

265 Nfld. & P.E.I.R. 92

Intestate Succession Act, Re

Newfoundland and Labrador Supreme Court (Trial Division)

M. Dunn J.

Judgment: March 23, 2007

Intestate Succession Act, Re

In the Matter of The Registrar of the Supreme Court

In the Matter of The Intestate Succession Act, Revised Statutes of Newfoundland
and Labrador 1990, Chapter I-21

In the Matter of the Children's Law Act, Revised Statutes of Newfoundland and
Labrador, Chapter C-13

In the Matter of the Adoption Act, Statutes of Newfoundland and Labrador, 1999

Newfoundland and Labrador Supreme Court (Trial Division)

M. Dunn J.

Judgment: March 23, 2007

Docket: 200601T4908

Counsel: **David Day**, Q.C. for Registrar of the Supreme Court of Newfoundland and Labrador

Cases considered by M. Dunn J.:

[Clayton v. Markolefas \(2002\), 2002 BCCA 435, 2002 CarswellBC 1726, 3 B.C.L.R. \(4th\) 22, 31 R.F.L. \(5th\) 64, 46 E.T.R. \(2d\) 58, 215 D.L.R. \(4th\) 405, \(sub nom. Clayton v. Markolefas Estate\) 171 B.C.A.C. 263, \(sub nom. Clayton v. Markolefas Estate\) 280 W.A.C. 263 \(B.C. C.A.\)](#)
-- referred to

Statutes considered:

Adoption Act, R.S.B.C. 1996, c. 5

s. 37 -- considered

s. 37(1) -- considered

s. 37(1)(c) -- considered

s. 37(6) -- considered

Adoption Act, S.N. 1999, c. A-2.1

Generally -- referred to

s. 27(1) -- considered

s. 27(1)(a) -- referred to

s. 27(1)(b) -- referred to

s. 27(1)(c) -- considered

s. 27(3) -- considered

s. 32 -- considered

Adoption of Children Act, S.N. 1964, No. 23

Generally -- referred to

s. 12(1) -- referred to

Adoption of Children Act, R.S.N. 1970, c. 5

Generally -- referred to

s. 13(3) -- referred to

Adoption of Children Act, 1972, S.N. 1972, No. 36

Generally -- referred to

s. 21 [rep. & sub. 1988, c. 61, s. 83] -- considered

s. 21(3) -- referred to

Children's Law Act, S.N. 1988, c. 61

Pt. I -- referred to

Children's Law Act, R.S.N. 1990, c. C-13

s. 3 -- considered

s. 3(2) -- considered

Intestate Succession Act, R.S.N. 1990, c. I-21

Generally -- referred to

s. 5 -- considered

Rules considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D

Generally -- referred to

R. 7.16 -- considered

APPLICATION by Registrar for declaration that person was not entitled to inherit under Intestate Succession Act from either of his or her birth parents who died after adoption other than birth parent who joined in adoption of person.

M. Dunn J.:

Introduction

1 This is an originating application (ex parte) of the Registrar of the Supreme Court of Newfoundland and Labrador for a declaration that: A person is not entitled to inherit under the *Intestate Succession Act*, from either of his or her birth parents who dies after that person's adoption, other than a birth parent who joined in adoption of that person. Counsel for the Registrar, David C. Day, Q.C. provided a comprehensive and erudite argument in support of the Registrar's position. These submissions, and my decision, are set out hereafter.

Facts

2 The facts giving rise to this ex parte application are brief and are set out in paras. 3 to 7, inclusive, of the Memorandum of Argument filed January 5, 2007. They state:

3. The Registrar, in the capacity of administrator of the estate of a person -- a birth parent -- (the intestate) dying intestate (the intestate's estate), (i) has historically received, (ii) is presently receiving, and (iii) expects to receive claims, under the *Intestate Succession Act*, to a share of an intestate's estate by a person, proven to be the intestate's biological issue, who was adopted in or outside Newfoundland by adoptors, not including the intestate, before the intestate's death. (A birth parent may join, with another adult person, in adoption of a child;

in which event the subject of this Application does not arise.)

4. The Registrar has been, and is, in doubt about the legal validity of such a claim against an intestate's estate.

5. Notwithstanding the Registrar's doubt about the legal validity of such claims, they have, historically, been settled or otherwise resolved by the Registrar without prejudice to other claims against the intestate's estate.

6. Presently, the Registrar, as administrator of an intestate's estate, is in receipt of such a claim from a person -- a biological issue of the intestate -- against that intestate's estate. The person making the claim was adopted outside Newfoundland before the death in Newfoundland of the intestate, who did not join in that person's adoption. The Registrar is unable to settle or otherwise resolve this particular claim without prejudice to other claims against that intestate's estate, unless and until he obtains the requested judicial declaration respecting the legal validity, generally, of such a claim.

7. The Registrar is concerned about his legal liability, were he to endeavour to settle or otherwise resolve this particular claim without first obtaining the requested judicial declaration.

ISSUE

8. Is a person entitled to inherit, under the *Intestate Succession Act*, from either of his or her birth parents who dies after that person's adoption, other than from a birth parent who joined in adoption of that person?

Law

Rules of The Supreme Court of Newfoundland, 1986

3 The applicant seeks a declaratory judgment pursuant to Rule 7.16 of the *Rules of The Supreme Court*, 1986, which Rule states:

No proceeding shall be open to objection on the ground that only a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Statutes

Adoption Act

4 The principle effect of an adoption order is as prescribed by subsection 27(1) of the *Adoption Act*, SNL, 1999, c. A-2.1:

27(1) Where an adoption order is made,

- (a) the child becomes the child of the adoptive parent;
- (b) the adoptive parent becomes the parent of the child;
- (c) a birth parent ceases to have parental rights and obligations in respect of that child, except a birth parent who remains as a parent jointly with the adoptive parent;
- (d) a person having custody of the child ceases to have that custody; and
- (e) a person whose consent is required under section 10 [reference consent to adoption] ceases to have a right or obligation with respect to that child.

...

(3) An adoption order does not affect an interest in property or a right of the adopted child that vested in the child before the date of the adoption order.

...

5 The *Adoption Act* also speaks to adoptions which occur outside this province at s. 32:

Where a person has been adopted in or under the laws of another jurisdiction, the person and his or her adoptive parent have the same status, rights and duties as if the adoption had been in accordance with this Act.

Children's Law Act

6 Just as s. 27(1)(c) of the *Adoption Act* ends parental rights and obligations of a birth parent in respect of a child (unless the parent jointly adopts the child) s. 3 of the *Children's Law Act*, RSNL 1990, c, C-13, subsection 2, recognizes upon adoption parental rights to the child become vested in the adopting parents. Section 3 states:

- (1) A person is the child of his or her natural parents, and his or her status as their child is independent of whether he or she is born inside or outside marriage.
- (2) Notwithstanding subsection (1), where an adoption order has been made, the *Adoption of Children Act* applies and the child is in law the child of the adopting parents as if they were the natural parents.
- (3) Kindred relationships shall be determined according to the relationships described in subsection (1) or (2) and section 12 [children born of artificial insemination].

(4) All distinctions between the status of a child born inside marriage and a child born outside marriage are abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined in accordance with this section and section 12 [children born of artificial insemination].

It should be noted the "*Adoption of Children Act*" referred to in subsection 3(2), should read "*Adoption Act*."

Intestate Succession Act

7 Under s. 5 of the *Intestate Succession Act*, RSNL 1990, c. I-21 issue have a right to inherit from an intestate's estate:

Where an intestate dies leaving issue, the estate of the intestate shall be distributed, subject to the rights of the spouse, *per stirpes* among the issue.

8 Neither s. 5, nor any other provision of the *Intestate Succession Act*, distinguishes between issue borne inside or outside marriage.

Historical Statutory References

9 Counsel for the Registrar points out the predecessor to the *Adoption Act*, the *Adoption of Children Act* -- enacted in 1964, incorporated in the 1970 Revised Statutes of Newfoundland, and repealed with substitution in 1972 by name sake adoption legislation ("the intestacy inheritance provision"), provided:

When a person is adopted he shall not lose his right to inherit from his natural parents or kindred.

- Re:
1. SNL 1964 No. 23, s. 12(1)
 2. RSNL 1970 c. 5, s. 13(3)
 3. SNL 1972, No. 36, s. 21(3)

10 The foregoing provision of the 1964, 1970 and 1972 legislation was repealed with substitution in the *Children's Law Act*, SNL 1988 c. 61, effective May 1, 1989 at s. 83:

83. Sections 21, 22 and 23 of the *Adoption of Children Act*, 1972 are repealed and the following substituted:

21. The status of a child that has been adopted shall be as set out in Part I of the *Children's Law Act*.

11 Part I of the *Children's Law Act*, SNL 1988, c. 61; now RSNL 1990, c. C-13 subsection 3(2) states:

(2) Notwithstanding subsection (1), where an adoption order has been made, the *Adoption of Children Act* applies and the child is in law the child of the adopting parents as if they were the natural parents.

Analysis

12 It is the applicant's position a person is not entitled to inherit under the *Intestate Succession Act*, from his or her birth parents who die after that person's adoption, other than from a birth parent who joined in the adoption of the person. The historical evolution of the legislation is, in part, evident in the recitation of the relevant provisions set out above. From 1940 to May 1, 1989 an adopted child was entitled to inherit, on intestacy, at the death of either the birth parents or the adoptive parents. This benefit as provided in the 1964, 1970 and 1972 adoption legislation was repealed by s. 83 of the 1988 *Children's Law Act*, which section came into force on May 1, 1989. Counsel for the Registrar points out the amendment appears to reflect a recommendation of Gushue, R. in a report to government entitled *Family Law in Newfoundland (St. John's: Government of Newfoundland, 1973)*, pp. 248 - 249 wherein he stated:

The Adoption of Child Act, 1964 preserves for an adopted child his right of inheritance from his natural parents or kindred who die intestate, and gives him the right to inherit on the intestacy of his adopting parents and establishes a relationship for him only to the legal descendants of his adopting parents. The property that an adopted child has acquired by himself or by gift, inheritance or descent from an adopting parent or kindred of an adopting parent, goes on intestacy to the adopting parent's family, and any gift or inheritance from his natural parents or kindred goes as if he had not been adopted.

The current philosophy is that for all purposes the adopted child and his adopting parents should stand in the same relationship as that of natural child and natural parents. The natural parent has relinquished his responsibilities and the adopting parent has assumed them. The trend of modern legislation is to give recognition to this also in succession to property and to establish a relationship of kindred only to the kindred of the adopting parents. The Study will recommend that the Newfoundland legislation on adoption be amended accordingly.

13 Clarification is required by the Registrar because s. 27(1)(c) of the *Adoption Act* clearly states a birth parent ceases to have parental rights and obligations in respect of the adopted child (except where a birth parent remains as a parent jointly with an adoptive parent) but does not speak to the reverse, that is, an adoptive child ceases to have rights and obligations in respect of the birth parents. In addition to the repealing of the intestacy inheritance provision as set out in paras. 10 and 12 herein, affirmation of the foregoing intention, that is, the rights and obligations of the adoptive child cease, as well, may also be inferred by subsection 27(3) wherein it states an adoption order does not affect an interest in property or a right of the adopted child that vested in the child *before the date of the adoption order*. [Emphasis added] To vest in a person an interest in property or a right has been defined in *Funk and Wagnell's New Standard Dictionary of the English Language*, vol. II, p. 2647 as "...confer ownership of, as property, upon a person; invest a person with...the full title to property...; give to a person...an immediate, fixed right of present or future enjoyment." Section 27(3), when viewed in the context of the definition, speaks

to an immediate interest in property or the vesting of a fixed right of present or future enjoyment. Benefits or inheritances under last wills and testaments, or by virtue of the *Intestate Succession Act*, only arise upon the death of the testator and not before.

14 The *Children's Law Act* at s. 3(2) provides an adopted child is "in law the child of the adopting parents as if they were the natural parents," once again, signaling the cessation of the birth parent-child relationship."

15 A provision similar to 27(1)(c) of the Newfoundland and Labrador *Adoption Act* was considered by the Court of Appeal for British Columbia in *Clayton v. Markolefas*, [2002 BCCA 435](#) (B.C. C.A.). Section 37 of the *Adoption Act*, RSBC 1996, c. 5, under consideration in the case, reads:

37(1) When an adoption order is made,

(a) the child becomes the child of the adoptive parent,

(b) the adoptive parent becomes the parent of the child, and

(c) the birth parents cease to have any parental rights or obligations with respect to the child, except a birth parent who remains under subsection (2) a parent jointly with the adoptive parent.

...

(6) An adoption order does not affect an interest in property or a right of the adopted child that vested in the child before the date of the adoption order.

These provisions are virtually identical to the like provisions found at s. 27(1)(a)(b)(c) and 27(3) of the Newfoundland and Labrador legislation.

16 In determining the effect of s. 37(1)(c) as it relates to intestacy, Esson, J. states at paras. 7, 8, 10 and 11:

[7] Section 37(1)(c) is, in my view, all-important in relation to the present issue. Because the birth parents ceases to have any parental rights or obligations, it must follow that the child ceases to have any rights against the birth parents other than those defined in s. 37(6), i.e., rights which vested in the child before the date of the adoption order. The existence of s. 37(6) is inconsistent with a legislative intention to allow other rights of the child against the birth parent to survive the adoption order.

[8] Section 37(6) of the new Act, which provides that the family relationships of one person to another are to be determined in accordance with s. 37, also has a clear bearing on the present issue. The question whether a person is "issue" of another person is a matter of family relationships. The clear effect of s. 37(1) is that the adoptive child becomes the child of the

adoptive parent. From that it follows that all parental obligations fall upon the adoptive parents. It can therefore be said of the present provisions, as Seaton J.A. said of s. 11 of the former Act:

The thrust of these provisions is to move the child from one family to another family and make it a child of the new family and no longer a child of the old family.

...

[10] Mr. Skillings submitted that, because the present Adoption Act does not expressly exclude rights against the estate of a birth parent, it should be construed as regulating family relationships only during the lifetime of the child and the birth parent, and as not applying to a claim to share in the estate. I see nothing in the language of the present legislation which would justify limiting the effect of s. 37 in that way.

[11] The 1996 Act has effected many modifications of the law relating to adoption. Perhaps most importantly, it has modified the policy which underlay the previous Act which went so far in attempting to abolish any relationship or link between the birth parents and birth child that the child might never know that he or she was not related by blood to the adopting parents. The present Act, by such means as creating a birth father's registry (s. 10) and making provision for openness and disclosure (Part 5), recognizes genetic reality and the human desire to know, for better or worse, to whom one is related by blood. But in respect of legal rights and obligations, the fundamental premise remains the same. For those purposes, the adoptive parents are the parents and the adopted child is their issue.

Esson, J., then dismissed the petitioner's appeal wherein she claimed a share in the distribution of an intestate's estate.

17 In conclusion, I agree, as submitted by counsel, adoption is a creature of statute. Any rights which may attach to an adopted child must also arise by virtue of statute. I am satisfied, based on my review of the legislation cited herein, once a child is adopted all rights and obligations of the birth parents cease in respect of the child and are assumed by the adoptive parents. Conversely, all rights and obligations of the adopted child relative to the birth parents cease at the point of adoption.

Disposition

18 Having reviewed the application of John Baird, Estates/Trust Administrator for the Registrar of the Supreme Court of Newfoundland and Labrador (hereinafter called "the Registrar"), requesting declaratory relief under Rule 7.16; and having considered the pleadings and the Registrar's Memorandum of Argument; and further having heard David C. Day, Q.C., of counsel for the Registrar; *IT IS DECLARED* that a person is not entitled to inherit, under the *Intestate Succession Act*, from either of his or her birth parents who dies after that person's adoption, other than from a birth parent who joined in adoption of that person.

Application granted.

END OF DOCUMENT