

CANADA / JUDGMENT

Children's Aid Society v. Lyttle

[1973] SCR 568

COURT

Supreme Court of Canada

DECIDED

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Children's Aid Society v. Lyttle

Collection

Supreme Court Judgments

Date

1973-02-28

Report

[1973] SCR 568

Judges

Fauteux, Joseph Honoré Gérard; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

Ontario

Subjects

Family law

Decision Content

Supreme Court of Canada

Children's Aid Society v. Lyttle, [1973] S.C.R. 568

Date: 1973-02-28

Children's Aid Society of Metropolitan Toronto (Plaintiff) Appellant;

and

Ronald James Lyttle, Sr. (Defendant) Respondent.

1972: November 15, 16; 1973: February 28.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Infants—Custody—Illegitimate child registered under father's name—Maintained by father—Placed with Children's Aid Society by mother without father's knowledge—Crown wardship proceedings—No notice to father—Notice of intention to adopt given by prospective adopting parents—Time for appealing wardship order expired—Order void as to father—Father entitled to assert such nullity in custody proceedings—Adoption proceedings stayed—The Child Welfare Act, 1965 (Ont.), c. 14, ss. 24(4), 31(3) [en. 1968-69, c. 9, s. 1(2)]

The respondent was the father of an illegitimate child registered in his name whose mother left the respondent some two years after the child's birth. She took the infant with her, lived with another man and had another child. During the cohabitation the mother and child had been fully supported by the respondent. After the mother left, he continued to evince his willingness and ability to support the child but the mother refused that support and concealed her whereabouts.

Unknown to the respondent, she went to the appellant children's aid society and had the children admitted to care. An application was made by the society for an order making the two children wards of the Crown under s. 19(1)(b)(iii) of The Child Welfare Act, 1965 (Ont.), c. 14. No notice was given to the respondent. The mother later appeared before a judge and requested that the children "be made the wards of the Crown so that they may be considered for adoption" and the judge was informed that the society was "supporting [the] request for Crown wardship of the children". An order was made accordingly and a notice of intention to adopt was given by the persons to whom the children had been entrusted.

The respondent stated that it was only a little more than six months later that he learned of his son having been given away to the society by the mother. He was told that a wardship order had been made, that more than six months had elapsed and there was nothing he could do about it. In order to prevent an adoption order being made, he gave notice of an application to the Supreme Court of Ontario: 1. for an order granting him custody of his son; 2. for an order prohibiting the society and its director from consenting to his son's adoption; 3. in the alternative, for an order compelling the society to disclose particulars of the persons seeking to adopt his son or compelling these persons and the society to give him notice of any adoption proceedings.

This application was dismissed "without prejudice to the applicant to take whatever steps he may deem appropriate to question the order". On appeal, this judgment was varied to provide for notice to the present respondent of all adoption proceedings with the right of full participation. The society's appeal from that order was by leave of this Court.

Held (Abbott, Judson, Hall and Pigeon JJ. dissenting in part): The appeal should be allowed and the order of the Court of Appeal varied to provide that the custody application proceed to a hearing and that the adoption proceedings be stayed pending final disposition and abide the result thereof.

Per Fauteux C.J. and Martland, Ritchie, Spence and Laskin JJ.: Section 31(3) of The Child Welfare Act, 1965 (Ont.), c. 14, as enacted by 1968-69 (Ont.), c. 9, s. 1, provides that “Where a child has been committed as a ward of the Crown, the order...shall...remain in effect and the Crown wardship shall not be terminated where the child has been placed in the home of a person who has given written notice of his intention to adopt the child and the child is residing in the home, until an adoption order is made...”. The Crown wardship order which underlies the operation of this provision must be a valid one, that is, of a court or judge having authority to make it.

Section 24(4) enjoins the presiding judge from hearing or disposing of the wardship application “until he is satisfied that the parent or other person having actual custody...and the municipality... have had reasonable notice of the hearing or that every reasonable effort has been made in the opinion of the judge to cause them to be notified”. The effect of s.24(4) was to make the want of notice here a fatal defect and hence to make the wardship order a nullity so far as the father was concerned. Alternatively, a requirement of notice arose in the circumstances of this case, and the failure to give it or to make reasonable efforts to that end brought the same result; the Crown wardship order was void as to the father. The initiation of the adoption proceedings did not preclude a direct attack upon the wardship order and the father was entitled to assert the nullity of that order in the custody proceedings he had taken.

Although the legislative policy in protection of adopting parents, reflected in s. 31(3), goes a long way in clearing their claim to a Crown ward, their interest at the point of a mere intention to adopt was not so superior to that of a parent in the father’s position in this case to warrant denial to him of an opportunity to prove his fitness for custody.

Per Abbott, Judson, Hall and Pigeon JJ. (dissenting in part): The facts of this case did not justify any departure from the usual rules followed in adoption proceedings and make it proper to turn them into an alternative method of challenging the wardship order. Any remedy to which the father might be entitled was to be sought in attacking the wardship order and such attack must be made directly and explicitly, not inferentially.

Accordingly, the adoption proceedings should be stayed for a period of 30 days to allow the respondent an opportunity to launch an attack against the wardship order.

[Mugford v. Children’s Aid Society of Ottawa, [1969] S.C.R. 641; Prospective Adoptive Parents v. Mugford, [1970] S.C.R. 261; Moshos v. Minister of Manpower and Immigration, [1969] S.C.R. 886; Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec, [1953] 2 S.C.R. 140; Perepolkin v. Superintendent of Child Welfare (1957), 11 D.L.R. (2d) 417; R. v. Sanders, [1968] 4 C.C.C. 156, affirmed [1970] S.C.R. 109, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], varying a judgment of Hartt J. Appeal allowed, Abbott, Judson, Hall and Pigeon JJ. dissenting in part. W.J. Smith, Q.C., and H.D. Wilkins for the appellant.

B.M. Haines, for the respondent.

The judgment of Fauteux C.J. and Martland, Ritchie, Spence and Laskin JJ. was delivered by

LASKIN J.—I have had the advantage of reading the reasons for judgment prepared by my brother Pigeon and accept his statement of the facts in their bearing on the issues in this appeal. The preliminary question which lies at the heart of this case is whether the failure to give the father notice of the wardship proceedings made the Crown wardship order vulnerable. If not, then the father cannot interrupt the adoption proceedings in the manner that he has attempted. If the answer is “yes”—and that is my view—the further question arises even in that event whether there is any remedy open to him through the present proceedings when the time prescribed by statute for appealing against the wardship order has passed and when, moreover, there is the statutory protection of a Crown wardship order under s. 31(3) of The Child Welfare Act, 1965 (Ont.), c. 14, as enacted by 1968-69 (Ont.), c. 9, s. 1, forbidding its termination when, as here, adoption proceedings have been initiated, “until an adoption order is made”. Although the statute does not spell out the position if an adoption order is not made, it appears to me to be a reasonable conclusion that a parent may then apply under s. 31(1) of the Act, also enacted by 1968-69 (Ont.), c. 9, s. 1, for an order terminating the wardship.

In the present case, the adoption proceedings had been properly set in motion within s. 31(3), and pursuant to ss. 70 and 72, before the father learned that his child had been made a ward of the Crown. By that time, the period provided for appealing against the Crown wardship order had passed and there was no express provision in the Act for the father’s participation in the adoption proceedings. He had recourse to an application for custody under The Infants Act, R.S.O. 1960, c. 187, and, concurrently, sought an order to prohibit consent by the Director of Child Welfare to the adoption of his child (the Director’s consent being alone required under s. 73(3) of the Act in the case of the adoption of Crown wards) or, alternatively, an order compelling disclosure of the identity of the adopting parents or compelling notice to him of the adoption proceedings.

The dilemma confronting the Courts below and this Court is whether the statutory policy reflected in s. 31(3) should prevail in its literal terms, with the result that the father would have no status to be heard in the adoption proceedings and, indeed, no right to custody under The Infants Act, or whether the Court should give an equitable reading to the adoption provisions of The Child Welfare Act so as to allow the father to come in at that stage when he was ignored in the Crown wardship proceedings, or whether the vulnerability of the wardship proceedings, by reason of the failure to give him notice thereof, entitles him to make a collateral attack upon the wardship order with the consequential result, if successful, of aborting the adoption proceedings and clearing the way to have his application for custody considered on the merits.

Hartt J., before whom the father's application came, dismissed it without written reasons, but the formal order of dismissal was without prejudice to any steps the father might deem appropriate to question the Crown wardship order. I take it that Hartt J. rejected collateral attack upon that order and applied s. 31(3) strictly to foreclose any participation of the father in the adoption proceedings. Collateral attack was also rejected by the Ontario Court of Appeal which, speaking through Aylesworth J.A., held that (1) there was no justification, in view of want of notice to the father, for making the Crown wardship order; (2) the father could apply to terminate the wardship if an adoption order was refused (and, apparently, only if it was refused); and (3) to clear the way for that possibility, the Court, acting under The Infants Act, as well as taking into consideration the best interests of the child pursuant to s. 76(b) of The Child Welfare Act, would make an order requiring notice to be given to the father of all proceedings in connection with the adoption and entitling him to participate fully therein. In the result, the appeal was dismissed subject to variation of the order of Hartt J. in accordance with the Court of Appeal's conclusion as to notice and participation.

The history of the relevant provisions of The Child Welfare Act, and especially of s. 31 and of s. 35 (repealed by 1968-69 (Ont.), c. 9, s. 2, following the judgment of this Court in *Mugford v. Children's Aid Society of Ottawa*[2]), shows the interconnection created by the Legislature between Crown wardship proceedings and adoption proceedings respecting Crown wards. Section 31(3), so far as material here, shows this clearly in the following words thereof:

Where a child has been committed as a ward of the Crown, the order...shall...remain in effect and the Crown wardship shall not be terminated where the child has been placed in the home of a person who has given written notice of his intention to adopt the child and the child is residing in the home, until an adoption order is made...

In my view, the Crown wardship order which underlies the operation of this provision must be a valid one, that is, of a court or judge having authority to make it. What must be determined, therefore, is whether the failure to give notice to the father of the Crown wardship proceedings tainted the jurisdiction of the Court which granted the order, and, if so, whether the order was a nullity with the consequent nullification of the dependent adoption proceedings, of which cognizance could be taken on the father's application herein.

I am of the opinion, as was the Ontario Court of Appeal, that the father in this case was entitled to notice of the wardship proceedings. This is so either under ss. 19(1)(e) (definition of "parent") and 24(4) or as a matter of common law entitlement. The record of the wardship proceedings is bare of any reference to the father or of any effort to notify him of the pending proceedings. Yet it shows that the child was registered at birth in the name of the father who thus admitted paternity.

Section 24(4) enjoins the presiding judge from hearing or disposing of the wardship application "until he is satisfied that the parent or other person having actual custody...and the municipality... have had reasonable notice of the hearing or that every reasonable effort has been made in the opinion of the judge to cause them to be notified". I do not think that the disjunctive "or" in this

case is a sufficient bar to the statutory entitlement of one parent to notice simply because it has been given to the other or given to a person, not being a parent, who has actual custody of the child. If a parent (and, in accordance with s. 27(j) of The Interpretation Act, now R.S.O. 1970, c. 225, this word in s. 24(4) includes either or both parents) is known or is probably alive, he or she is entitled to notice or to have reasonable efforts made to that end.

What s. 24(4) does is to ensure that notice will be given or reasonable efforts made to give it to persons having a parental or custodial interest in the child in respect of whom wardship proceedings are instituted. The definition of “parent” at the time the proceedings herein were taken is that found in s. 19(1)(e) of the Act of 1965 (there has since been a revised definition which even more clearly covers the father in this case: see 1972 (Ont.), c. 109, s. 2) which reads as follows:

“parent” means a person who is under a legal duty to provide for a child, or a guardian or a person standing in loco parentis to a child other than a person appointed for the purpose under this Act.

The current Criminal Code, s. 197(1), spells out a legal duty, and such a duty is also envisaged by s. 57(2) of The Child Welfare Act, 1965, which, in respect of affiliation proceedings, provides for the arrest of a putative father who is about to quit the territorial jurisdiction of the Court so as to evade his obligations in respect of the child. I cannot accept a construction of s. 24(4) that would spell compliance by notification to one parent, or to a non-parent in whose custody the child happens to be, when both parents are known or are probably alive but they may be living apart or are divorced without renunciation of claims to custody of their child.

Moreover, if s. 24(4) be regarded as requiring a literal interpretation, I would not construe it to exclude the right of a parent to notice as a party interested in the fate of his child where the parent's existence is known or is probable according to available records or to information of other interested parties. I would regard it as a duty of the presiding judge to make the inquiry. The record in the present case as to the wardship proceedings, if it is a complete account of the course of the inquiry leading to the Crown wardship order, is frighteningly sparse. I need no statutory warrant for applying here an elementary principle of natural justice. It is so deeply rooted in our law as to require express words of exclusion before a person with an interest in proceedings governed by statute may be shorn of it without an opportunity to defend it. Failure to give notice where there is provision therefor in statutory judicial proceedings or where it is imported as a requisite in such proceedings has been held to abort the decision questioned for want of notice: cf. *Moshos v. Minister of Manpower and Immigration*[3], and see *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec*[4]. In these two cited cases, the impugned decisions were attacked directly, in the one case by appeal and in the other by prohibition proceedings with a claim of nullity. It appears that Hartt J. had certiorari to quash in mind when his formal order was without prejudice to any steps the father might take to question the wardship order. I do not consider its appropriateness here when the issues, as they arise under the order in appeal and under the application brought by the father, are different. Nor need I concern myself with jurisdictional error in relation to certiorari purposes alone in assessing the vulnerability of the Crown wardship order in the present case. The Child Welfare

Act itself speaks clearly enough to me in its s. 24(4) to make the want of notice here a fatal defect and hence to make the Crown wardship order a nullity so far as the father is concerned.

Alternatively, a requirement of notice arose in the circumstances of this case, and the failure to give it or to make reasonable efforts to that end brings the same result; the Crown wardship order is void as to the father.

Of course, to say that an order is a nullity has no effect per se unless proceedings are taken, by a person with standing, to have it so declared or quashed or set aside or otherwise superseded by relief against its operation. As has been aptly said, "it makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy": see Wade, "Unlawful Administrative Action: Void or Voidable" (1967), 83 Law Q. Rev. 499, at p. 512. What concerns me here is whether it is not too late to question the Crown wardship order and whether, in any event, it can be questioned in proceedings which do not attack it directly. I do not refer to timely appeal or review when I speak of lateness because, in my opinion, a nullity gains no validity merely because time has run in respect of procedures prescribed for challenging it. By lateness here I have in mind supervening events which may reasonably be taken to preclude a direct or a collateral attack. I postulate the situation of an adoption order having been made before the father learns of the fate of his child, but with all the parties involved in the wardship and adoption proceedings having acted in good faith. There may be doubt in such a case whether there would be any way in which the nullity of the wardship order as to the father alone could be pressed to permit him to seek to reclaim his child. It may be that the child's status would have been altered beyond recall unless it became again a child in need of protection and hence subject to wardship proceedings.

That, of course, is not the present case. There has been no conclusion to the adoption proceedings; indeed, so far as appears from the record, the required consent of the Director of Child Welfare has not yet been given, nor has any hearing taken place. The child is still a Crown ward under an order which is a nullity as against the father. I do not regard the mere initiation of adoption proceedings as alone foreclosing the father. The pertinent inquiry is whether he may assert the nullity in the proceedings he has taken.

I read the reasons of the Ontario Court of Appeal as indicating an unwillingness to allow a collateral attack upon the Crown wardship order even though that Court regards the order as unjustifiable in the circumstances. Another reading of those reasons, especially in the light of the order made by the Ontario Court of Appeal, is that the initiation of the adoption proceedings has so overlaid the Crown wardship order as to leave it beyond attack until the adoption proceedings are terminated favourably to the father. On the other hand, my brother Pigeon has proposed an order that does not take this position. Rather, it is based on the view that the initiation of the adoption proceedings does not preclude a direct attack upon the Crown wardship order; and hence a stay of the adoption proceedings is proposed to enable the father to challenge the order.

I adopt this position whose logic seems to me to carry beyond the proposal for a stay of the adoption proceedings. In my view, the father is entitled to assert the nullity of the Crown wardship order in the custody proceedings that he has brought. The nullity of the order is as to him and him alone; and since it stands in the way of his assertion of a parental claim which it has purported to wipe out, multiplicity of proceedings will be avoided if he is permitted to make his claim on the footing that an order which is null as to him should not be allowed to obstruct him.

This is not a case of relying on another's position as a basis for asserting one's own. It is one of pressing, before a superior court of competent jurisdiction, an interest or claim against which the only defence to its entertainment is an order in defeasance which is, however, void as to the claimant. I see only a technical difficulty in any refusal to hear the father's application on the merits. All interested parties can be brought before the Court; that is, the child, the mother and the Children's Aid Society. The interest of the adopting parents does not come into play when the Crown wardship order upon which their interest depended turns out to be a nullity against the father. It is difficult, if not impossible, in a case of this kind, involving the welfare of a child, to make a decision that will satisfy the conflicting interests of the various parties. Although the Courts as well as the Legislature hold the best interests of the child to be paramount, the determination of where those best interests lie cannot be an arbitrary one, foreclosing a parent, not shown to be disqualified, from an opportunity to show that he will and can serve his child's best interests. The legislative policy in protection of adopting parents, reflected in s. 31(3), is a commendable one, but although it goes a long way in clearing their claim to a Crown ward, their interest at the point of a mere intention to adopt is not so superior to that of a parent in the father's position in this case to warrant denial to him of an opportunity to prove his fitness for custody.

I would, accordingly, allow the appeal without costs, and would vary the order of the Ontario Court of Appeal to provide that the appeal from the order of Hartt J. be allowed and that the custody application proceed to a hearing. It follows too that I would direct that the adoption proceedings be stayed pending the final disposition of the custody proceedings and to abide the result thereof.

The judgment of Abbott, Judson, Hall and Pigeon JJ. was delivered by

PIGEON J. (dissenting in part)—The respondent, Ronald James Lyttle, is the father of a boy born December 13, 1965, of one Molly Cox, a 15-year-old girl with whom he was then living as man and wife. He formally acknowledged his paternity by having the boy registered as bearing his name on December 24, 1965. Two years later, there was a separation. The mother took the infant with her, lived with another man and had another child, a girl. During the cohabitation the mother and child had been fully supported by the respondent. After the mother left, he continued to evince his willingness and ability to support the child but the mother refused that support and concealed her whereabouts.

In 1970, unknown to the respondent, she went to the appellant, The Children's Aid Society of Metropolitan Toronto, and had the children admitted to care on January 22. An application was made by the Society to the Provincial Court (Family Division) for an order making the two children wards of the Crown under s. 19(1)(b)(iii) of The Child Welfare Act, 1965 (the "Act"). No notice was given to the respondent. On March 19 and April 6, 1970, Miss Cox appeared before a judge, she requested that the children "be made the wards of the Crown so that they may be considered for adoption" and the judge was informed that the Society was "supporting Miss Cox's request for Crown wardship of the children". An order was made accordingly and a notice of intention to adopt was given by the persons to whom the children had been entrusted.

The respondent says that it was only a little more than six months later that he learned of his son having been given away to the Society by Miss Cox. He was told that a wardship order had been made, that more than six months had elapsed and there was nothing he could do about it. In order to prevent an adoption order being made, he gave notice on December 22, 1970, of an application to the Supreme Court of Ontario:

1. for an order granting him custody of his son;
2. for an order prohibiting the Society and its director from consenting to his son's adoption;
3. in the alternative, for an order compelling the Society to disclose particulars of the persons seeking to adopt his son or compelling these persons and the Society to give him notice of any adoption proceedings. This application was dismissed by Hartt J. "without prejudice to the applicant to take whatever steps he may deem appropriate to question the order" of Crown wardship.

On appeal, this judgment was varied to provide for notice to the present respondent of all adoption proceedings with the right of full participation. The present appeal from that order is by leave of this Court.

In the oral judgment, Aylesworth J.A., after reciting the facts, referred to subs.3 of s.31 of the Act, as enacted in 1969, which is in the following terms:

- (3) Where a child has been committed as a ward of the Crown, the order under clause c of section 25 shall, subject to section 34, remain in effect and the Crown wardship shall not be terminated where the child has been placed in the home of a person who has given written notice of his intention to adopt the child and the child is residing in the home, until an adoption order is made under Part IV.

He then said:

The subsection precisely fits the facts in the case at Bar. Although it may be suggested that the appellant sat upon whatever rights he had as the putative but actually the acknowledged and recorded father of the infant from the time of the wife's departure with the child from his abode until the end of 1969, a period of some approximate three years, yet it would seem on the material that to a very large extent if not wholly, he was lulled into a position of belief that his

child was adequately cared for, the mother, as I have said, assuring him whenever he caught up with her of the fact, according to her, that the child was well taken care of. On the other hand, it is abundantly plain, that the entire basis or justification for the making of the Crown wardship order which now stands in the appellant's way, was completely lacking at the time the order was made. That is to say, the fact of the position of the appellant with respect to the child and of the appellant's continued desire and ability to maintain that child was not revealed by the mother to the Family Court, nor was there any inquiry so far as the proceedings reveal, by the Family Court as to the parentage on the father's side of this child, or as to the ability or willingness of that male parent to contribute to the support of the child. Thus, it would appear from the material that in fact the child was not a child in need of protection, which is the very basis and the only basis upon which a Crown wardship order may be founded.

It is apparent from the reference I have made to the most recent amendment to s. 31 of the Child Welfare Act that if the County Court Judge or the Supreme Court Judge before whom under s. 70 of the Child Welfare Act the adoption proceedings will be heard, refuses to make the adoption order, the way will be clear for the appellant to apply for termination of the wardship order and presumably for custody of his child.

I have put it precisely in the language I have used, because what we propose to do is to open the way for this appellant to appear and be heard fully in the best interests of the child at any proceedings respecting the current adoption application. It is apparent from the material, as perhaps I have already made clear, that the appellant is able and willing to support the child, admittedly, only one of the many factors which it will be the duty of the tribunal hearing the adoption application to consider in the discharge of that Court's duty under s. 76 of the Child Welfare Act, which is in part that no adoption order will be made unless it is considered in the best interests of the child.

We consider that not only under the Infant's Act have we jurisdiction to make the order I propose be made but that particularly, quite apart from that statute, in the best interests of this infant, we have jurisdiction to make the proposed order and to see that natural justice is done and the proceedings have the appearance of natural justice.

Accordingly, we order that the respondent in this appeal notify the appellant of all proceedings respecting the current application for adoption, and we further order that upon any hearing in those proceedings the appellant be entitled to be present in person and to be represented by counsel with the right of full participation in the proceedings and of making such representations as the appellant may be advised respecting the adoption application and as to whether or not, in the best interests of the child, an order of adoption should be made upon that application.

In the above reasoning the crucial point is the construction of s. 31(3). This was enacted by s. 1 of c. 9 of the Statutes of Ontario 1968-1969, assented to December 17, 1969. Section 2 of the same Act repealed s. 35 of The Child Welfare Act, 1965, which section was the basis of the decisions of this Court dated February 12 and November 17, 1969, in *Mugford v. Children's Aid Society of Ottawa*[5]

and Prospective Adoptive parents v. Mugford[6]. The result of those decisions was to uphold a judgment based on s. 35 restoring to his mother a child who had been made a ward of the Crown and had been entrusted to the care of prospective adoptive parents. It is significant that the amending statute repealed s. 35 which had just been held to authorize the mother's application as against s.31(1) which then contemplated an application for terminating a wardship by a society only. As amended by s. 1 of the 1969 Act, s. 31(1) now reads:

- (1) Subject to subsection 3, where a child has been committed as a ward of the Crown, the children's aid society having the care of the child or a parent of the child may apply to a judge for an order terminating the Crown wardship, and, if the judge is satisfied that the termination is in the best interests of the child, he shall order that the Crown wardship be terminated.

The opening words of this enactment clearly indicate that the new subs. 3 was intended to restrict the right of the Society and of the parents of the child to apply for the termination of a wardship after a notice of intention to adopt has been given. The legislative intent is obviously to protect the prospective adoptive parents from an application which would result in the child being taken away from them. With respect, the result of the construction put upon subs. 3 by the Court of Appeal is to frustrate this legislative intent. In effect, the decision is: The parent cannot under such circumstances apply for the termination of a wardship but we will allow him to oppose any adoption proceedings so as to open the way for such an application. The result of such an order is, not only to disclose the identity of the prospective adoptive parents, but also to enable the parent to invite the judge hearing the application for an adoption order to decline to make it so that the wardship be terminated. In other words, by a different route, the same result as in Mugford might be reached while the legislative changes were clearly intended to make this impossible. No provision of The Infants Act was mentioned to us which would tend to overbear those considerations.

By virtue of s. 73(3) it is for the Director only to give consent to the adoption of a child who is a Crown ward. While s. 76 provides that the Court before making an adoption order must also be satisfied that this will be in the best interests of the child, one must consider that in the case of a Crown ward the parents' duty of care has been taken away from them and entrusted to the Children's Aid Society and the Director. Section 84 makes it clear that, in the discharge of this duty, they are to arrange for adoption of the child if at all possible. To do this efficiently, they have adopted a policy of secrecy towards the natural parents which is fully in keeping with such legislative provisions as that adoption proceedings shall be in chambers (s. 70(2)) and the papers shall be sealed up (s. 79(1)).

It does not appear to me that the facts of this case justify any departure from the usual rules followed in adoption proceedings and make it proper to turn them into an alternative method of challenging the wardship order. In my view, Hartt J. was correct in holding that any remedy to which the father might be entitled was to be sought in attacking the wardship order. Unless this order is set aside, the respondent should not be allowed to interfere with the adoption proceedings. The primary consideration is the welfare of the child. If the respondent can show

that he is able and willing to take care of him properly and not disentitled to custody by virtue of his past conduct or otherwise, then provided he can also succeed in having the wardship order set aside, it could be held that it is better for this boy to be brought up by his own father than by any adoptive parents. However, if the wardship order stands, then the father should not be allowed to have anything to say respecting the selection or fitness of the prospective adoptants.

This does not mean that the provisions of the Act limiting the time within which an appeal or an application to terminate a wardship order may be made, should be given the absolute effect which the Society has been contending for. Assuming a kidnapped infant had been brought to the Society by a woman pretending it was her illegitimate child, a wardship order had been obtained and six months had expired before the legitimate parents discovered what had happened, surely no one would contend that the Supreme Court of Ontario lacked jurisdiction to set aside an order obtained by such a fraud or to declare it to be a nullity. It is quite true that, as contended by counsel for the Society, the jurisdiction of the Provincial Court under the Act is carved out of the Supreme Court jurisdiction but this carving out leaves intact the supervisory jurisdiction. While I share appellant's anxiety to avoid the disruption of the bond between a child and his prospective adoptive parents, this cannot go to the extreme of protecting a wardship order from an attack on jurisdictional grounds by a parent whose conduct does not disentitle him to such a relief.

The situation here is essentially the same as it would be in habeas corpus proceedings. In *Perepolkin v. Superintendent of Child Welfare*[7], Sidney Smith J.A. said in a passage (at p. 420) that was relied on in *R. v. Sanders*[8]: Where a person in custody applies for a habeas corpus he is usually imprisoned under a conviction. Habeas corpus only questions the authority for detention which is the gaoler's warrant. If this is invalid on its face and is not later cured the prisoner can obtain his release on the habeas corpus alone. One ground of invalidity may be that it recites a conviction which, as recited, is void on its face; but if the warrant is valid on its face and recites a conviction valid on its face a habeas corpus alone is useless. If the prisoner wishes to attack the conviction as being invalid for reasons not shown on its face he must get rid of the conviction by quashing it through certiorari proceedings. Sometimes, however, a prisoner seeking release on habeas corpus issued a certiorari to remove his conviction, not because he wanted the certiorari but because the Court would not grant him a habeas corpus without it, once it became apparent that he was imprisoned under a conviction.

This being so, I do not think that the wardship order can be attacked collaterally. It is valid on its face and it should be given full effect as long as it stands. Although this does not make it immune to attack, such attack must be made directly and explicitly, not inferentially. While it might still be possible to join such an attack to proceedings initiated by respondent's motion, it does not appear to me it would be proper to send the case back to that end. Respondent's counsel said in this Court that the validity of the wardship order was not challenged.

However, an opportunity should be given to the respondent to launch an attack against the wardship order if he thinks this can succeed and reasonably expects to be able to show that he is a fit and proper person to obtain custody of his child. To that end, I would order the Society not to allow adoption proceedings to take place within the next 30 days. If the respondent does not see

fit to institute proceedings as above indicated in that time, then he should realize that his duty for the welfare and happiness of his child is to refrain from any interference with the adoption proceedings and any attempt to ascertain the identity of the adoptive parents.

For the above reasons I would allow the appeal without costs, reverse the judgment of the Court of Appeal and restore the judgment of Hartt J. subject, however, to a direction to the Children's Aid Society of Metropolitan Toronto that an application for an adoption order of Ronald James Lyttle is not to be heard until 30 days from this date have expired.

Appeal allowed without costs, ABBOTT, JUDSON, HALL and PIGEON JJ. dissenting in part.

Solicitor for the appellant: William J. Smith, Toronto.

Solicitor for the respondent: Bruce Haines, Toronto.

[1] [1971] 3 O.R. 129, 19 D.L.R. (3d) 625.

[2] [1969] S.C.R. 641, 4 D.L.R. (3d) 274.

[3] [1969] S.C.R. 886, 7 D.L.R. (3d) 180.

[4] [1953] 2 S.C.R. 140, [1953] 4 D.L.R. 161.

[5] [1969] S.C.R. 641.

[6] [1970] S.C.R. 261.

[7] (1957), 11 D.L.R. (2d) 417.

[8] [1968] 4 C.C.C. 156 at p. 166, affirmed [1970] S.C.R. 109.

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