

COMMENTARY

FATHERS NOT SHORTCHANGED BY CURRENT ADOPTION LEGISLATION

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CITED: (2008) 13 Appeal 22-27

Issues around adoption can be both emotion arousing and contentious. This is evidenced by the public reaction to a recent British Columbia Supreme Court (BCSC) decision assessing the issue of birth fathers and adoption notice. In her ruling, Smith J. overruled the decision made by Master Caldwell, in which he found that the adoption of an aboriginal child could not proceed until the mother divulged the identity of the birth father so that he could be provided with notice of the adoption proceedings. Her decision sparked debate over the merits of the current adoption legislation and the disservice it does to father's rights. In response to her decision, the *Vancouver Sun* published an editorial arguing that the current legislation prevents birth fathers who are unaware they have children from ever knowing those children unless the mother decides to name them, and that this is not in the best interests of the child.¹ Yet the editorial acknowledges that Smith J. interpreted the *Act* correctly, and therefore deemed the problem to lie with the *Act* itself, which needs to be remedied if the best interests of the child are to be protected. However, upon examining the *Act*, it is found that provisions are in place to protect unacknowledged birth fathers. As such, the B.C. *Adoption Act* ("*the Act*"), in its current form, sufficiently balances the interests of the father, the mother and particularly the child in adoption proceedings and should not be amended to accommodate the interests of birth fathers who are unaware they have fathered a child.

THE ADOPTION ACT

The purpose of the *Act* is to "provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests."² As such, it can be stated that the proper lens through which the *Act* is to be interpreted is that provided by the best interests of the child principle; however, this is not to say that the *Act* does not consider the birth mother's or birth father's rights. For the purposes of this discussion, the relevant provisions of the *Act* are ss. 6(1)(g), 10, 11 and 13.

Section 13(1) states that the consent of the child (if over the age of 12), the birth mother, the birth father and any person appointed the child's guardian are required for a child's adoption. Furthermore, s. 13(2) specifies who is considered a father for the purposes of the *Act*. It

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1 "Adoption Law Needs Overhauling to Give Children Knowledge of Their Birth Dads" *The Vancouver Sun* (3 October 2007).

2 *Adoption Act*, R.S.B.C. 1996, c. 5, s. 2.

states that the father of a child is anyone who is or was the child's guardian, is acknowledged by the birth mother as the father and is registered on the birth fathers' registry, or anyone who has acknowledged paternity by either signing the child's birth registration, by having custody or access to the child or by supporting, maintaining or caring for the child.³ If a man fulfills any of the above criteria, his consent would be required for an adoption to proceed, subject to s. 11, which will be discussed shortly. Furthermore, s. 6(1)(g) states that before placing a child for adoption, a director or an adoption agency must make reasonable efforts to give notice of the proposed adoption to (i) anyone who is named by the birth mother as the child's birth father if his consent is not required under s. 13, and (ii) anyone who is registered under s. 10 in the birth fathers' registry in respect of the proposed adoption.⁴

With respect to the birth fathers' registry, s. 10 of the *Act* states that a birth father may, in accordance with the regulations, register on the birth fathers' registry to receive notice of a proposed adoption.⁵ This provision, which was added when the *Act* was amended in 1996, provides fathers with the ability to register and receive notice prior to any adoption proceedings, thereby ensuring their consent is obtained. Therefore, in situations where the mother does not acknowledge the father and the father is not protected pursuant to the conditions listed in s. 13(2), his rights will still be protected under s.10(1). As stated by the Hon. J. MacPhail in legislative debates, s. 10 allows a man who believes he is the father of a child to be able to register his name with the Ministry and thereby receive notice of a proposed adoption of the child. As such, it "will give the birth father the opportunity to become involved in the planning very early in the process and therefore really reduce the risk of a custody application later in the placement process."⁶ However, it should be remembered that the onus to register with the Ministry falls on the father; therefore, if a man is unaware that he has fathered a child and does not register with the Ministry, he would have no entitlement to notice.

Finally, s. 11(1) of the *Act* looks at situations where it is appropriate to dispense with the requirement to provide the birth father with notice of a proposed adoption. These include situations where it has been satisfied that it is in the best interests of the child to do so or any other circumstance that may justify dispensing with the notice. Whether the reasons provided meet either of these requirements is determined by a judge, and is only an issue in situations where the birth mother has named the father or where the father has registered pursuant to s. 10(1).

CASE LAW

The case in question involved the adoption of an aboriginal child. The birth mother, who was not in a relationship with the birth father, chose not to inform him of the child's adoption. As such, no notice was provided to the birth father. The case originally came before a Master, who dismissed the adoption application primarily on the grounds that the father was required to receive notice of the adoption prior to any approval being granted. His reasoning was based on a misinterpretation of the *Act* and reference to inappropriate case law. Specifically, the Master relied on s. 11, finding that no evidence had been provided that would "allow him to properly exercise [his] discretion under s. 11", stating that a simple assertion by the mother that the birth father is unaware of the pregnancy and birth, and that she decided not to name him is insufficient in his view. Furthermore, the Master supported his decision by relying on case law that examined the importance of obtaining consent and providing notice in a general sense, rather than specifically focusing on the provisions in the *Act*.⁷

3 *Ibid.* s. 13.

4 *Ibid.* s. 6.

5 *Ibid.* s. 10.

6 British Columbia, *Official Report of the Legislative Assembly*, No. 18 (28 June 1995) at 16368 (Hon. J. MacPhail).

7 *Birth Registration No. 06-014023 (Re)*, 2007 BCSC 304.

As the Master's decision precluded the granting of a final order of adoption, the decision was appealed and came before the BCSC. Smith J. overruled the Master's decision on the grounds that he erred in interpreting the provisions of the *Act*. In her judgment, Smith J. stated that within s. 13 of the *Act*, there is no requirement to obtain the consent of the birth father in situations where the mother has not acknowledged the birth father or where the birth father has not registered with the birth fathers' registry. Furthermore, she found that s. 11 is only applicable in situations where the birth father falls within the categories of father as stated under ss. 6(g)(i), 10(1) or 13. From this, it can be seen that the Master incorrectly interpreted the *Act*, as he found that s. 11 stated that notice must be provided to the birth father, unless reasonable evidence is provided to him stating why such notice could not be given. Furthermore, according to the Master's interpretation, s. 11 does not allow for notice to be dispensed with if the father has registered with the birth fathers' registry.

Since the public interest would not be served if courts were at liberty to 'amend' the legislation by means of its 'inherent jurisdiction',⁸ Smith J. overruled the Master's decision and affirmed that s. 13 of the *Act* does not require that notice of a proposed adoption be given to a birth father who is unacknowledged, has no legal rights or obligations to a child that is the subject matter of an application for an adoption order or who is not registered with the birth fathers' registry. She further stated that why the birth mother declined to advise the birth father of the child's birth, or why she did not name or acknowledge the birth father, is immaterial to determining the issue of who must be notified of a proposed adoption pursuant to the *Act's* provisions.⁹

POSSIBLE AMENDMENTS

As the *Act* currently stands, cases where men who do not know they have fathered a child and where the mother refuses to acknowledge the father, are technically out of luck as the *Act* does not require the mother to identify him and thus provide him with notice of the adoption proceedings. It is for this reason that father's rights groups are arguing that the *Act* needs to be remedied if it is to protect the interests of those fathers and particularly the interests of the child. In evaluating what type of amendment may help remedy this supposed "flaw" in the *Act*, it is useful to look to the Supreme Court of Canada case of *Trociuk v. British Columbia (Attorney General)* ("*Trociuk*").¹⁰ Although not on point, *Trociuk* is factually similar to the current case in that it too involved a birth mother who chose to mark the birth father as unacknowledged in the statement of live birth. As such, pursuant to the B.C. *Vital Statistics Act*, the mother was entitled to choose and register the child's surname. Furthermore, once registered, the father was precluded from subsequently altering that registration.

Unlike the *Adoption Act*, the *Vital Statistics Act* listed three categories of fathers whose particulars can be excluded from the registration: those fathers that are arbitrarily unacknowledged; those fathers who are unacknowledged for valid reasons; and those fathers who are incapable or unknown.¹¹ With respect to those fathers who are unacknowledged for valid reasons, the Court held that permitting mothers the option of excluding them did not justify "arbitrarily exposing a father, without recourse, to the possible disadvantages that flow from an unacknowledgement that protects neither her legitimate interests nor the best interests of the child."¹² As such, the Court found that the provisions of the *Vital Statistics Act* discriminated against biological fathers on the basis of sex, violating s. 15(1) of the *Charter of Rights*

8 *Registration Number 06-014023 (Re)*, 2007 BCSC 1441 at para. 30.

9 *Ibid.* at para. 41.

10 *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34.

11 *Ibid.* at para. 22.

12 *Ibid.* at para. 22.

and Freedoms, and therefore should be amended. However, to ensure that mothers who were unacknowledging the father for valid reasons were able to do so, the Court in *Trociuk* suggested that provisions be put in place to allow these women to address a judge in chambers, who would alone determine whether a father has been justifiably excluded based on affidavit evidence.

Such an approach was implemented in the Alberta case of *L.J.J. (Re)*.¹³ In this adoption case, the birth mother refused to disclose the father's identity for reasons that were unknown. Referring to *Trociuk*, the Court concluded that fathers have certain rights which cannot be arbitrarily overwritten, even if the mother is adamant in doing just that.¹⁴ As such, it was decided that the adoption application would not be granted until the mother had provided some further explanation for why the father's identity could not be disclosed. Her explanation could be provided to a judge in chambers thereby protecting the mother's privacy. Another Alberta case, *C.M.S. (Re)*,¹⁵ also stated that more information is required with respect to why the birth mother is unwilling to identify the biological father before notice can be dispensed with, and that this could be done via an affidavit or in private to the judge.

Placing a provision in the *Act* similar to that proposed in *Trociuk* could certainly reduce the number of fathers who are unacknowledged, as it would take decision making out of the mother's hands and place it in those of an objective third party. However, this can be problematic, as often what might be considered a valid and pressing reason not to disclose by the mother may not be considered to be so by the judge. In such situations then, the mother would be left with no recourse other than being precluded from continuing with the adoption proceedings, which may have detrimental consequences for both mother and child, which will be discussed below. Furthermore, it is important to note that legislature had considered implementing such a requirement in the *Act*, but had serious misgivings about doing so. As stated in legislative debates, the only way to ensure that unacknowledged fathers are named would be to implement a provision such as that suggested in *Trociuk*, which they refused to do. The Hon. J. MacPhail stated, "I wouldn't want the state to interfere to the extent that the birth father's name has to be registered, by any means. That would be the only way to prevent that, and we are not going to do that."¹⁶

Furthermore, according to Daphne Gilbert, "requiring a mother to give reasons for why the father is "unacknowledged" could further stigmatize her or her child."¹⁷ This might occur in cases where the mother is unacknowledging the father because the child was the result of prostitution, or because the mother does not know who the father is and therefore cannot name him. In these situations, a judge may find the mother's actions to be morally reprehensible, and although they could not require the mother to disclose the father's information, as that might not be possible, she would be subjected to his or her scrutiny. This would undoubtedly be harmful to the mother, as putting a child up for adoption is already a difficult process for her to have to endure. As well, requiring that the mother disclose the name of the father places a significant burden on her to protect the father's interests. If men are having sexual intercourse with women, it should come as no surprise that pregnancy is a possibility, especially given that contraception use is not guaranteed one hundred percent. Therefore, men should also be required to take responsibility to ensure that no pregnancies have resulted from their actions or if they have, then to exert their rights via the birth fathers' registry.

13 *L.J.J. (Re)*, 2003 ABQB 962.

14 *Ibid.* at para. 30.

15 *C.M.S. (Re)*, 2004 ABQB 567.

16 *Supra* note 6 at 16368.

17 Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill L.J. 627 at para. 44.

BALANCING INTERESTS AND IMPLICATIONS OF THE MASTER'S DECISION

The *Act*, in its current form, appropriately balances the interests of all the parties involved. As stated by Tom Christensen, Minister for Children and Families, “at the end of the day it wouldn't be reasonable to compromise the opportunity of a child to have a brighter future through adoption simply because of a birth mother's inability or refusal to name the birth father.”¹⁸ This balancing is especially critical in these types of circumstances because the legislation cannot account for every possible personal situation, and therefore will never be perfect in that respect.

By allowing fathers the opportunity to register with the birth fathers' registry, their rights and interests are protected, as it provides these men the chance to participate in the adoption process or file to receive custody or access of the children themselves. As such, the father can play an active role in the child's life and, as stated in the editorial, this would undoubtedly be in the best interest of the child. The mother's interests are also protected under the current provisions. Though it may be that the birth mother is simply vindictive and is not naming the birth father solely out of spite, these situations are likely few and far between. The majority of women who choose not to name the birth father do so for reasons relating to privacy and security. Specifically, the mother may feel shame over an unwanted pregnancy that resulted out of rape or incest, and fear disapproval from her family and society; or she may be worried that if she acknowledges the father, she will be subjected to violence or harassment from him.¹⁹ Because the mother has the right under the *Act* not to name the father, she is protected from having to endure any stigma from the community or harassment from the birth father. In situations such as these, the mother's privacy rights should outweigh the father's right to notice.²⁰ Furthermore, the child's interests are protected by allowing him or her the opportunity to grow up in a stable and caring environment. These interests would not be well served if the child had to wait to be adopted until the mother decided to name the father, which she may not be able to do, or until the father registered with the birth fathers' registry, which he may not know to do.

Had the Master's decision been upheld, it would have had serious consequences for the birth mother. As mentioned above, very rarely does a mother not acknowledge the father out of spite but instead does so out of concern for her privacy and safety. If these women were required to identify the father in order to place their child for adoption, they would endure serious psychological stress from having to do so and possibly suffer a significant financial burden that raising a child would impose. As many of these women are in a financially precarious state, either due to employment circumstances or as a result of their youth, the requirement that they keep the child and raise him or her themselves would unlikely provide for the most stable and nurturing environment. As such, if the option of adoption is taken away from these women, the result could be devastating for both mother and child, and this would not be in the best interests of either.

A final point that should be made pertaining to fathers and the Master's decision is the conceptualization of ‘father’. Emphasis in the law has been significantly placed on the genetic component of what it means to be a father, rather than social and contextual factors. This is demonstrated by Deschamps J.'s decision in *Trociuk*, where she reduced fatherhood to genetic paternity and accorded genetic fathers the full panoply of constitutionalized paternal rights.²¹

18 Steve Merti, “Fathers not Short-Changed by B.C. Adoption Act, Minister says” *Canadian Press Newswire*. (Toronto) (1 October 2007)

19 Karen Thompson, “The Putative Fathers Right to Notice of Adoption Proceedings: Has Georgia Finally Solved the Adoption Equation?” (1998) 47 *Emory L.J.* 1475 at 1497.

20 Tonya Zdon, “Putative Fathers Rights: Striking the Right Balance in Adoption Laws” (1994) 20 *Wm. Mitchell L. Rev.* 929 at 956.

21 Hester Lessard, “Mothers, Fathers and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*” (2004) 16(1) *C.J.W.L.* 165 at 190.

However, upon examining s. 13(2) of the *Act*, half of the provisions pertain to contextual factors. In this sense, by taking into account these other factors, the current legislation is moving in the right direction. That is, there is more to be said for what constitutes a father than mere genetics, and the law should not blindly protect those men who engage in sexual relations and then do not attempt to determine if any child may have resulted from that encounter. These men, although they fit the description of father in a genetic sense, do nothing more to consolidate their role in the child's life, and therefore should not be protected by legislation.

CONCLUSION

Under the current adoption legislation, birth mothers are not required to identify the birth father in adoption proceedings. As such, if the mother decides not to name the father and the father does not register with the birth fathers' registry, the father will not be provided with notice of the child's adoption. It is for this reason that fathers' rights groups contest the law, arguing that it is not in the best interests of children to not know their fathers, and that the law needs to be amended, requiring mothers to acknowledge the father. However, such requirements would have negative consequences on mothers who are not disclosing the father's identity for legitimate reasons, such as rape or incest. Precluding these women from proceeding with the adoption would also have negative consequences for the child, who may be deprived of being raised in a stable and nurturing environment. Therefore, as the current *Act* takes into account the interests of the mother, the father and the child, and appropriately balances these interests against one another, it should not be amended.