Privy Council Appeal No. 102 *of* 1925.

Benjamin Stevenson - - - - - - - *Appellant*

v.

Dame Flora Florant - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1926.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ATKINSON.
LORD CARSON.
SIR THOMAS ROLLS WARRINGTON.
SIR JOHN WALLIS.

[*Delivered by* SIR THOMAS ROLLS WARRINGTON.]

This is an appeal, brought by special leave of His Majesty in Council, from an order of the Supreme Court of Canada, affirming an order of the Court of King's Bench, Appeal Side, which itself affirmed an order of the Superior Court of Montreal.

The last-mentioned order was made upon an application under section 1114 of the Quebec Code of Civil Procedure, and ordered the appellant to surrender to the care and custody of the respondent a child named Gertrude Stevenson, at that time (the 22nd May, 1924) of the age of nine years and six months or thereabouts.

The respondent is the mother of the child. The appellant is her paternal grandfather, and was duly appointed her tuteur under the provisions of the Civil Code of Quebec.

The questions raised by the appeal are :—

1. Whether the tuteur can successfully resist the mother's demand for the custody of her child by asserting his position as tuteur.

2. Whether proceedings under section 1114 of the Code of Civil Procedure were proper for the purpose of determining the question.

3. Whether on the merits and in the interest of the child the order for her delivery into the care and custody of the mother ought to have been made.

These questions have all been answered by the Canadian Courts in the respondent's favour.

The child is the daughter of Archibald Stevenson and the respondent. Her parents were married on the 30th April, 1912.

The respondent is a Roman Catholic. Archibald Stevenson was brought up as a Protestant, but shortly before his marriage was baptised as a Roman Catholic. The marriage took place in a Roman Catholic church.

Archibald Stevenson died on the 26th February, 1914, the child was born at the house of her maternal grandmother on the 19th September, 1914, and was baptised as a Roman Catholic on the following day.

The respondent was left entirely without means to support herself and her child, and in the month of November, 1914, when the child was about two months old, she and her mother went to live with the appellant and his wife at their farm at St. Sophie, about 30 miles from Montreal.

After a time, however, the respondent desired to return to Montreal and endeavour to make her living, and it was ultimately arranged that steps should be taken to obtain the appointment of the appellant as tuteur, the respondent surrendering her right to be appointed tutrice.

The family council was accordingly summoned and advised the appointment of the appellant, and on the 28th December, 1914, the parties all appeared before a Deputy Prothonotary of the Superior Court of Quebec, who ratified and confirmed the advice of the council and ordered that the appellant should be and remain tuteur to the child, the mother (the respondent) having renounced the charge of tutrice.

From that time the appellant and his wife (now dead) have had the sole custody of and have maintained and educated the child, but the respondent has frequently visited her and has taken her presents of clothes, toys and so forth. The child has been educated as a Protestant.

The respondent had a hard struggle to make a living, but towards the end of 1923 she was in the employment of the Canadian Pacific Railway Company, receiving a salary of $100 a month. She then, considering herself in a position adequately to support her child, requested the appellant to place her in her charge, informing him that for the purpose of education she proposed to place her as a boarder at a Pensionnat in Montreal kept by nuns and to make such arrangements for holidays as

would enable her to see as much as possible of her grandparents. The appellant, however, refused to give her up and, after an ineffectual attempt to obtain possession of her by force, the present application was made under section 1114 of the Code of Civil Procedure, being in substance of the same nature as an application in this country for a writ of *habeas corpus*.

The result in Canada of these proceedings has been stated above.

The Courts in Canada have all come to the conclusion that it is in the best interests of the child that the care and custody of her person and the direction of her education should be entrusted to her mother, the respondent. Their Lordships agree with this view. The tuteur, her grandfather, is now over 80 years of age. Since the commencement of the present proceedings her grandmother has died, and the only female influence of which there is any evidence is that of a great-aunt, who must be of considerable age, and a school teacher of the Jewish faith. On the materials before the Courts in Canada there was no suggestion of any immorality or other defect in character on the part of the respondent which would disqualify her from having the care of her daughter. Under these circumstances it seems to their Lordships that the Courts in Canada were right in holding that it is in the interests of the child that she should now have the advantage of the natural care of and association with her mother, and learn to treat her home as her own and to look up to her as the person having authority to direct her education and conduct. As to the question of religion, the child is now under 12 years old; at the time of the institution of the proceedings she was more than two years younger. It is not likely that she has formed such definite views on religious matters that a possible change in this respect would be a serious shock to her, and their Lordships, therefore, do not think that there is anything on this head which would counterbalance the advantages of a change of custody and control already referred to.

Under these circumstances the appellant is driven to attack the order appealed from on legal and technical grounds only.

The first and principal ground of attack is founded on the contention that, according to the true construction and effect of the Code Civil, the tuteur, so long as he occupies that position, is the only person entitled to have the care of the child, and that accordingly before the mother can exercise her parental authority she must obtain the removal of the tuteur by an order of the Court after consideration of the advice of the *conseil de famille*.

On this question their Lordships have the advantage of a carefully considered and reasoned judgment of Rinfret, J., concurred in by Anglin, C.J., and Duff, Mignault and Newcombe, J.J. Of these five judges two, Rinfret J. himself and Mignault J., have special experience in the law of Quebec, and Mignault J.

is the author of a well-known commentary on the Code Civil. The judgment is illustrated by copious references to authorities.

Their Lordships have read this judgment several times with the assistance of counsel on both sides, and in particular with the help of the criticisms of counsel for the appellant. This part of the judgment concludes with the following passage :—

> " Il faut donc décider que la qualité de tuteur de l'appelant ne lui confère pas sur la personne de Gertrude Stevenson des droits qu'il puisse opposer à l'autorité paternelle de l'intimée, qui est la mère. C'est donc à la mère et non au tuteur, qu' appartient le droit de garde et d'éducation de Gertrude Stevenson."

This decision their Lordships accept as correct, and they must, therefore, deal with the remaining objections of the appellant on the footing that according to the true construction and effect of the Code Civil, and in view of the fact that to give effect to the mother's right to the exercise of her authority is in the interests of the infant, the order appealed from is correct unless the technical objection to the form of the proceedings now to be mentioned is to be sustained.

The objection is that at the date of the issue of the writ the infant was in the custody of the appellant " under an order in a civil matter granted by a court or judge having jurisdiction," viz.: the order appointing him tuteur, and that a return to the writ stating that fact is a sufficient return.

The answer to this objection as it seems to their Lordships is that, holding as they do that the authority of the mother and her right to the custody of her child ought to prevail over the authority conferred on the tuteur by the order in question, and, further, that a transfer of custody from the tuteur to the mother is in the interests of the infant, they would not be disposed to treat these proceedings, in which the whole question has been considered on the merits by three Canadian Courts, as ineffective by reason of a defect in procedure, and to require the respondent to institute proceedings in another form which (according to their Lordships' view) would end in the same result.

If there be a valid technical objection to the form of proceedings, and if they ought to have been instituted by an ordinary writ of summons, the Court would properly in the interests of both parties and acting under Article 3 of the Code of Civil Procedure set aside the objection and make the order which would have been made if the form had been strictly correct.

On the whole, their Lordships are of opinion that the order appealed from is correct and the appeal ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

There is, however, a further matter to be mentioned. A petition was presented to this Board asking leave to adduce further evidence, the object of such evidence being to attack the moral

conduct of the respondent in the period immediately succeeding the death of her husband, now 12 years ago. Their Lordships are of opinion that this petition cannot be entertained and should be dismissed with costs, but without prejudice to any fresh application which may be made to the Courts in Canada founded on further evidence, and they will on this matter also humbly advise His Majesty accordingly.

In the Privy Council.

BENJAMIN STEVENSON

v.

DAME FLORA FLORANT.

DELIVERED BY
SIR THOMAS ROLLS WARRINGTON.

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