

Chief Justice

26/06/02

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

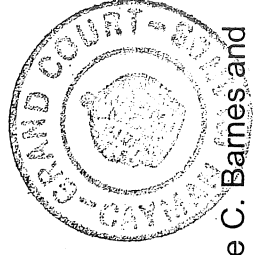
THE HONOURABLE MR. JUSTICE KELLOCK

CAUSE NO.: A1 OF 2001

IN THE MATTER OF AN APPEAL OF A DECISION OF THE ADOPTION BOARD

AND

IN THE MATTER OF THE ADOPTION OF CHILDREN LAW (1996) REVISED



REASONS FOR JUDGMENT (JUNE 24, 2002)

I have before me a Summons for Directions brought on behalf of Carlene C. Barnes and Charles E. Barnes. The Summons seeks directions as to the conduct of the appeal.

I was attended on June 19, 2002 by Karin M. Thompson, Counsel for Mr. & Mrs. Barnes and by Ms. Look Loy on behalf of the Adoption Board. I indicated that I thought the provisions of the *Adoption Law* were difficult to follow and the matter was adjourned to 9:00 a.m. today for further submissions. Mrs. Thompson appeared. Ms. Look Loy did not. I was advised by Ms. Dixon who is a representative of the Social Services Department that Ms. Look Loy thought that the time fixed was 9:30 a.m. This, of course, was an error.

In the result, a copy of Mrs. Thompson's written submissions were given to Ms. Dixon to give to Ms. Look Loy. I advised Ms. Dixon that I required Ms. Look Loy's written response today.

As it turned out, Ms. Look Loy was before me later that morning on another matter. I took the opportunity to advise her of what I had told Ms. Dixon. Ms. Look Loy advised

me that she would provide her submissions as requested. I am sorry to say, none have been received.

The Appellants / Applicants in this case were married on the 16<sup>th</sup> February 1998. Mrs. Barnes is Jamaican. Mr. Barnes a Caymanian. Prior to the celebration of the marriage Mrs. Barnes was in the process of adopting a child, Shaion Annecia Fearon who was born on the 18<sup>th</sup> April 1990 in respect to which a final Adoption Order was made by the Family Court in Kingston and St. Andrew, Jamaica on the 25<sup>th</sup> November 1998. This Order was made in the name of Mrs. Barnes alone. Since the date of the making of the Adoption Order the child has lived with and has been cared for by Mr. and Mrs. Barnes as a part of their family at their home in the Cayman Islands. Sometime in mid 1998 the parties endeavored to commence adoption proceedings here with a view to having Mr. Barnes recognized as the lawful father of the child. These efforts met without success and culminated in a letter signed on behalf of the Chairman of the Adoption Board informing Mr. & Mrs. Barnes that the Adoption Board was not prepared to accept the adoption application on the basis that the child was already the subject of an Adoption Order, which raised a jurisdictional issue for the Courts in the Cayman Islands and the Cayman Courts would not seek to make any Order which attempted to vary, amend or otherwise interfere with an Order made by the Jamaican Courts". Upon receipt of this letter dated the 17<sup>th</sup> September 2001, Mr. & Mrs. Barnes filed their Notice of Appeal against the decision made by the Adoption Board, a copy of which was delivered by Mr. Barnes to the Board on the very same day that it was filed, namely on the 1<sup>st</sup> October 2001..

By letter dated 2<sup>nd</sup> October 2001, the Deputy Clerk of the Court informed the Adoption Board of the appeal which had been lodged against their decision and requested that the Court be provided with copies of documentation as mandated by the relevant statutory provisions. There is no record of any response ever being received from the Adoption Board and no further steps were taken to have the matter set down for

hearing. Following the delay and failure of the Board to respond to the Clerk of the Courts, Mr. & Mrs. Barnes then sought legal advice. On the basis of this advice a Summons for Directions was filed on behalf of the parties on the 28<sup>th</sup> May 2002. In the meantime, it would appear that sometime shortly before the scheduled hearing for directions there was some form of written communication from the Legal Department to the Clerk of the Court, the basis of which would seem to be hinged on the fact that the Board had not adhered to the relevant statutory provisions for the reasons outlined therein.

There appears to be two distinct scenarios contemplated by *the Adoption of Children Law*(1996 Revision), the *Regulations* and the *Rules*.

Scenario 1 is where an adopter (as defined in section 2 of the *Law*) is seeking a child to adopt and the Adoption Board acts as the arranger and places the child with the adopter pursuant of section 6 of the *Law*.

In such a case an application to the Court for an adoption order (only the Court can make an adoption order), may not be made until three (3) months after the child is delivered pursuant to the arrangement made by the Board (section 5 and 6 of the *Law*) no one else can lawfully make such arrangements (see section 4 of the *Law*).

During that three (3) month period, the adopter may decide not to adopt or the Board may decide not "to allow the child to remain in the care and possession of the adopter".

Scenario 2 is where the adopter already has the child in his or her care. In that case section 6 of the *Law* would not apply.

The latter scenario seems to be regarded as a “*de facto*” adoption. In this case the child – SHAION ANNECIA FEARON BARNES has been residing with the applicants Carlene and Charles Barnes for more than two (2) years.

Section 3 of the *Regulations* provides that:

“Every person desirous of adopting a child shall first make application to the Board in Form A and submit with that application the certificate of a registered medical practitioner in Form B” (unless the adopter is the natural mother or father of the child).

Section 4 of the *Regulation* then requires the Board to furnish the parent or guardian of the child with a memorandum in Form C which explains the legal consequences of an adoption order in terms of the loss of parental rights. The Board is not to proceed further with negotiations or arrangements until the parent or guardian signs a Form D indicating that he or she has read Form C and agrees with it.

However section 5 of the *Regulation* requires the Board to make inquiries and obtain reports and have a case committee composed of at least three (3) members of the Board consider the proposed adoption. Nothing is said in the *Regulations* as to what the case committee is to do after it has considered the case. As I read the *Regulations* the Board is required to comply with section 5 without regard to the provisions of section 4.

When an application is made to the Court (and it is to be made by summons) (see section 3 of the *Rules*) the Board is required to file the Form D with the Court (assuming such a form exists).

The *Regulations* are provided for in the first schedule to the *Law*. Section 8 of the *Law* contemplates that the Governor may make other regulations which may vary the schedule regulations but so far as I am aware no such regulations have been made.

By section 2 of the *Law* "adoption order" is defined as an order made by the Court under section 9 of the *Law*.

Section 9(1) provides that:

"Subject to this *Law*, the Court may, upon an application made in the prescribed manner by a person domiciled in the Islands, make an order authorising the applicant to adopt a child".

Section 10 of the *Law* provides that an adoption order may not be made in the circumstances therein set out – but these do not include any reference to the Board or the Board's opinions.

Section 11 of the *Law* permits the Court to dispense with some of the requirements of section 10, e.g. the consent of the child's parent or guardian.

Section 14(1) of the *Law* provides that:

"The Court, before making an adoption order shall be satisfied:

- (a) that every person whose consent is necessary (and) not dispensed with, has consented to and understands the nature and effect of the order for which application is made, and in particular in the case of any parent, understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights.;

- (b) that the order if made will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regard to its age and understanding; and
- (c) that the applicant has not received or agreed to receive, and that no person has made or given or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption except such as the Court may sanction”.

There is no reference here to the Board or its views.

Section 19 of the Law provides:

“An adoption order or an interim order may be made in respect of a child who has already been the subject of an adoption order, and, upon any application for such further adoption order or interim order, the adopter or adopters under the adoption order last previously made shall be deemed to be the parent or parents of the child for all purposes of this Law”.

As stated, the *Rules* require that an adoption application be made by summons and must have with it a Form A statement, particulars in Form B and Form D – consents.

(Note: These forms are forms to the *Rules* not the *Regulations*.)

Section 5(1) of the *Rules* requires the Court to appoint a guardian *ad litem* for the child and provide who the respondents to the summons are to be. Again the Board is not included as a required respondent.

Paragraph 2 of Form A to the *Rules* states:

"The child was on the date of coming into force of the said Law in my / our custody and was being brought up, maintained and educated by me / us as my / our child under a *de facto* adoption and had been in my / our custody and had been so maintained and educated for a period of not less than two (2) years before that date, to wit, from and after the        day of        19        ".

The side note to this paragraph states "delete except in the case of a *de facto* adoption".

It therefore appears that in the case of a *de facto* adoption (so called) the Board's role is confined to complying with section 5 of the *Regulations*, i.e. making inquiries, obtaining reports and having a case committee consider the matter and complying with Rule 3(3) which provides as follows:

"The Board shall lodge in the Court on every application for an adoption order the certificate of the parent or guardian of the child referred to in Regulation 4 of the *Adoption of Children Regulations* (1996 Revision) and a statement with respect of the identity of the child in Form C".

Form C does not include any provision for comments by the Board on the merits or otherwise of the application.

Consequently while an application to the Board in Form A is required (by section 3 of the *Regulation*) and an application by way of a summons to the Court is required by the *Rules*, there is no provision in the *Law*, the *Regulations* or the *Rules* for the Board to make its views known to the Court.

Under section 6 of the *Law* the Board may determine that a child that the Board had placed for adoption should be removed from the care and control of the potential adopters. However that section does not apply in this case.

Section 7 of the *Law* provides:

“Where any person has made representations to the Board with a view to the adoption of the child, and the Board are of the opinion that the adoption of the child by such person would not be in the best interests of the child, the Board shall notify such person accordingly. and such person may appeal from the decision of the Board to a Judge in Chambers”.

Apart from section 6 and 7 of the *Law*, there is no other provisions in the *Law*, *Regulations* or *Rules* for any decisions of the Board and the Court is not obliged to consider the Board's views in deciding whether or not to make an adoption order.

Consequently why anyone would make “representations” to the Board and invite the Board to make a decision is a mystery and why anyone would seek to appeal from the Board under section 7 is also a mystery.

I do not know who drafted the *Law*, the *Regulation* or the *Rules* or what precedent (if any) the draftsman used. It does, however, appear that the draftsman of this legislation has misfired badly.

In the case at bar Mr. & Mrs. Barnes made some sort of application or inquiry to the Board, perhaps orally concerning their desire to adopt the child and as a result received the following letter from the Board dated December 17, 2001:

“Dear Mr. & Mrs. Barnes:

**Re: Shaion Annecia Fearon**

*We refer to your adoption query on behalf of the above named child and wish to inform you that on the advice of the Legal Department, the Adoption Board is unable to accept your adoption application.*

*The fact that Shaion is already the subject of an Adoption Order, which was granted by the Jamaican Courts, raises a jurisdictional issue for the Courts in the Cayman Islands. The Cayman Courts would not seek to make any Order, which attempts to vary, amend or otherwise interfere with an Order made by the Jamaican Courts.*

*We are sorry that we are unable to assist you further in this matter.*

*Yours faithfully,*

*Maureen Gay*

*For Chairman, Adoption Board”*

As a result, Mr. & Mrs. Barnes appealed to this Court under the Rules which clearly contemplates such appeals. (I note in passing that neither the Board nor its legal adviser seems to have read section 19 of the Law).

Rule 20 provides:

“Every appeal shall be by way of rehearing, and the Rules of Court shall apply thereto unless it is otherwise provided in these Rules”.

As I have indicated the Court is not bound by the Board's views except in a case covered by section 6 and I will say again that section 6 does not apply to this case.

Accordingly, as I have been asked for directions I will provide the following:

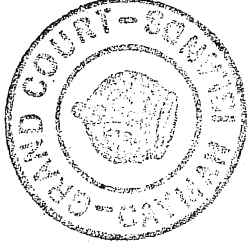
1. Mr. & Mrs. Barnes may issue a summons for the adoption of the child as contemplated by the *Rules*.
2. Before issuing the summons Mr. & Mrs. Barnes should prepare and file with the Board an application in Form A to the *Regulations*.
3. Upon the filing of that Form A application, the Board shall forthwith comply with section 5 of the *Regulations*.
4. Once the application to the Board has been filed and in case the judge hearing the summons for the adoption order disagrees with my views as to the Board's role in the process, I will direct the Board to comply with section 5 of the *Regulations* within ninety (90) days of the date of the filing of the application (Form A). Mr. & Mrs. Barnes will have liberty to apply to enforce this requirement should the Board fail to meet it unless, of course, The Board advises the Court that it has no role to play in the hearing of the summons and no other party to the proceeding takes a contrary position.
5. The Board shall comply with the *Rules* so that the appeal may be perfected unless the Board agrees that it has no role to play in the determination of the summons and no other party takes a contrary position.
6. Once the summons has been filed Mr. & Mrs. Barnes shall comply with the other requirements of the *Law and Rules* and the Court will then issue the documents required of it so that the summons is heard on its merits no later than September 30, 2002.

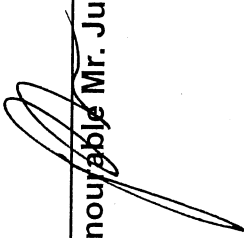
7. Liberty to apply is granted to all parties in order that the purpose of these directions is achieved, i.e. the adoption application is heard and determined on its merits prior to the time that the child ceases to be a child as defined in section 2 of the Law.

I should say that direction 5 above is provided so that the appeal can be listed for hearing at the same time as the summons.

I may be spoken to as to the costs.

Dated this *26<sup>th</sup>* day of June 2002



  
The Honourable Mr. Justice Kellock