the child.

The background to the intervention is as follows:-

1) For at least nine years between 1976 and 1985 the intervenor lived and co-habited with the mother of the child who was born to the mother in October, 1981, as a result of their union.

2) In the spring of 1985 the intervenor, at the mother's request, left the home which he had hitherto shared with the mother, leaving the child with her.

3) In July, 1985, the mother was married to Mr. A. and they went to live elsewhere; the mother took a positive decision not to leave details of her whereabouts in order to allow the child to develop a relationship with his stepfather.

4) Thereafter, the intervenor was unable to trace the mother of the child for a period of some months; but, on the 19th September, 1986, after discovering the mother's whereabouts, the intervenor obtained a Court Order in a Magistrates' Court granting the intervenor reasonable access to the child.

5) Upon the making of the Order, the intervenor commenced visits to the child; these took place satisfactorily; but they were very few.

6) In the spring of 1987, the mother moved to Jersey where she now resides with her husband.

7) The mother and the husband wish to adopt the child and the intervenor opposes the adoption and wishes to maintain access to the child.

The opposition of the intervenor to the making of an adoption order is twofold:-

(a) The intervenor claims that by virtue of the definition contained in Article 1(1) of the Adoption (Jersey) Law, 1961, he is deemed to be the father of the child; and that as the father of the child he qualifies as a parent of the child for the purposes of Article 4(1)(a) of the Law, which prevents the Court from making an adoption order, inter alia, without the consent of every person who is a parent of the child; that the consent of the intervenor is required to the making of the adoption order unless his consent shall have been dispensed with in accordance with the provisions of Article 5 of the Law; and that the representor's consent has not been dispensed with.

(b) Under the terms of Article 12(1) of the Law all rights, duties, obligations and liabilities of the parents of the infant adopted are extinguished upon the making of an adoption order and such rights vest in the adopters. Thus, the rights and duties which the intervenor may have in relation to the child are in

issue in the application and are relevant and material as matters to be taken into account by this Court in considering the application for adoption; the

intervenor does not wish the child to be taken from him and, as the natural father, wishes to be permitted to continue to develop his relationship with the child; the intervenor has already obtained the Order, despite the opposition of the mother on the basis that it would not be in the child's best interests, granting the intervenor reasonable access to the child, which access the intervenor claims was exercised to their mutual benefit and enjoyment until the mother moved to Jersey; the intervenor claims that his blood relationship with the child is a factor of very great relevance and that they are capable of developing a bond which an adoptive father is not able to replicate; and that in the present situation where he has already established a paternal relationship with the child as the child's natural father it would be prejudicial to the child to terminate or attempt to terminate that relationship.

The Court is grateful to Crown Advocate Miss Nicolle, on behalf of the guardian 'ad litem', and thus really in the position of 'amicus curiae', for her assistance and the Court has accepted her submissions in their entirety.

The first question that the Court has to decide is whether the intervenor is a parent of the child whose consent to the making of an adoption order is required, unless his consent is dispensed with by the Court.

Article 1(1) of the Adoption (Jersey) Law, 1961, is substantially based upon section 57(1) of the Adoption Act, 1958. The definition of 'father' in the Act and in the Law is identical and is in the following terms:-

"'father", in relation to an illegitimate infant, means the natural father".

Article 4(1)(a) of the Adoption (Jersey) Law, 1961, is based upon section 4(1)(a) of the Adoption Act, 1958. The wording is indistinguishable, save that the words "section 5 of this Act" which appear in the Act have been altered to "Article 5 of this Law" in the Law.

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Because the Law was based on the Act, the Court considers it relevant to turn to cases decided under the Act as of assistance in interpreting the provisions of the Law. Notwithstanding the submissions of Mr. Boxall we find these cases to be of very persuasive authority.

In Re Adoption Application No.41/61 (1962) 3 All E.R. 553 C.A. it was said at page 555 by Danckwerts, L.J.:-

"It will be desirable now to consider the relevant statutory provisions. The Adoption Act, 1958, except for some minor provisions, superseded the Adoption Act, 1950, which was a consolidating Act. Section 1 empowers the Court to make orders authorising applicants to adopt infants. Section 4(1) provides that, subject to s.5, an adoption order shall not be made (a) in any case, except with the consent of every person who is a parent or guardian of the infant; 4(1)(b) is immaterial for the present case. In s.57 (the definition section)...."Father", in relation to an illegitimate infant, means the natural father. There is no definition of "parent", but "relative", in relation to an infant,....includes....(b) where the infant is illegitimate, the father of the infant.... It would appear from this that a putative father is included among the relatives of the illegitimate child, but is not a 'parent' for the purposes of the Adoption Act. This was so decided on the Adoption Act, 1950 - which differed from the Act of 1958 only in that the provision requiring the consent of a putative father in certain limited cases....has been omitted from the Act of 1958 - by this court in Re M. (an infant) (1955) 2 All E.R. 911."

At page 588 of the same case, Danckwerts L.J. said:-

"I now turn to the statutory provisions on which the case of the putative father is based. Before the passing of the Legitimacy Act, 1959, the putative father was liable to be made to provide maintenance for the child under the bastardy laws, but he had no more right to interfere with the affairs of the

infant than a stranger; and in the statutes relating to infants, the titles of

"mother" or "father" referred only to legitimate parents: see Re C.T. (an infant, Re T.J. (an infant)), (1956) 3 All E.R. 500. He could, of course, initiate proceedings to make the child a ward of court, but so could any other person not related in any way to the child. The material section is "s.3 of the Legitimacy Act, 1959, sub-section (1) of which provides as follows:-"

(the judgment sets out the sub-section, then continues):

"It is plain that the rights given to a putative father by this section are limited to proceedings relating to custody of an infant under the Acts mentioned, and do not confer directly (if at all) rights in regard to adoption proceedings."

At page 562 of the same case, Diplock, L.J., albeit in a dissenting judgment, said:-

"In 1955 it was held by the Court of Appeal in Re M. (an infant) (1955) 2 All E.R. 911 that the putative father of an illegitimate child was not a "parent" within the meaning of the corresponding section of the Adoption Act, 1950. The phraseology has not been altered in the Act of 1958, and we must presume that Parliament did not intend to bring the putative father of an illegitimate infant into the class of persons whose consent was required, and whose interest was to be taken into consideration as well as the welfare of the infant.... In my view, it was the clear policy and meaning of the Act of 1958 that in adoption proceedings the court was to have no regard to the interests of the putative father of an illegitimate child."

The case of Re M. (an infant) (1955) 2 All E.R. 911 C.A. was decided under the 1950 Act, but the point at issue was the same, namely, whether the natural father of an illegitimate child was a "parent" within the meaning of Section 2(4) of the Act, which provided that an adoption order should not be made:-

"except with the consent of every person or body who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant."

At page 912, Denning L.J. said:-

"In my opinion the word "parent" in an Act of Parliament does not include the father of an illegitimate child, unless the context otherwise requires."

At page 913 he said:-

"Once it is accepted that in an Act of Parliament the word "parent" prima facie does not include the natural father of an illegitimate child, I ask myself whether the context otherwise requires. The answer is that in this Act of 1950 it does not so require."

"The word "parent" must be construed in the light of the sections of the Act itself, and the various sections I have cited all seem to me to point unmistakably to the fact that the father of an illegitimate child cannot be a "parent" within the meaning of the Act."

Finally, at page 917, Romer, L.J. said:-

"....the consents referred to in s.2(4)(a) of the Act are, in my judgment, essentially linked with the transfer of rights which results from an adoption order under the provisions of s.10..... The mother of an illegitimate child has both rights and obligations towards it....and it therefore follows that she should not be subjected unheard to the operation of s.10(1). The father of a bastard, however, has under our law no rights in respect of it at all and to the best of my belief he never has had.... In my judgment, therefore, a putative father is in no way affected by the operation of s.10(1) of the Adoption Act, 1950, in

that he is not deprived of any rights by an adoption order made in relation to his illegitimate children, and this in itself constitutes a very cogent reason for rejecting the view that his consent to the adoption, as a parent, is required."

This Court is of the opinion that the foregoing cases, which were decided under corresponding provisions in the United Kingdom statute(s), upon which the Adoption (Jersey) Law, 1961, was modelled, show that the word 'parent' in the section relating to consents does not include the father of an illegitimate child. The Court is further of the opinion that the draftsman of the Adoption (Jersey) Law, 1961, in choosing to follow the wording of the United Kingdom statute(s), must have intended the provision to have the same meaning. We reject Mr. Boxall's submission that the legislature in Jersey had a different intention.

Nevertheless, the Court has considered whether there is anything in the law of Jersey relating to natural fathers and illegitimate children which could lead it to conclude that the draftsman intended identical words to have a different meaning. The answer is in the negative. We adapt the language of Denning, L.J. in *Re M (an infant)* (supra) at p.912. The law of Jersey has from time immemorial looked on a bastard as the child of no known body except its mother. "Ils n'ont aucun lien avec leur famille naturelle" (see C.J. Le Gros' *Droit Coutumier*). The father is too uncertain a figure for the law to take any cognisance of him, except that it will make him pay for the child's maintenance if it can find out who he is. The law recognises no rights in him in regard to the child, whereas the mother has several rights. She has the right to the custody of him whereas the father has no right to the custody of him either during her lifetime or after her death. The mother has the right to give or withhold consent to the marriage of the child whilst under twenty, but the natural father has no such right either during the mother's lifetime or after her death. The natural father has no right at law to succeed on intestacy. He has no rights at all; the truth is that the law does not recognize the natural father at all. A natural father was not even permitted to sell or gift real property to his bastard child; if he did so the 'contrat' of gift or sale was liable to cancellation. (*Gallichan -v- Rousseau et au* (1886) 48 H 311). Whilst there is

no prohibition on a testamentary bequest or devise by a natural father to his bastard child he can only bequeath or devise that part of his estate that he can bequeath or devise to a stranger (Nicolle -v- Nicolle (1922) 11 O.C. 183). The only father the common law recognizes as having any rights is the father of a legitimate child born in wedlock. Thus we reject the submissions of Mr. Boxall that in Jersey a putative father is recognized as having greater rights than a putative father in England. We find no difference of any substance.

In Thomas -v- O'Shea (1988) J.J. unreported 88/30, the Court considered an application by a natural father for access to his illegitimate child. The Court said this:-

"The position, in our judgment, is that which was shown and clearly acknowledged in Boisan, femme etc. -v- Rowe (1944) 242 Ex.94, 97, that is that the mother of an illegitimate child has the custody or guard of the infant and that on her marriage or remarriage, as the case may be, the custody passes to her husband, who assumes the responsibility for the maintenance and upbringing of the child. A position which, in our view, has been confirmed by Article 50 of the Children (Jersey) Law, 1969".

As to access the Court went on to say that:-

"... the Court is not precluded from making such order as it thinks fit in the child's best interests. It is clear, in the words of Sir George Jessell, in R -v- Nash (1891) 10 Q.B.D. 454, that in equity regard was always had to the mother, putative father, and relations on the mother's side. Put another way, in the more recent case Re Adoption Application No.41/61 (supra) the tie between the child and his natural father may properly be regarded.

"Despite the careful and reasoned arguments from Advocate Habin, it appears to us that in a case such as this, this is the principle that the Court ought to follow and that we have the power and indeed the duty to do so."

In the view of this Court, the decision that the putative father should be allowed to proceed with his application for access, was reached on the basis that the child's best interests were paramount and the tie between father and child was something which might properly be taken into account by the Court when seeking to make an order in the child's best interests. It does not indicate any belief on the part of the Court that the putative father had any right or entitlement to access.

Our view is that there is nothing in Jersey law to suggest that the word 'parent' in the Adoption (Jersey) Law, 1961, was intended to have other than the same meaning as it bears in the United Kingdom statute(s) upon which the Law was based, and we are fortified in that view by the fact that the Court in Thomas -v- O'Shea had regard to Re Adoption Application No.41/61, which is one of the cases which we have cited.

In the Court's judgment, therefore, the intervenor, as the natural father, is not a parent within the meaning of Article 4(1)(a) of the Adoption (Jersey) Law, 1961, and his consent to the making of an adoption order is not required.

Following on the foregoing, in the further judgment of the Court, the intervenor, as the natural father, has no right to be heard on the merits of the adoption order. We respectfully agree with Denning, L.J. that the natural father has no right to object to this adoption. His consent is not required. We allowed the intervenor to be heard because the English Magistrates' Court made an order granting the intervenor reasonable access to the child and we had regard to the desirability for judicial comity. But because we have found that his consent was not necessary he is not entitled to be heard on the merits of the application for an adoption order. Now that his consent has been found to be unnecessary "he disappears from the scene".

Rule 13 of the Adoption (Jersey) Rules, 1962, provides that notice of the hearing should be served on, inter alia, any person who, in the opinion of the Court, ought to be served with notice of the hearing of the application, and

that any such person may attend and be heard; and paragraph 9 of the Second Schedule to the Rules provides that, where the infant is illegitimate but no one is liable as the putative father to contribute to the maintenance of the infant by virtue of any order or agreement, the guardian ad litem shall inform the Court if he learns of any person, claiming to be the father, who wishes to be heard by the Court on the question whether an adoption order should be made. The intervenor is not liable, as the putative father, to contribute to the maintenance of the child, whether by virtue of any order, because none was ever sought or made, nor by agreement because none was ever sought or reached. But the Court learned of his wish to be heard and it was right that we should do so.

The intervenor having been heard, the position is, in our view, as described in *Re Adoption Application No.41/61 (No.2) (1963) 2 All E.R. 1082*, at p.1085, namely, that the father has the right, in equity, to put forward his plans on their objective merits and the Court must take into account all the merits and demerits of the alternative proposals; the tie (if any) between the child and the intervenor is relevant, not on the basis that the intervenor has a claim which he has a right to have satisfied, but only to the extent that it is beneficial to the child.

But we turn to *Re M. (A Minor) (Adoption Order: Access) (1986) 1 F.L.R. 51 C.A.* There the Court of Appeal held that as a general rule it was highly undesirable that after an adoption order was made there should be any contact between the child and his natural parents. This was not an absolute rule and there was clearly jurisdiction to make an adoption order with a condition as to access. But each case has to be considered on its own merits. An adoption order is an order vesting the parental rights and duties relating to the child in the adopters. It would be a great interference with the rights of the adopters to compel them to grant access and that is the reason why an order for adoption with a condition of access should only be granted in very exceptional circumstances.

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This Court has a discretion to exercise and the interests of the child are paramount. We apply the test in *Re G (A Minor) (Adoption and Access Applications)* (1980) 1 F.L.R. 109. The Court must balance the two considerations of (a) the advantages of the child retaining contact with his natural father, as compared with (b) the advantages of being adopted by his mother and step-father. We have done precisely that and we have no hesitation in finding that the best interests of the child lie in the making of an adoption order. Having done so, we are unable to find those exceptional circumstances that would cause us to superimpose a condition of access and we decline to do so.

Accordingly the Court (a) dismisses the intervention and (b) makes an adoption order.

Authorities

Adoption (Jersey) Law, 1961: Articles 1(1), 4(1)(a), 5, 12(1).

Adoption (Jersey) Rules: Rule 13.

Adoption Act 1958: S.57(1), S.4(1)(a).

re. Adoption Application No. 41/61 (1962) 3 All E.R. 533 C.A.

re. M (an infant) (1955) 2 All E.R. 911 C.A.

Gallichan -v- Rousseau et autre (1886) 48 H 311.

Nicolle -v- Nicolle (1922) 11 O.C. 183.

Thomas -v- O'Shea (1988) J.J. as yet unreported 88/30.

re. Adoption Application No. 41/61 (No. 2) (1963) 2 All E.R. 1082 at p. 1085.

Re. M. (a Minor) (Adoption Order: Access) (1986) 1 F.L.R. 51 C.A.

Re. G. (a Minor) (Adoption and Access Applications) (1980) 1 F.L.R. 109.