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Wade v. Newfoundland (Director of Child Welfare)

Newfoundland Court of Appeal

Mifflin, C.J.N., Morgan, Cushue, JJ.A.

Judgment: August 27, 1981

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Wade and Wade v. Director of Child Welfare and Whitty

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Judgment: August 27, 1981
Docket: 1981 No. 16

Counsel: **David** C. **Day**, Q.C., for the appellants

Deborah Fry, for the respondents

Mifflin, C.J.N.:

1 On September 10, 1980, Annette Whitty gave birth to a male child whom she committed to the care of the Director of Child Welfare on September 17, 1980 by executing a "Non-Ward Agreement". On September 24, 1980, pursuant to Section 9(1)(b)(ii) of The *Adoption of Children Act*, R.S.N. 1972, the Act No. 36 of 1972, Annette Whitty executed a consent to the adoption of the child. On November 4, 1980 Anthony Joseph Wade, claiming to be the putative father of the child, and his mother, Veronica Wade, through their solicitor caused a Chambers Summons to be issued out of The Supreme Court of Newfoundland, Unified Family Court, ordering all parties concerned to attend in Chambers on November 17, 1980 to show cause why a Writ of Habeas Corpus should not issue directed to the Director of Child Welfare for Newfoundland to have the body of the child before the Judge in Chambers to undergo and receive all and singular such matters and things as the court shall then and there consider concerning him in that behalf. This is the usual form of application for custody. At the time of this application by Anthony Joseph Wade and Veronica Wade, the child was in the care and control of the Director and still is.

2 The Director of Child Welfare raised the following three preliminary objections to the application for custody:

(a) That the applicant in this matter has no right at common law to custody.

(b) That the applicant in this matter has no statutory right to custody.

(c) That the applicant in this matter has not established a bond or relationship with the male child born to Annette Whitty.

3 In the course of his reasons for judgment, Justice Fagan held that the putative father had no common law right to apply for custody of an illegitimate child and had no statutory right to apply for custody of an illegitimate child. He also found that the court should not invoke its *parens patriae* jurisdiction to permit this application for custody. The learned justice did not deal with the third question submitted to him because he was of the opinion that the whole circumstances of the case came within the purview of The *Adoption of Children Act*.

4 From this decision, Anthony Joseph Wade and Veronica Wade appeal and in the Notice of Appeal are set forth some six grounds which I do not find it necessary to repeat here. Mr. Day, counsel for the appellants, stated that the essence of the appeal is the question as to whether an unwed father has a right to a hearing of custody, care, and control of the illegitimate child, and whether the Unified Family Court has jurisdiction to entertain that application for custody.

5 In my view, it is only necessary to consider The *Adoption of Children Act* to dispose of this particular appeal. The *Adoption of Children Act* is a complete code with regard to adoption. In the case of a child who is born out of wedlock the only consent necessary before an adoption order can be made is the written consent of the mother [S.9(1)(b)(ii)]. This consent can be cancelled by the mother by a document in writing within twenty-one days after the consent is given, but otherwise the consent is, subject to subsection (9) of Section 9, irrevocable [S.9(8)]. Subsection 9 of Section 9 gives a judge the right to cancel a consent referred to in subsection (8) if satisfied it is in the best interests of the child. The application under subsection 9 of Section 9 would obviously have to be made by the consenting party.

6 In the present case, the mother has given her written consent to an adoption order, and the time has passed for her to cancel it by a document in writing, and she has not made an application to a judge to cancel her consent. In my view, that disposes of this matter. The appellants have no status to apply for custody, care and control of the child, and the court should not entertain such an application.

7 Before leaving this matter, I want to say that in my view there is no room in a case like this to consider the *parens patriae* jurisdiction of the court. I cannot see how it could conceivably be invoked. Nor is there any purpose in considering the rights of a putative father at common law or by statute to apply for the custody of an illegitimate child, even though generally I agree with what the learned trial justice said in this regard. As such, a putative father has no rights. Having said this however, I do not want it to be understood that a person, simply because he is a putative father, has no right to apply for custody, care and control of an illegitimate child. It may well be in a proper case it would be in the best interest of a child that his or her custody be awarded to a person who happened to be a putative father even though being such may not give him any common law of statutory rights to apply for custody. That would depend on the circumstances of a particular matter.

8 I would dismiss the appeal.

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