SYLVIA ELAINE MUGFORD .....APPELLANT;

AND

THE CHILDREN'S AID SOCIETY OF OTTAWA .....RESPONDENT.

1968
*Dec. 11, 12
1969
Feb. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infants—Child of unmarried mother made ward of Crown under s. 25(c) of The Child Welfare Act, 1965 (Ont.), c. 14—Subsequent application by mother under s. 35 for custody of child—Whether judge had jurisdiction to consider such application.

The appellant gave birth to a child on October 5, 1967, and at that time was unmarried and between 19 and 20 years of age. Prior even to the birth of the child she consulted the Children's Aid Society of Ottawa as to the child about to be born being given into custody of that organization subsequent to its birth. On October 26, 1967, upon the application of the Society, a judge of the Family Court made an order whereby he found that the child was a child in need of protection. Exercising the jurisdiction conferred in s. 25(c) of *The Child Welfare Act,* 1965 (Ont.), c. 14, he made the infant a ward of the Crown and committed him to the care of the Society.

On January 24, 1968, the appellant wrote to the social worker of the Society and said as to her infant son, "but now I want him back", but on February 23, 1968, in reply to a letter from the social worker, she asked that the earlier request be disregarded. However, by a letter of April 10, 1968, the appellant again applied for the return of her son. In the interim, the appellant's mother for the first time had discovered the birth of the child and she and her husband were anxious to take the appellant back into their home and to care for the child. On April 18, the social worker replied stating that the infant had been placed with adopting parents and that "we cannot disturb this arrangement".

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Subsequently, the appellant applied to the Juvenile and Family Court under s. 35 of *The Child Welfare Act* for an order for the production of the infant and for a further order for the delivery of the said infant to the applicant. The application was dismissed. On an appeal under s. 36 of the Act, a County Court judge allowed the appeal, terminated the order of October 26, 1967, and directed that the child be produced and delivered to the appellant. An appeal from this decision to the Court of Appeal was allowed on the ground that s. 25(*c*) of the Act provided "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34", and that, therefore, no application could be made by a parent under the provisions of s. 35 of the Act when a child had been so made a ward of the Crown under the provisions of s. 25(*c*). With leave, an appeal from the judgment of the Court of Appeal was brought to this Court.

Held (Judson and Hall JJ. dissenting): The appeal should be allowed and the case returned to the Court of Appeal for consideration upon the merits.

Per Cartwright C.J. and Martland and Spence JJ.: Under s. 31 of *The Child Welfare Act* the Children's Aid Society having the care of the child could apply to terminate the wardship order, and under s. 34 the wardship would terminate when the child reached the age of 18. But a Court should not be forced to the conclusion that the whole determination of whether the mother should have the custody of her child returned to her is to be left for the Children's Aid Society so that that society by simply refusing to make an application provided for by s. 31 could bar the mother having a Court consider a change of circumstances and what might well be not only to her advantage but to the advantage of the welfare of the child.

While there was truth in the submission that such an interpretation of the section is necessary in order to permit the efficient operation of the procedure for the adoption of children who have been made wards of the Crown, and that proposed adopting parents will not take a child preparatory to adopting the said child if their custody of the child and their opportunity to secure the adoption of that child is imperilled by the possibility that the parent or parents of the child might at any time prior to the granting of an adoption order make an application to have the child returned thereby disrupting all the plans of the proposed adopting parents and causing them a considerable emotional upset, this should not persuade the Court to find that the most important right of a natural parent has been taken from such natural parent merely by implication. Consent of the natural parent to the original order which made the infant a ward of the Crown is often and perhaps usually given under conditions when such natural parent, almost inevitably the mother, is under a condition of almost intolerable stress.

Accordingly, s. 35 of the Act permitted the application of the natural mother for production of the child even when that child was a ward of the Crown and, therefore, the Family Court judge had jurisdiction to consider such application by the present appellant and the County Court judge had jurisdiction to consider an appeal from the Family Court judge's refusal of the application.

Per Judson and Hall JJ., *dissenting:* Under s. 32 of *The Child Welfare Act,* the Crown is made the legal guardian and has the care, custody

and control of a child designated as a Crown ward. It has the obligation to secure adoption of the child under s. 84(1). By s. 73(3) the natural parent's consent is dispensed with in the case of a Crown ward in adoption proceedings under Part IV of the Act.

It followed that the Legislature intended, by s. 25(*c*), that once a child was designated as a Crown ward, the natural parent was to be accorded no recourse other than the right to appeal, and the order designating the child as a Crown ward was not to be terminated except as provided in s. 31 or when the child attained the age of 18. The power of the Legislature to so enact could not be questioned: *Reference re Adoption Act, etc.*, [1938] S.C.R. 398.

The plain words of s. 25(*c*) "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34" could not be read as being nullified by the opening words of s. 35(1). The two subsections have a place in the scheme of things contemplated by the Act. Section 25(*c*) does not deprive s. 35(1) of effect. Section 35(1) still applies to wards of children's aid societies who are not Crown wards namely, those so designated under s. 25(*b*) and to whom s. 31(1) does not apply.

[*Fortowsky v. Roman Catholic Children's Aid Society for County of Essex*, [1960] O.W.N. 235, 23 D.L.R. (2d) 569; *Re Minister of Social Welfare and Rehabilitation and Dubé* (1963), 39 D.L.R. (2d) 302; *Hepton and Hepton v. Maat*, [1957] S.C.R. 606; *Martin v. Duffell*, [1950] S.C.R. 737, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from an order of Honeywell Co.Ct.J. Appeal allowed and case remitted to Court of Appeal to be dealt with on the merits, Judson and Hall JJ. dissenting.

Joseph F. Foreman, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

P. J. Brunner and J. I. Tavel, for the intervenants, the adoptive parents.

The judgment of Cartwright C.J. and of Martland and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] pronounced immediately following argument on October 1, 1968. Leave to appeal to this Court was granted by the Court on October 21, 1968.

The appellant Sylvia Elaine Mugford gave birth to a child, David John Mugford, on October 5, 1967. At that time, Sylvia Elaine Mugford was unmarried and between 19 and 20 years of age. She was living temporarily with a

[1] [1968] 2 O.R. 866.

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Spence J.

sister in Ottawa and her mother did not know of her pregnant condition. Prior even to the birth of the child, she had consulted the Children's Aid Society of Ottawa as to the child about to be born being given into custody of that organization subsequent to its birth. On October 26, 1967, upon the application of the Children's Aid Society of Ottawa, His Honour Judge Robert Good, a judge of the Family Court, made an order whereby he found that the infant David John Mugford was a child in need of protection. Exercising the jurisdiction conferred in s. 25(*c*) of *The Child Welfare Act,* 1965 (Ont.), c. 14, to which reference shall be made hereafter, he made the said David John Mugford a ward of the Crown and committed him to the care of the Children's Aid Society of Ottawa.

On January 24, 1968, Miss Mugford wrote to the social worker with the Children's Aid Society of Ottawa and said as to her infant son, "but now I want him back". The social worker replied thereto suggesting that Miss Mugford should come and discuss the matter with her but on February 23, 1968, Miss Mugford replied to that letter asking the social worker to disregard her earlier request. Part of that letter is of some relevance to these considerations. Miss Mugford said, in part:

> I'm sorry for causing so much inconvenience but I have been very upset lately and didn't know which way to turn. I didn't answer your letter immediately because I was in the process of really trying to straighten myself out and wanted to be sure. As it is now I don't see how I will be able to take the baby back because I don't feel worthy of him. I will always want him but I don't feel I have that extra something that it takes to devote my life to raising him.

Further in the letter, Miss Mugford said:

> Please let me know as soon as he is adopted; I am planning to move away soon and I would like to know exactly how everything is with him before I leave.

By her letter of April 10, 1968, Miss Mugford again renewed her application to have her son David John Mugford returned to her. The evidence reveals that in the interim Miss Mugford's mother had for the first time discovered the birth of the child and she and her husband were most anxious to take Miss Mugford back into her home and to care for the child. To that letter, the social worker replied on April 18 stating that the infant had been placed with adopting parents in mid-March and that "we cannot disturb this arrangement". On May 27, 1968, through her

solicitor, Miss Mugford applied to the Juvenile and Family Court of the City of Ottawa and County of Carleton under the provisions of s. 35 of *The Child Welfare Act* for an order for the production of the infant and for a further order for the delivery of the said infant to the applicant. That application was considered by His Honour Judge Good, the same judicial officer who had, as a judge of the Family Court, jurisdiction under s. 25(*c*) of *The Child Welfare Act,* and who had ordered on October 26, 1967, that the infant should be a ward of the Crown. His Honour Judge Good's formal order dismissing Miss Mugford's application appears under date of June 24, 1968, which would appear to have been the date of the hearing. His Honour Judge Good, however, delivered careful and detailed reasons dated July 5, 1968. An appeal therefrom in accordance with the provisions of s. 36 of *The Child Welfare Act* was taken to the presiding judge in chambers for the County Court of the County of Carleton. After a hearing and with detailed and carefully considered reasons, by an order made on August 13, 1968, His Honour Judge Honeywell allowed the appeal, terminated the order of October 26, 1967, and directed that the child be produced and delivered to Miss Mugford. From this order, the Children's Aid Society of Ottawa appealed to the Court of Appeal in accordance with s. 36(2) of *The Child Welfare Act,* and those persons with whom the infant had been placed and who hoped to become the adopting parents applied to the Court of Appeal for leave to appeal the said order of the County Court judge.

The appeal came on for hearing on October 1, 1968, and, for reasons given by Kelly J. A., the appeal was allowed upon the ground that s. 25(*c*) of *The Child Welfare Act* provided "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34 . . .", and that, therefore, no application could be made by a parent under the provisions of s. 35 of the said statute when a child had been so made a ward of the Crown under the provisions of s. 25(*c*) of the statute. Whether or not this is the effect of the statute was the subject of the argument in this Court. Although the present *Child Welfare Act* is a new statute first enacted in 1965, it contains many statutory provisions which had appeared in earlier statutes. Section 35 has appeared in various forms in the statutory provisions for about sixty years, and the present section

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Spence J.

is largely a repetition of that which appeared in *The Child Welfare Act,* R.S.O. 1960, c. 53, s. 30. The only revisions wrought in the new statute were to provide, firstly, that the application under s. 35 should be made "to a judge of the Supreme Court", and, secondly, that the words in the original section that the judge should refuse to enforce "his [the parent's] right to the custody of the child" have been replaced by the words "that the child is in need of protection".

In *Fortowsky v. Roman Catholic Children's Aid Society for County of Essex*[2], the Court of Appeal for Ontario considered an appeal arising under circumstances surprisingly similar to those of the present case. There the application had been made by the parent, under the provisions of *The Infants Act,* R.S.O. 1960, c. 187, to a judge of the Surrogate Court of the County of Essex. At that time, there was in effect *The Child Welfare Act,* 1954 (Ont.), c. 8. Section 27(1) of that statute provided:

> 27.—(1) Where a parent applies to a judge of the Supreme Court for an order for the production of a child committed under this Part and the judge is of the opinion that the parent has neglected or deserted the child or that he has otherwise so conducted himself that the judge should refuse to enforce his right to the custody of the child, the judge may in his discretion decline to make the order.

Aylesworth J. A. delivered the judgment of the Court in which he held that the Court was by the provisions of the said *Child Welfare Act* deprived of its jurisdiction under the general provisions of s. 1(1) of *The Infants Act* when the child had been made a permanent ward of the Children's Aid Society. At p. 236 of the note it is said:

> All the provisions of Part II expressed overwhelmingly the intention of the legislature to deal specifically by special provisions with all matters relevant to the protection, care and custody of neglected children and the legislature by these enactments, as it were, segregated all such questions with respect to this specific class of infants to be dealt with by those special provisions only and not to be dealt with at large under the provisions of the Infants Act. Under Part II a parent seeking to regain the custody of a neglected child must bring an application for that purpose, before a Judge of the Supreme Court: s. 27. Upon such an application the Judge was required to give specific consideration to all those matters with respect to which provision was made in the Part. It was true that the provisions of s. 27 having to do with the issue of custody of a neglected child, were phrased somewhat in the negative, rather than in the positive, in referring to the powers of a Judge of the Supreme Court. That, however, was immaterial. A Judge of the Supreme Court or a

[2] [1960] O.W.N. 235, 23 D.L.R. (2d) 569.

Judge of the Surrogate Court were given general jurisdiction over questions of custody by the provisions of the Infants Act. The Child Welfare Act, Part II simply carved out of that general jurisdiction the powers which a Judge of the Surrogate Court otherwise would have and set up provisions for the guidance of a Judge of the Supreme Court when application was made to him by a parent with respect to a neglected child.

It should be noted that the order which the Surrogate Court judge purported to vary was an order made under the provisions of s. 16(8)(*c*) of *The Child Welfare Act*, 1954, which provided:

> 16. (8) Where the judge finds the child to be a neglected child he shall make an order,
>
> * * * *
>
> (*c*) that the child be committed permanently to the care and custody of the children's aid society;

Subsection (14) of the said s. 16 provided:

> (14) Where a judge has made an order under clause *c* of subsection 8, the society may at any time during the period of permanent commitment and upon at least thirty days notice in writing to the Director, bring the case before a judge to determine if the welfare of the child might best be served by the termination of such permanent commitment and if the judge is satisfied that such action is in the interest of the welfare of the child, he shall terminate the commitment.

and subsection (16) of the said s. 16 provided:

> (16) Where a child has been permanently committed to the care and custody of a society, the society shall be the legal guardian of such ward until he has attained the age of eighteen years, or until he is adopted under Part IV,...or until the wardship is terminated by a judge under subsection 14, or until an extended guardianship under subsection 17 terminates.

It would, therefore, appear that with the exception that the application under the present s. 35 of *The Child Welfare Act* is made to a "judge", defined in s. 19(1)(*d*) as being a judge of a Juvenile and Family Court, while the application under s. 27 of *The Child Welfare Act*, R.S.O. 1960, c. 53, was made to a judge of the Supreme Court, all the other relevant provisions of the statute are similar. I cannot see that the fact that the earlier statutory provisions were that the child should be made a permanent ward of the society while the present provisions are that the child should be a ward of the Crown can affect the matter; nor can I see that the alteration of the words "to enforce the right to the custody of the child" to the words "that the child is in need of protection" require any different interpretation of the section. It was very plainly Aylesworth J.A.'s opinion that the parent could have made

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Spence J.

an application not to the Surrogate judge under the provisions of s. 1(1) of *The Infants Act*, as the parent in the *Fortowsky* case purported to apply, but rather to a Supreme Court judge under the provisions of the then s. 27 of *The Child Welfare Act*, for the learned justice in appeal said at p. 237:

> If the mother was sincere in her wish for the custody of her child—and the record gave every indication of such sincerity—the question of custody would remain to be decided, if necessary, upon an application to a Judge of the Supreme Court for custody of the child, on notice, of course, to the society.

I am, therefore, of the opinion that the *ratio decidendi* of the Court of Appeal in the present case and of the same Court in the *Fortowsky* case are in exact opposition. If an application could have been made by a parent under the provisions of s. 27 of *The Child Welfare Act*, 1954, c. 8, as to a child who had been made a permanent ward of the society under the provisions of s. 16 of that statute then, similarly, the application may be made by a parent under s. 35 of the present *Child Welfare Act* as to an infant who had been made a ward of the Crown under the provisions of s. 25(*c*) of the latter statute.

In support of the submission that the interpretation of s. 35 made by the Court of Appeal in the present case is the correct one, it has been said that the original order made by His Honour Judge Good on October 26, 1967, was subject to appeal under s. 36 of *The Child Welfare Act*, that there is no limitation on the time for such appeal and that, therefore, the present appellant instead of taking the procedure under s. 35 of *The Child Welfare Act* could have appealed that original order. This argument seems to me to exhibit a misconception of the purpose of appeal. It is not the appellant's contention that the order made by His Honour Judge Good on October 26, 1967, was in error. She had appeared to support that application, she was represented by counsel, and she was carefully warned of her rights but believed at that time and under the circumstances which then prevailed that the only way in which the interest of her infant child could be protected properly was by the making of such order. No matter what extension of time might be obtained to permit such an appeal and no matter what other evidence might be permitted upon such an appeal, it would be the duty of the

judicial officer hearing the appeal, *i.e.*, the judge of the County Court of the County of Carleton, to consider the appeal on the circumstances which prevailed at the time the order appealed from was made. Any attempt to bring in the subsequent most important circumstances as to the mother's present ability to care for her infant and the offer of her mother and step-father to assist her, as they are well able to do, could not affect the validity of the order as originally made.

Kelly J.A., in giving reasons for the Court of Appeal, said:

> The order under s. 25(*c*) had the effect of making the child a ward of the Crown until the wardship be terminated under s. 31 or s. 34 of *The Child Welfare Act*, 1965. No proceedings with respect to the termination of the wardship under either of those sections are before the Court or have been taken. It is the view of this Court that the application was misconceived and that no power lay in the Judge under s. 35 to make any order with respect to a wardship under s. 25(*c*) that had not been terminated.

As I have pointed out, to attribute that exclusive character to s. 25(*c*) is contrary to the view of Aylesworth J.A. as outlined in the *Fortowsky* case, *supra*. It would appear, moreover, not to be in accordance with the other provisions of *The Child Welfare Act*. As Kelly J.A. pointed out, an order under s. 25(*c*) is subject to an appeal. Part IV of *The Child Welfare Act* makes the provision for adoption and Part IV is not referred to as an exception under s. 25(*c*). The inevitable effect of s. 82, which appears in the said Part IV, is to terminate any wardship as by subs. (1) the adopted child becomes the child of the adopting parents. There is some indication that unless and until that adoption takes place the natural parent still maintains rights. Section 73(3) provided that the only consent required to the adoption of a child which is a Crown ward is the consent of the Director. Apart from that provision, the natural parent, by the provisions of s. 73(2), would have been required to consent.

In *Re Minister of Social Welfare and Rehabilitation and Dubé*[3], Culliton C.J.S., giving judgment for the Court of Appeal of Saskatchewan, considered an appeal from an order made granting the custody of a child to its father. The child had been found, by a Family Court judge, to

[3] (1963), 39 D.L.R. (2d) 302.

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Spence J.

have been abandoned and it had been committed to the Minister, that being the provision of the Saskatchewan statute rather than granting wardship to the Crown as in Ontario. An appeal had been taken to a judge in chambers and that appeal had been dismissed. The father then made an application to the Court of Queen's Bench under the provisions of *The Infants' Act,* R.S.S. 1953, c. 306, for custody of the child. This order was granted and an appeal was taken to the Court of Appeal. Culliton C.J.S. said at p. 304:

> The primary question raised by this appeal is whether when there is an existing committal order under Part I of the *Child Welfare Act,* the Court of Queen's Bench has jurisdiction to entertain an application for custody.

The *Fortowsky* case, *supra,* was cited as an authority for the depriving of the Court of Queen's Bench of such jurisdiction. The learned Chief Justice of Saskatchewan refused to follow such case pointing out that the Ontario statute, *i.e., The Child Welfare Act,* 1954, c. 8, contained the provision in s. 27 to which I have already referred and that such provision was not reproduced in the Saskatchewan statute. At pp. 307-8 he said:

> I would also point out that an order for custody made by the Court of Queen's Bench is not a final judgment. It is not a decision which terminates for all time the rights of the parents or either of them. The Court always has the right, under changed conditions, to make a new order, notwithstanding the existence of the previous order. To give effect to the contention of learned counsel for the appellant, would be to give to a committal order a finality not provided for in a custody order. This, in my view, would so drastically terminate the rights of the parents that such effect should not be given thereto *in the absence of express language.*

(The italicizing is my own.)

In Hepton and Hepton v. Matt[4], the present Chief Justice of this Court found reason to repeat his statement in *Martin v. Duffell*[5], and such statement received the expressed approval of Rand J. in the same case. There, the present Chief Justice said:

> ...I regard it as settled law that the natural parents of an infant have a right to its custody which, apart from statute, they can lose only by abandoning the child or so misconducting themselves that in the opinion of the Court it would be improper that the child should be allowed to remain with them, and that effect must be given to their wishes unless "very serious and important reasons" require that, having regard to the child's welfare, they must be disregarded.

---

[4] [1957] S.C.R. 606.

[5] [1950] S.C.R. 737.

I think that view is sound basis for a disinclination to find that the statute has deprived the natural parent of any right to apply for a variation of the order making a child the ward of the Crown unless it so provides in express words. On the interpretation urged by the respondent in the present appeal, upon the order having been made originally on October 26, 1967, and properly made for what then existed as good and sufficient cause, no matter what change in circumstances took place, the mother was forever barred from making an application to the Court for the custody of her own child. It is true that under s. 31 of *The Child Welfare Act* the Children's Aid Society having the care of the child might then determine that the welfare of the child would justify termination of the wardship order and itself apply, and under s. 34 the wardship would terminate when the child reached eighteen years of age. Surely a Court should not be forced to the conclusion that the whole determination of whether the mother should have the custody of her child returned to her is to be left for the Children's Aid Society so that that society by simply refusing to make an application provided for by s. 31 could bar the mother having a Court consider a change of circumstances and what might well be not only to her advantage but to the advantage of the welfare of the child.

It is said such an interpretation of the section is necessary in order to permit the efficient operation of the procedure for the adoption of children who have been made wards of the Crown, and it is to be noted that s. 84(1) of *The Child Welfare Act* provides that every Children's Aid Society should endeavour to secure the adoption of Crown wards. It is argued that proposed adopting parents will not take a child preparatory to adopting the said child if their custody of the child and their opportunity to secure the adoption of that child is imperilled by the possibility that the parent or parents of the child might at any time prior to the granting of an adoption order make an application to have the child returned thereby disrupting all the plans of the proposed adopting parents and causing them a considerable emotional upset. There is truth in this submission but I cannot feel that even that should persuade this Court to find that the most important right of a natural parent has been taken from such natural parent merely by implication. It must be remembered that the consent of the natural parent to the

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Spence J.

original order which made the infant a ward of the Crown is often and perhaps usually given under conditions when such natural parent, almost inevitably the mother, is under a condition of almost intolerable stress, and to attribute the degree of finality argued for by the respondent to her consent under those circumstances is a course which I find most difficult to follow.

For these reasons, I am of the opinion that s. 35 of *The Child Welfare Act* permits the application of the natural mother for production of the child even when that child is a ward of the Crown and that, therefore, His Honour Judge Good had jurisdiction to consider such application by the present appellant and His Honour Judge Honeywell had jurisdiction to consider an appeal from His Honour Judge Good's refusal of the application.

The Court of Appeal for Ontario based its decision only on this question of jurisdiction and having expressed its view that no such jurisdiction existed did not deal with the merits of the appeal. His Honour Judge Good came to one conclusion in carefully detailed reasons and His Honour Judge Honeywell, on appeal from His Honour Judge Good, came to the opposite conclusion, again in carefully detailed reasons. It would seem that those merits should be dealt with by the Court of Appeal for Ontario and it is, therefore, my view that this appeal should be returned to the Court of Appeal for Ontario for consideration upon the merits.

Neither before His Honour Judge Good nor before His Honour Judge Honeywell, nor in the Court of Appeal for Ontario were any costs allowed. I would, therefore, not make any provision for costs in this appeal.

The judgment of Judson and Hall JJ. was delivered by

HALL J. (*dissenting*):—The facts are set out in the reasons of my brother Spence. The merits of the appellant's application for the production and delivery to her of the infant David John Mugford are not in issue in this appeal. The only question for determination is whether His Honour Judge Good had jurisdiction to entertain the application, having regard to s. 25(*c*) of *The Child Welfare Act*, 1965 (Ont.), c. 14. The Court of Appeal held that His Honour Judge Good was without jurisdiction.

There is no question as to the validity of the original order made by His Honour Judge Good on October 26,

1967, wherein he found the child David John Mugford to be a child in need of protection and under s. 25 of *The Child Welfare Act*, which reads:

25. Where the judge finds the child to be a child in need of protection, he shall make an order,

(*a*) that the case be adjourned *sine die* and that the child be placed with or returned to his parent or other person subject to supervision by the children's aid society; or

(*b*) that the child be made a ward of and committed to the care and custody of the children's aid society having jurisdiction in the area in which the child was taken into the protective care of the society for such period, not exceeding twelve months, as in the circumstances of the case he considers advisable; or

(*c*) that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34 and that the child be committed to the care of the children's aid society having jurisdiction in the area in which the child was taken into the protective care of the society.

He elected to act under cl. (*c*) above and ordered:

(*a*) that the child be made a ward of the Crown and committed to the care of the Children's Aid Society of Ottawa commencing 26th October, 1967.

Although s. 36 of *The Child Welfare Act* gives a right of appeal, no appeal was taken from this order. In fact the order was made with the mother's consent three weeks after the birth of the child and after she had been counselled and advised by Mr. Brian Golding, who acted as guardian *ad litem*.

As will be seen, s. 25 above recognizes two types of wardship. The first, under cl. (*b*), provides for a child being made a ward of, and committed to, the care and custody of the Children's Aid Society having jurisdiction in the area in which the child was taken into protective custody; and the second, under cl. (*c*) that the child be made a ward of the Crown until the condition is terminated under s. 31 or 34.

It is only in respect of an order made under cl. (*c*) that the condition is to continue until terminated under s. 31 or 34.

Section 31 reads:

31. (1) Where a child has been committed as a ward of the Crown, the children's aid society having the care 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.

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Hall J.

(2) Within twelve months after a Crown ward is admitted to an institution under *The Mental Hospitals Act*, other than an examination unit, the children's aid society responsible for the care of the child shall, upon notice to the superintendent of the mental institution, apply to a judge for an order terminating the Crown wardship, and, if the judge is satisfied that the termination of the wardship is in the best interests of the child, he shall order that the Crown wardship be terminated.

and provides for termination of a Crown wardship unilaterally on an application by the Children's Aid Society having the care of the child. No similar provision is provided for in this section in favour of anyone else.

Section 34 reads:

34. Every wardship terminates when the ward attains the age of eighteen years, but, upon the application of a children's aid society with the approval of the Director, a judge may order that the wardship of a Crown ward continue until the ward attains the age of twenty-one years where the ward is dependent for educational purposes or because of mental or physical incapacity.

and has no application here.

That leaves s. 35(1) which reads:

35. (1) Where a parent applies to a judge for an order for the production of a child committed under this Part and the judge is of the opinion that the parent has deserted the child or that he has otherwise so conducted himself that the child is in need of protection, the judge may in his discretion decline to make the order.

and it is under this section that the appellant applies to terminate the Crown wardship. Kelly J.A., speaking for himself, MacKay and MacGillivray JJ.A., said:

Under the scheme of *The Child Welfare Act* the Judge, as therein defined and within which definition came His Honour Judge Good who made the order of 26th October 1967, may make orders, under s. 25, in respect of a child whom he finds to be "in need of protection", which phrase is defined in s. 19(1)(*b*) of the Act. The order of Judge Good did find that this child was a child in need of protection. Having made such a finding, the Judge was authorized to make one of several orders. The order which he chose to make was made under s. 25(*c*) and must be taken to have been made judicially on the facts before him. No proceedings have been taken to set aside or appeal from that particular order. The order under s. 25(*c*) had the effect of making the child a ward of the Crown until the wardship be terminated under s. 31 or s. 34 of *The Child Welfare Act*. No proceedings with respect to the termination of the wardship under either of those sections are before the Court or have been taken. It is the view of this Court that the application was misconceived and that no power lay in the Judge under s. 35 to make any order with respect to a wardship under s. 25(*c*) that had not been terminated. It follows that neither of the Courts below had jurisdiction to deal with the application and the proper order would be that the order appealed from be varied and as varied provide that the proceedings before the Judge of the Juvenile Court be quashed for want of jurisdiction.

It was argued in this Court that this result was in conflict with the decision of the Court of Appeal in *Fortowsky v. Roman Catholic Children's Aid Society for County of Essex*[6], in which Aylesworth J.A., in dismissing an application for custody on the grounds quoted by my brother Spence in his reasons, continued as follows [pp. 573-74 (D.L.R.)]:

> For these reasons I conclude that the appeal must succeed. Having come to that conclusion it is unnecessary to deal with the merits of the respondent mother's application. If the mother is sincere in her wish for the custody of her child and the record gives very indication of such sincerity, the question of custody will remain to be decided, if necessary, upon an application to a Judge of the Supreme Court for production and for custody of the child, on notice, of course, to the appellant. I say "if necessary" because the appellant if convinced that it is in the best interests of the child's welfare to restore custody to the respondent (and upon the evidence before him the Surrogate Court Judge was so convinced) may decide to expedite the matter by itself upon notice to the mother making application under s. 16 (14) of the special Act; *otherwise the respondent must be left to the legal remedy which is hers under s. 27.*

(Emphasis added.)

It is on this reference to s. 27 that the appellant relies.

Section 27 referred to by Aylesworth J.A. then read:

> 27.(1) Where a parent applies to a judge of the Supreme Court for an order for the production of a child committed under this Part and the judge is of the opinion that the parent has neglected or deserted the child or that he has otherwise so conducted himself that the judge should refuse to enforce his right to the custody of the child, the judge may in his discretion decline to make the order.

Section 35(1) with some amendments replaced s. 27 of the 1954 Act which was the operative section when *Fortowsky* was decided.

By one amendment the judge in s. 35(1) is a judge of a Juvenile and Family Court (s. 19(1)(*d*) of the 1965 Act) in lieu of a judge of the Supreme Court. Other changes were made in the wording of the section which are not relevant to this appeal.

When the *Fortowsky* case was decided in March 1960, the application having been made May 7, 1959, the present s. 25 was then s. 16(8) of *The Child Welfare Act* 1954, c. 8, and read:

> (8) Where the judge finds the child to be a neglected child he shall make an order,

---

[6] [1960] O.W.N. 235, 23 D.L.R. (2d) 569.

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Hall J.

(*a*) that the case be adjourned *sine die* and that the child be returned to his parent or guardian or other person in whose charge he is, subject to supervision by the children's aid society; or

(*b*) that the child be committed temporarily to the care and custody of the children's aid society for such period, not exceeding twelve months, as in the circumstances of the case he considers advisable; or

(*c*) that the child be committed permanently to the care and custody of the children's aid society; and

(*d*) that in cases under clause *b* or *c* the municipality to which the child belongs pay the rate in respect of the child from the day the child was apprehended, or if he was not apprehended, from the day he was brought before the judge as an apparently neglected child, and so long as the child remains in the care and custody of the society.

There were amendments to cl. (*a*) of subs. (8) in 1957 and cl. (*d*) in 1958, none of which are relevant to the present problem.

Accordingly, when *Fortowsky* was decided the Act did not contain s. 25(*c*) and the Court in *Fortowsky* was not required to give consideration to the condition "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34", as that stipulation did not exist in law until 1965. It must also be noted that s. 31(1) as it now reads, first appeared in the Act of 1965 as well as s. 84 which reads:

84. (1) Every children's aid society shall endeavour to secure the adoption of Crown wards, having regard to the individual needs of each ward.

(2) Every children's aid society shall, within one year after a Crown ward is committed to its care, report to the Director in the prescribed form the efforts made to secure the adoption of the ward and the facts relevant to his adoption.

(3) Every children's aid society shall submit to the Director a quarterly return in the prescribed form showing, as at the end of each quarter, the adoption status of each Crown ward in its care and of applicants as adoptive parents.

At the same time s. 66(3) of the 1960 Act, was replaced by 73(3) which reads:

73. (3) An order for the adoption of a child who is a Crown ward shall be made only with the written consent of the Director, in which case no other consent is required.

This amendment substituted the words "Crown ward" for "who is committed permanently to the care and custody of a children's aid society" and substituted "the Director" for "the society".

The expression "Crown ward" is not defined in the 1965 Act. However, by s. 32, the Legislature spelled out the

Crown's rights and duties to Crown wards saying, "The Crown has and shall assume all the rights and responsibilities of a legal guardian over its wards for the purpose of their care, custody and control . . ." Having so enacted, the question arises—what rights, if any, were left by the Legislature to a Crown ward's natural parent? The Crown is made the legal guardian and has the care, custody and control of a child designated as a Crown ward. It has the obligation to secure adoption of the child under s. 84(1). By s. 73(3) the natural parent's consent is dispensed with in the case of a Crown ward in adoption proceedings under Part IV of the Act.

The emphasis on the special provisions relating to Crown wards is illustrated by a comparison of the provisions of subss. 1 and 2 of s. 73 with those of subs. 3. Subsections 1 and 2 relate to children committed under s. 25(*b*) while subs. 3 relates to Crown wards under s. 25(*c*).

It follows from the foregoing that the Legislature intended, by s. 25(*c*), that once a child was designated as a Crown ward, the natural parent was to be accorded no recourse other than the right to appeal, and the order designating the child as a Crown ward was not to be terminated except as provided in s. 31 or when the child attained the age of 18. The power of the Legislature to so enact cannot be questioned: *Reference re Adoption Act, etc.*[7]

I cannot see how the plain words of s. 25(*c*) "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34" can be read as being nullified by the opening words of s. 35(1) because the two subsections have a place in the scheme of things contemplated by the Act. Section 25(*c*) does not deprive s. 35(1) of effect. Section 35(1) still applies to wards of children's aid societies who are not Crown wards namely, those so designated under s. 25(*b*) and to whom s. 31(1) does not apply.

The Legislature might have used more specific language, but the language it did use is plain and unambiguous and must be given its plain meaning, and it is obvious from the other changes which were made in the Act in 1965, when s. 25(*c*) first appeared, that once a child was designated

[7] [1938] S.C.R. 398, *per* Duff C.J. at p. 402 and pp. 418-19.

1969

MUGFORD v. CHILDREN'S AID SOCIETY OF OTTAWA

Hall J.

as a Crown ward only a Children's Aid Society may under s. 31(1), apply for an order terminating the Crown wardship. Once an order under s. 25(*b*) becomes effective the natural parent has no further enforceable rights. This is the over-all scheme or programme for Crown wards which the Legislature has erected and its power to do so is beyond question: *Reference re Adoption Act, etc.* It is to be expected that a Children's Aid Society, having the care of a ward of the Crown, upon being satisfied that it is in the best interests of the child to restore it to the natural parent would accomplish that result by an application under s. 31(1). There are no limitations on a society's right to do so. The section empowers the judge to terminate the wardship ". . . if the judge is satisfied that the termination is in the best interests of the child . . ."

I would accordingly dismiss the appeal. I agree with my brother Spence that there should be no order as to costs.

Appeal allowed and case remitted, no order as to costs; JUDSON *and* HALL JJ. *dissenting.*

Solicitor for the appellant: John P. Nelligan, Ottawa.

Solicitors for the respondent: Burke-Robertson, Urie, Butler, Weller & Chadwick, Ottawa.

Solicitors for the intervenants: Gowling, MacTavish, Osborne & Henderson, Ottawa.