25 R.F.L. (4th) 285, 193 A.R. 167, 135 W.A.C. 167, [1997] A.W.L.D. 033, [1997] W.D.F.L. 075

1996 CarswellAlta 941

M. (R.K.) v. K. (L.D.)
In the Matter of the Domestic Relations Act, R.S.A. 1980, Chapter D-37 and amendments thereto and In the Matter of the Child Welfare Act, S.A. 1984, C-8.1 as amended and In the Matter of the Guardianship of the minor child, K.J.R., Born March 22, 1987; R.K.M. and L.M.M. (Appellants) and L.D.K. (Respondents)
Alberta Court of Appeal
Hetherington, Conrad and McFadyen JJ.A.
Oral reasons: July 22, 1996
Docket: Calgary Appeal 16425



Counsel: D. **Castle** , for appellants.

A. Tzankos , for respondent.

Subject: Family

Family law --- Adoption -- Under statute -- Practice and procedure -- Notice of proceedings.

Best interests of child served by maintaining present relationship with father.

The child's biological father had lived with the child's mother for three years prior to the child's birth, with a break of two months in the twelve-month period immediately preceding the birth. The father also lived with the mother and child for three years after the birth. When the couple parted, the father paid maintenance and exercised regular access pursuant to various orders of various courts. The mother remarried and her husband applied to adopt the child. The adoption order was granted, but later set aside on the basis that the father was entitled to notice and that the best interests of the child required that the order be set aside. The trial judge rejected a psychological report suggesting that it was in the child's best interests not to have a relationship with her father until she was 16. The mother and her husband appealed.

Held:

Appeal dismissed.

The father was clearly entitled to notice of the proposed adoption especially since the father had a long-term relationship with the child. Whether or not the only means of setting aside a final adoption order was by application to the original trial judge or an appeal to the Court of Appeal, it was improper for that issue to be raised for the first time on appeal and, in any event, the failure of service required that the adoption order be set aside. In rejecting the psychological report, it was apparent the trial judge concluded it was in the child's best interests that she have a present relationship with the father. It could not be said that the trial judge misunderstood or misapprehended the evidence or applied the wrong test.

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Statutes considered:

Child Welfare Act, S.A. 1984, c. C-8.1

s. 62referred to

s. 63referred to

Domestic Relations Act, R.S.A. 1980, c. D-37 -- pursuant to

Rules considered:

Alberta Rules of Court

R. 390referred to

Appeal of order setting aside adoption order.

**Memorandum of judgment delivered orally from the bench. *Hetherington J.A.* (for the Court):**

1 Madam Justice Conrad will deliver the unanimous decision of the Court.

***Conrad J.A.* (for the Court):**

2 This is an appeal from the order of Madam Justice Bensler declaring that the adoption granted to the appellants on the 5th of March, 1993 be set aside on the basis that the biological father was entitled to notice, and that the best interests of the child require the order be set aside.

3 The biological father had lived with the appellant mother of the child for about three years prior to the daughter's birth, with a break of 2 months in the 12 month period immediately preceding that birth. The father also lived with the mother and child for approximately three years following her birth. In addition, he has paid maintenance and exercised access rights pursuant to various orders of various courts.

4 Everyone concedes, in retrospect, that the biological father should have received notice of the adoption application. He was entitled to notice under the *Act* . The access orders arising from this longterm relationship confirm that the father had a role in the child's life. Counsel for the appellants argue that a judge granting an adoption has the right to dispense with notice. She further argues that although the *ex parte* rule would apply to an order dispensing with service prior to the hearing of the adoption under s. 62 of the *Child Welfare Act* , it does not apply to an order made under s. 63 at the hearing. Since the Adoption Order is a final order, she submits that the only means of setting aside the order's by application pursuant to Rule 390 in front of the judge that originally granted the adoption or, alternatively, on appeal to this Court.

5 In our view, the appellants cannot avail themselves of that argument at this time. The appellants did not raise that argument at the beginning of the five day trial that took place in front of Bensler, J. Had they done so, the trial judge may well have elected to refer the matter back to the judge who granted the original adoption order. At a minimum she would have had the opportunity to consider the issue now raised at the outset. Instead, the appellants raise the issue for the first time in argument at the end of the five day trial. In our view, that was too late and we are not prepared to entertain that argument at this time. In any event, we are satisfied on the facts of this case that the failure of service requires that the adoption order be set aside.

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6 The appellants' counsel also argues that the trial judge erred in finding that the best interests of the child required the adoption to be set aside; rather, she says that the evidence supports the continuance of the adoption. In this regard, the appellants argue that Dr. Froberg's evidence is the only evidence on the issue. However, the trial judge addressed that issue. She rejected the opinion of Dr. Froberg that it is in the best interests of this child to wait until she is 16 to have a relationship with her father. It follows that she concluded the child's best interests required a present relationship with the father. We are not satisfied that the trial judge misunderstood or misapprehended the evidence or applied any wrong test. Accordingly, we dismiss the appeal on those issues.

7 The last issue argued related to the question of costs. We adjourn that issue until the Director has been notified, and ask that the Director appear to make submissions on costs. We allow both parties the opportunity to present further submissions on costs, if desired.

*Appeal dismissed.*

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