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# Recent Changes In Ontario Adoption Legislation

GARY J. SMITH and ALFRED W. J. DICK \*

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In the last few years, Ontario's adoption legislation has undergone an amazing transformation. It is perhaps significant that the law on this matter is no longer to be found in The "Adoption" Act but rather in The "Child Welfare" Act. Concern for the welfare of the adopted child has been the keynote of these gratifying changes, and marks the whole-hearted acceptance of adoption as a desirable social policy in Ontario.<sup>1</sup>

The concept of adoption is not a new one. It was used commonly by the Greeks and Romans to effect succession, and, in later times, was employed in France to deal with orphans of dead soldiers. In England, there was really no legal adoption at common law. *De facto* adoptions, possibly under adoption agreements, existed, but could have no effect on status, since the rights of parents were regarded as inalienable at common law.<sup>2</sup> Generally speaking this was the position in Ontario prior to the enactment of our first Adoption Act in 1921. Hence, legal adoption is wholly statutory in Ontario.

In this article no attempt will be made to describe in detail the statutory provisions and the adoption procedure, but the changes effected by the 1958 legislation will be indicated. Under the new legislation the steps necessary to effect a legal adoption are in broad outline the same as before, namely—the prospective adoptive parent must possess certain qualifications and must have obtained certain consents before an adoption order will be made by the court.

Whereas formerly the legislation allowed the application to be heard in chambers, the new provision requires that an application for an adoption order shall be heard and determined in chambers.<sup>3</sup> The use of the imperative "shall" in place of the permissive "may" in all probability effects no change in the actual procedure formerly employed, but is one of several examples of statutory recognition of the emphasis being placed upon the welfare of the child; it is assumed without discussion that the interests of the child are better served by the more private and informal hearing afforded to a chambers application.

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<sup>1</sup> Classified newspaper advertisements are a good example of this acceptance.

<sup>2</sup> Graveson and Crane, *A Century of Family Law (1857-1957)* (London, Sweet & Maxwell Ltd., 1957), at pp. 45-46.

<sup>3</sup> The Child Welfare Amendment Act, 1958 (Ont.), c. 11, s. 61(2).

There has been an effort on the part of the legislature to clear up any obscurity which arose in the interpretation of the 1954 Act. The ambiguity of the former section 69 is removed by the use of "spouse" instead of the awkward phrase, "the wife or husband as the case may be"; the latter could be said not to relate to the husband or wife making the application. The type of consent required in this and other sections is now expressly stated to be "written".

Similarly, section 64 is much more satisfactory than section 70 which it replaces. Particular provision is made for the consents required where a child is born in wedlock and where it is born out of wedlock, whereas the former section gave a general rule for infants under twenty-one followed by a "notwithstanding" subsection in which an exception was made in the case of illegitimate children. Further, in the case of children born out of wedlock provision is made for the cancellation of that consent by the mother or father by a document in writing to that effect made within twenty-one days after consent is given and verified by an affidavit of execution.

This raises the question of the right to cancel a consent once given. This is a problem that in recent years has resulted in much litigation and has caused distress to the parties involved. At common law, parental rights were considered to be inalienable, and until 1958 the relevant legislation contained no provisions which could be said to have changed the law in this regard. Thus in *Re Baby Duffell*,<sup>4</sup> the Supreme Court of Canada respected the wishes of the mother of an illegitimate child by allowing her to withdraw a consent to adoption given by her in writing and requiring that the child be returned to her. Cartwright J. stated that as the law then stood the wishes of the mother must be given effect to unless very serious and important reasons require that, having regard to the child's welfare, they must be disregarded.<sup>5</sup> It is submitted that the court paid lip service only to any consideration of the welfare of the child in disregarding the fact that the child had been in the custody of the adoptive parents from shortly after birth until the determination of this appeal over two years later. This case was followed in the Supreme Court of Canada in *Hepton v. Maat*<sup>6</sup> and in *Re Agar*.<sup>7</sup> The words of Rand J. in the former case illustrate the reluctance the courts had to interfere with parental rights. In agreeing with the view that *prima facie* the natural parents are entitled to custody, he concluded:

The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility—as if, for example, he were a homeless orphan wandering at large.<sup>8</sup>

<sup>4</sup> [1950] S.C.R. 737.

<sup>5</sup> *Ibid.* p. 746.

<sup>6</sup> [1957] S.C.R. 606.

<sup>7</sup> [1958] S.C.R. 52, 55.

<sup>8</sup> *Supra*, footnote 6 at p. 607.

Section 64(6) provides that the consent can be withdrawn only if, having regard to all the circumstances of the case, the court is satisfied that it is in the best interests of the child that the consent be withdrawn. This effects a statutory reversal of the matters which are to be the basis of the court's decision. The welfare of the child is now the primary consideration. Although it is unlikely that this welfare can ever be entirely isolated from the "moral bonds" existing between the child and his natural parent, the policy of the legislation is clear. The near-absolute power of the parent to revoke consent has been replaced by the requirement that a parent wishing to withdraw his consent must satisfy the court of a positive situation, *i.e.*, that the welfare of the child is being served by such withdrawal. In keeping with this approach, the 1958 Act has clarified the circumstances in which a consent can be dispensed with by the court. In section 72(2) of the 1954 legislation we find a vague reference to circumstances in which the consent may "properly" be dispensed with by the court. It is not surprising, in retrospect, that section 64(5) which replaces the old sec.72(2) defines the circumstances in which it is proper to dispense with the consents required under section 64 in the now familiar phrase "if the court is satisfied that it is in the best interests of the child."

It is curious to note that the court may now dispense with the consent of a children's aid society, but not with the consent of the spouse of the person making application for adoption.<sup>9</sup> Under the 1954 legislation, if the court was of the opinion that it was "proper",<sup>10</sup> it could dispense with any consent but that required of a children's aid society by section 70(3). In effect, the new legislation acknowledges that the interest of the child cannot be served by an adoption to which the spouse of the adopting parent does not consent. Further, it denies to the children's aid society the right to prevent an adoption by refusing consent where the court considers it in the best interests of the child that it dispense with such consent. It must be noted that although the discussion of withdrawal of consent has been limited to consents given by parents, section 64(6) likewise refers to all consents required by section 64. It would, perhaps, have been better if this subsection had referred to consents required by this *part* instead of *section*, as no provision is made for the withdrawal of consent given by the spouse of the adopting parent. It is unnecessary, however, to speculate as to whether any such right was intended to be given. This matter, if it arose, would be adequately covered by section 67(b) which requires the court to be satisfied, before an adoption order is made, that it is in the best interests of the child. Clearly, except in special circumstances similar to those required by section 63(1), the desire of the spouse to withdraw consent would militate against the making of an adoption order and would result in a revocation of consent quite as effective as if the consent were withdrawn under section 64(6).

<sup>9</sup> The Child Welfare Amendment Act, 1958 (Ont.), c. 11, s. 64(5).

<sup>10</sup> The Child Welfare Amendment Act, 1954 (Ont.), c. 8, s. 72(2).

The legislature has not entirely disregarded the position of the natural parents. There is still reserved to the mother, and to the father if the child resides with and is maintained by the father, the absolute right to cancel such consent within twenty-one days after it was given.<sup>11</sup> Also, the same section requires that the consent of the mother of an illegitimate child must be given after the child is seven days old. This is intended to allow her time to consider her decision. Too often cases have arisen in which unscrupulous and even well-meaning persons had prevailed upon the unfortunate mother to give a consent which she claimed to withdraw on further consideration. It is questionable whether seven days is an adequate allowance; however, the position of the adopting parents also requires consideration.

Before leaving the matter of consent, a comment should be made upon the unfavourable effects that the publicity, which has been given cases where consent has been revoked, has had upon prospective adoptive parents. Some effort should be made to publicize the remedial steps taken by the legislature to make the position of the adoptive parent more secure. In order to ensure the effectiveness of Ontario's adoption programme, it is not enough to wait until an application is made to explain the legal implications of an adoption order.

Reference has already been made to section 67 which reproduces in shorter form the conditions precedent to the making of an adoption order which were set out in section 75 of the 1954 Act. The new section omits, however, subsection (3) which required that the court be satisfied that no reward was involved in the making of the adoption. The legislature was quite justified in making this change as the matter of payments for procuring adoptions is adequately covered by the penal section.<sup>12</sup> It is also in keeping with the general view of the new act that the welfare of the child is the paramount consideration. Thus, an adoption order now might issue as being in the best interests of the child in the particular circumstances although some reward was involved.

The most striking and far-reaching in their effect have been the changes brought about by section 74. An English periodical has expressed the view that "adoption is a fiction played by adults, who pretend that a child, generally not theirs, is theirs."<sup>13</sup> Such a statement assumes that *prima facie* adopted children are not the children of the adoptive parents because they were not born to the adoptive parents, but the legislature has reversed this premise, so that the adults no longer have to "pretend". For years it has been a social fact that a child adopted into a home is a child of that

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<sup>11</sup> The Child Welfare Amendment Act, 1958 (Ont.), c. 11, s. 64(2). This subsection is subject to s. 64(5) which allows the court to dispense with consents required by s. 64.

<sup>12</sup> *Ibid.* s. 78.

<sup>13</sup> (1957), 223 L.T. at p. 284.

family so far as the child and parents were concerned. Indeed, sociologists and other persons active in child welfare speak of furnishing a child with the tender loving care and security which can be provided best in a healthy family environment, and they look on a proper adoption as providing an unwanted child with a better opportunity to mature happily. In Ontario, the legal effect of adoption did not match the social effect until the passage of the 1958 legislation, which instituted a simple all-embracing approach to the position of an adopted child, and kept in sight the welfare of the child as the paramount criterion.

This approach was well-summarized by Chief Justice McRuer in the important case of *Re Blackwell*<sup>14</sup> where his Lordship said:

This Act did not purport to declare rights but created a legal relationship from which legal rights and legal responsibilities flowed and likewise it destroyed the legal relationship arising out of the natural birth of the child.

Prior to this statement, Chief Justice McRuer set out an exhaustive account of the previous legislation and case law in several common law jurisdictions. In general, the trend of the legislation was to cause the adopted child either to be deemed in law the child born in lawful wedlock of the adopting parent except in certain circumstances,<sup>15</sup> or to be accorded the same rights, upon the intestacy of his adopting parent, in the property of that parent as a child born in lawful wedlock.<sup>16</sup> In short, the adopted child either was deemed, with express reservations, to be a legitimate child or was considered to have a separate status and to possess only certain itemized rights similar to those held by legitimate children. In Ontario such an enumeration of rights and obligations has been abolished. Subsections (1), (2), and (3) of section 74 confer on the adopted child the status of a legitimate offspring of the adopting parent. The sole exception to these "blanket" provisions is section 74(4), which deals with the laws relating to incest and to consanguinity in marriage. A recent English case, *Re Marshall*,<sup>17</sup> may be contrasted with *Re Blackwell*. An important point in *Re Marshall* was that the date of distribution of the testator's estate in relation to the adopted child fell before the passing of the 1957 British Columbia legislation, and the court applied the law in force at the time of the testator's death. This law of 1945, both in British Columbia and England, did not give the adopted child the succession rights of a legitimate child, and the court further held that *prima facie* adopted children were not within the class of "child" as intended by the testator. In other words, by the law in force at the time of the death of the deceased, the testator, in using the word "child", was *prima facie* taken to refer only to a child born in lawful wedlock, so that adopted children were excluded along with illegitimate children.<sup>18</sup>

<sup>14</sup> [1959] O.R. 377 at p. 401.

<sup>15</sup> 1895 (N.Z.) c. 8, s. 7.

<sup>16</sup> Adoption Act, R.S.O. 1927, c. 53, s. 6(2).

<sup>17</sup> [1957] 1 Ch. 507 (C.A.).

<sup>18</sup> *Ibid.* at p. 523.

In *Re Blackwell*, Chief Justice McRuer in refusing to accept a submission that the intention of the testator was similarly to be construed, indicated that the words "for all purposes" in section 74 fully covered all situations.<sup>19</sup> In this case, the point of distribution fell after January 1, 1959, with the result that the 1958 legislation applied so as to give the adopted child a legal "rebirth" as of January 1, 1959.<sup>20</sup> Once a case falls to be decided under the new enactment, the "rebirth" becomes retroactive from the operation of the word "heretofore" in section 75 and eliminates any discussion regarding the intention of the testator. Thus sections 74(1) and 74(2) form all-embracing clauses which transform an adopted child into the legal child of his adoptive parents, and section 74(3) seeks to clarify this even further by indicating that 74(1) and (2) shall determine the relationship among all persons other than the parent and child.

Some interesting points on this aspect of the 1958 legislation deserve short comment. An adopted child's former dual capacity, whereby he was essentially still the child of his natural parents while being the child of the adopters for certain purposes, no longer exists. He loses, for example, all right to the property of his natural parents, by way of intestate succession. Compensation for this loss is the achievement of complete legal membership in his new family. This is desirable as his new "single" position eliminates confusion and tends to stabilize the child emotionally since he will not be torn between two sets of parents as much as he was under the old legislation.

It is well-established that a legitimate child receives his domicile of origin from his father, and an illegitimate child receives his domicile of origin from his mother.<sup>21</sup> However, if a child experiences a "legal rebirth" and becomes the legal child of his adoptive parents, it is submitted that he now takes his domicile of origin from his adoptive parents.<sup>22</sup> This result is in line with the intention of the legislation in cutting off all relationship with the natural parents, and is covered in the words "for all purposes".<sup>23</sup>

It is to be noted that the Ontario legislation makes no mention of other Acts in Ontario which distinguish between persons related by adoption and persons who are not. In the 1956 legislation of British Columbia,<sup>24</sup> subsections (1), (2), (3), and (4) of section 9 are very similar in wording and effect to the corresponding subsections of section 74 of the Ontario legislation, but subsection (5) states:

This section is to be read subject to the provisions of any Act which distinguishes in any way between persons related by adoption and persons not so related.

<sup>19</sup> [1959] O.R. 377 at p. 403.

<sup>20</sup> *Ibid.* at p. 404.

<sup>21</sup> *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441.

<sup>22</sup> See Article 4(1) (iii) of the Code of the Law of Domicile—First Report of the Private International Law Committee, Cmd. 9068, App. A.

<sup>23</sup> The Child Welfare Amendment Act, 1958 (Ont.), c. 11, s. 74.

<sup>24</sup> 1956 (B.C.) c. 2, consolidated in 1957 (B.C.), c. 1.

An example of where this might arise in Ontario is found in section 158(2) of the Insurance Act,<sup>25</sup> which provides that "adopted children", "children of adopted children", and "grandchildren" are included as preferred beneficiaries. Mr. G. D. Kennedy points out that this apparently excludes adopted children of children and adopted children of adopted children.<sup>26</sup> The fact that the British Columbia legislature felt it necessary to include such an express exception is an indication that if such an exception were absent, the new law regarding adopted children would override and alter the provisions of other Acts. Further, since the Ontario legislation emphasizes that, "for all purposes . . ." an adopted child is legitimate, and that the relationship to one another of all persons "be determined by this consideration",<sup>27</sup> it would seem that the words of the Insurance Act are rendered redundant and that the previously excluded persons would now come in as "grandchildren". A problem of statutory interpretation arises on this point since either the Insurance Act or the Child Welfare Act might be characterized as a particular enactment and so take precedence.<sup>28</sup> It is submitted, however, in view of the ambiguity, that the Child Welfare Act should override the Insurance Act on this question.<sup>29</sup>

Of interest is the ingenious use made recently of legislation which has provisions regarding the status of an adopted child similar to those in the Ontario legislation. In *Re X*,<sup>30</sup> a case tried before the British Columbia Supreme Court in 1957, an unmarried mother sought to adopt her illegitimate child. The British Columbia Adoption Act<sup>31</sup> contains the following provision:

- 4 (1) Any adult unmarried person, or any adult husband and his adult wife together, may apply to adopt a child under the provisions of this Act.
- (2) In like manner, an adult husband and his wife together may apply to adopt the child of either of them, whether legitimate or illegitimate.
- (3) An adult husband or an adult wife may individually apply to adopt the child of either of them.

Strictly, the applicant was not an adult "wife", but Clyne J. felt that he should interpret the Act liberally and permit the adoption of the child in order to follow the intention of the Act which was to provide for the welfare of the child. However, the learned judge was disquieted by the potential danger to the institution of marriage if the adoption legislation were used often as a method of legitima-

<sup>25</sup> R.S.O., 1950, c. 183.

<sup>26</sup> (1957-58), 12 U. of T. L.J. 296 at p. 298.

<sup>27</sup> The Child Welfare Amendment Act, 1958 (Ont.), c. 11, ss. 74(1) and 74(3).

<sup>28</sup> Halsbury's Laws of England, Second edition, Vol. 31 at p. 484, No. 604: ". . . Where two co-ordinate sections are apparently inconsistent, an effort must be made to reconcile them. If this is impossible, the latter will generally override the earlier; but a particular enactment, wherever found, must be construed strictly as against a general provision."

<sup>29</sup> *Ibid.*

<sup>30</sup> (1958), 12 D.L.R. (2d) 367 (B.C.).

<sup>31</sup> 1957 (B.C.) c. 1.

tion. No similar section exists in Ontario, but section 63(1)(c) should cover the situation since by this section the presumption would be firmly against an adoption by an unmarried applicant. However, if such a situation were allowed in Ontario, an interesting problem could arise. Section 1 of The Legitimation Act<sup>32</sup> provides that if the parents of an illegitimate child marry each other after his birth, the child will be deemed legitimate from the date of birth, but section 2 qualifies this by saying that if either of the parents was married at the time of birth, and legitimation subsequently takes place, the child may not compete with the lawful children by the first marriage of that parent. However, where A is married to B and causes an illegitimate child D to be born to C, C might adopt D with the result that D becomes C's lawful child. When A marries C, it is submitted that the words "for all purposes" in section 74(1) and the words of section 74(3)<sup>33</sup> could cause C's lawful child to become A's lawful child apart from the operation of the Legitimation Act.<sup>34</sup> Further, it is submitted that this situation would enable D to compete on A's intestacy with the lawful children of A's first marriage, contrary to the express words of section 2 of the Legitimation Act. Although the courts would undoubtedly prevent any abuses which would tend to impair the institution of marriage, an amendment to remove any ambiguity in section 63 could eliminate the possibility of difficulties arising, at least with respect to future Ontario adoptions.

Section 75, to which reference has already been made in discussing the *Blackwell* decision, is an improvement over the former section 78 which it replaces, as it is wider in scope and includes in its operation an adoption made in any country, instead of merely an adoption made in another province of Canada. Despite the section's apparent clarity, it raises a question of great importance in deciding what persons, in the wording of the section, "shall be governed by this Part". More precisely, Ontario's built-in conflict rule section does not settle the problem of foreign adoptions which are not effected by an adoption "order". It is possible for a person to be legally adopted under the laws of some other jurisdiction and yet not have the benefits of the subsections of section 74. These subsections depend upon an adoption order being made for their operation. What should be the status in Ontario of a person who is legally adopted in the eyes of a foreign law under an adoption agreement entered into according to the law of that jurisdiction? There may be no machinery, moreover, for obtaining a court order in that country. The position in Ontario where a *de facto* adoption had been effected before the advent of the legislation providing for the legal formal-

<sup>32</sup> R.S.O., 1950, c. 203, s. 1.

<sup>33</sup> The Child Welfare Amendment Act, 1958 (Ont.), c. 11.

<sup>34</sup> This would definitely seem to be the position where such an adoption and the subsequent remarriage occurred prior to January 1, 1959. See *Re Blackwell*, p. 402.

ties is obscure,<sup>35</sup> but the better view is that the benefits of this part would not be attracted by such a relationship. It is questionable whether such a strict view should prevail when an Ontario court is considering a foreign adoption. Reference to the adoption order being made should be equated with the simple requirement that there be a legal adoption in the eyes of the foreign law and not with the necessity of a particular procedure. It is submitted that an amendment similar to the New Zealand legislation of 1955 would be in order. There provision is made for recognition of adoptions for the purpose of attaching the incidents of a child born in lawful wedlock, if they are legally valid according to the law of the place where made, if the effect of the adoption was to give the adoptive parent rights over the child superior to those of the natural parent, and, further, if the adoptive parent had rights equal to or superior to those of the natural parent on the intestacy of the child. In addition, specific provision is made for certain preferred adoption jurisdictions to whose adoptions the provisions are specifically said to be applicable.<sup>36</sup>

While on the matter of conflicts and jurisdiction, it should be pointed out that section 62 provides that the court may make an order for the adoption of any child resident in Ontario upon application being made in the prescribed manner by any person domiciled in Canada and resident in Ontario.<sup>37</sup> The interesting point here is that we find one of the few legislative references to a "Canadian" domicile. We would suggest that the insertion of the word "anywhere", making the particular words of the section read "by any person domiciled *anywhere* in Canada", would avoid the rather theoretical question of whether there is a distinct Canadian domicile. Such an amendment would necessitate proof by the applicant of the acquisition of a domicile in a particular province or territory of Canada. Thus the applicant would not be able to rely upon a general intention to establish his domicile somewhere in Canada; the *animus* and *factum* necessary for the acquisition of a domicile of choice would not only have to concur in time, but also have to refer to the same territorial division.

In any review of legislation it is usually considered to be the prerogative of the reviewer to find faults and generally to criticize the act of Parliament. This, however, is not an occasion for the exercise of that prerogative. Aside from the rather technical criticisms we have already voiced, it can be said that the legislature, to

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<sup>35</sup> *In Re McCleneghan Estate*, [1954] O.W.N. 148; *Jackson v. Jackson*, [1942] O.W.N. 145; *Re Miller*, [1955] 3 D.L.R. 404 (Ont.).

<sup>36</sup> Adoption Act, 1955 (N.Z.), c. 93, s. 17.

<sup>37</sup> Prior to 1954, jurisdiction depended upon the applicant's being domiciled in Ontario: R.S.O., 1950, c. 7, s. 2.

use the words of Stephen J. has attained "a degree of precision which a person reading in bad faith cannot misunderstand".<sup>38</sup> This should not be construed as a bouquet to the pioneering spirit of the Ontario legislature, but rather as a commendation of its willingness to follow whole-heartedly the good example of other legislatures, notably those of New Zealand and British Columbia.<sup>39</sup> It should also be noted that no small part of the credit for these advances on the Canadian scene is due to the efforts of Mr. Gilbert Kennedy whose proposals<sup>40</sup> have been incorporated in the present legislation.

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<sup>38</sup> *In re Castioni*, [1891] 1 Q.B. 149 at p. 167.

<sup>39</sup> *Re Blackwell* at p. 402.

<sup>40</sup> *e.g.*, *The Legal Effects of Adoption* (1955), 33 Can. Bar Rev. at p. 751; *Adoption in the Conflict of Laws* (1956), 34 Can. Bar Rev. at p. 507.