



SUPREME COURT OF NORWAY

On 12 October 2015, the Supreme Court gave judgment in

HR-2015-02041-A (case no. 2015/824), civil case, appeal against judgment,

The municipality of X

(Counsel Hans-Jørgen Andersen)

v.

A

(Counsel John Christian Elden)

V O T I N G :

- (1) Justice **Ringnes**: The case concerns deprivation of parental responsibility and consent to adoption under section 4-20 of the Child Welfare Act.
- (2) B was born on 00.00.2009 and is now six years and seven months old. Since January 2011, she has been living with her foster parents C and D in Y, and the foster parents have applied to adopt the girl.
- (3) Her biological parents are E and A. E died in 2014, shortly after the judgment of the district court. E had two children from previous relationships who were removed from her in 2006. B is A's only child.
- (4) B suffered from neglect by her mother. By an interim order of 3 September 2010, the girl was placed in temporary care at a secret address. Before that, she had been living with her mother. A and E were not cohabitants, but A had a flat near E and was in daily contact with mother and daughter.
- (5) On 20 December 2010, the County Social Welfare Board (*fylkesnemnda for barnevern og sosiale saker*) ordered, in accordance with section 4-12 of the Child Welfare Act, that B be placed in a certified foster home at a secret address. E was allowed contact visits two hours four times a year. On the same day, the Board issued a special order allowing A supervised access two hours four times a year.

- (6) The County Social Welfare Board's order taking B into foster care was upheld by Sør-Østerdal District Court's judgment of 5 July 2011. Based on a positive assessment of A's suitability to have contact with B, the district court extended his access rights to two hours six times a year. He was described as "calm and secure, which has a positive effect on the girl's conduct as it makes her safer and more active during the visits". The district court also based its judgment on the foster father's statement that B had been happy and cheerful after spending time with her father.
- (7) E appealed the district court's judgment to Eidsivating Court of Appeal, which refused to grant leave under section 36-10 subsection 3 of the Dispute Act. The care order was thus final and binding.
- (8) In December 2012, E applied for extended access rights. The municipality dismissed her application, and requested in turn that the parents be deprived of parental responsibility and that consent be given to forced adoption under section 4-20 of the Child Welfare Act.
- (9) The County Social Welfare Board dismissed the municipality's request for deprivation of parental responsibility and consent to adoption in an order of 15 November 2013. The Board held that it had not been adequately substantiated that adoption would be in the child's best interests or that it would make a great difference to B if a possible adoption were postponed.
- (10) On A's suitability to have contact with his daughter, the County Social Welfare Board noted the following:

"In his statement in court, A made a positive impression and appeared kind, considerate and caring. He has little experience with children, but he has practiced five weeks at a kindergarten and read books on children's development to increase his competence. It is not disputed that the contact with A functions well. B recognises her father and embraces him on arrival. In disturbing situations, she seeks her father's protection. According to the supervisor, B enjoys the visits. A plays with her actively and follows her initiatives. He is loyal, cooperative and accepts guidance. The foster parents have not seen any negative reactions after contact with A. According to the foster mother, B is happy and content after having spent time with her father. The child welfare service has not deemed it necessary to reduce A's access rights."
- (11) The County Social Welfare Board then decided to allow A supervised access four times a year. It is stated in the order that he did not oppose supervision.
- (12) A saw his daughter 13 times from 28 August 2011 until the County Social Welfare Board's hearing in November 2013. Since that, he has seen her twice, most recently on 21 May 2014.
- (13) The municipality requested a review of the County Social Welfare Board's order. Sør-Østerdal District Court appointed psychologist Fredrikke Lynum as an expert witness. Her conclusion in a declaration of 2 June 2014 was that adoption would be positive for the relationship between B and her foster parents, in particular as it would eliminate the stress she would endure in a persisting care dispute. The expert witness also found that the contact between the child and her parents in any case should be suspended until B got older, so that stability could be created around her.

- (14) On 16 June 2014, Sør-Østerdal District Court, in session with one expert judge and one lay judge from the general lay judge committee, unanimously concluded as follows:
- "1. E, born 0.0.1972 and A, born 0.0.1957, are to be deprived of parental responsibility of B, born 00.00.2009 under section 4-20 subsection 1 of the Child Welfare Act.
 2. The court consents to C and D adopting B, born 00.00.2009, see section 4-20 subsection 3 of the Child Welfare Act.
 3. No access rights between B and her biological father are granted, see section 4-20 (a) of the Child Welfare Act.
 4. No access rights between B and her biological mother are granted, see section 4-20 (a) of the Child Welfare Act."
- (15) Items 3 and 4 of the conclusion were based on the foster parents' opposing access. The general legislative terms were thus not met.
- (16) A appealed the district court's judgment to Eidsivating Court of Appeal, which granted leave to appeal on 2 October 2014 under section 36-10 of the Dispute Act. The court of appeal referred to the district court's "very brief" arguments why adoption would be in child's best interests, despite this being the central issue to the County Social Welfare Board. It was also unclear whether the district court had applied the correct legal basis, as the requirement for weighty reasons had not been discussed.
- (17) Psychologist Fredrikke Lynum was appointed as an expert witness also by the court of appeal. She was requested, among other things, to evaluate whether there was a basis for allowing access now that the mother had died. Her mandate was also to give an account of how a child handles being adopted versus being placed in foster care.
- (18) Eidsivating Court of Appeal gave judgment on 23 February 2015 concluding as follows:
- "1. The request for deprivation of parental responsibility and consent to adoption is dismissed.
 2. A is not to have access rights to B."
- (19) The judgment was given with dissenting opinions. The majority – two professional judges and the lay judge from the general lay judges committee – found that it was premature to conclude that the advantages of adoption would make up for the disadvantages of losing contact with the biological father. The minority – one professional judge and the expert lay judge – concluded that the conditions for adoption were met. The minority found that there were weighty reasons for adoption, and mentioned in particular that adoption would ensure stability and security for the child and her foster parents.
- (20) The municipality of X appealed only the part of the court of appeal's judgment concerning adoption to the Supreme Court. The appeal concerns the findings of fact and the application of law.
- (21) Psychologist Fredrikke Lynum has been appointed as an expert witness also by the Supreme Court. She has issued a written declaration and made an oral statement during the hearing. Psychologist Lynum has, as before the district court and court of appeal, expressed that adoption is in the child's best interests.

- (22) The testimony of the foster parents has been taken, and a written declaration from A has been presented. In addition, witness statements have been presented from A's family and friends. Apart from that, the case remains the same as before the court of appeal.
- (23) The appellant – *the municipality of X* – has mainly contended:
- (24) Adoption is in the child's best interests, and there are weighty reasons for adoption.
- (25) The question is whether adoption is best for the child when no weighty reasons in fact suggest the opposite. In this assessment, one must also take into account that for a period from now, which the municipality estimates to 2-3 years, the child will have no contact with her biological father.
- (26) The child was placed in foster care as an infant, and general experience shows that children that young connect primarily to their foster parents, see Supreme Court judgment Rt. 2015 page 110 paragraph 62. Today, the girl is not psychologically attached to her biological father. She is vulnerable and needs security and stability. Adoption would ensure this and eliminate the risk of future disputes on care and access.
- (27) The majority of the court of appeal has placed too much weight on the foster parents' reluctance to allow contact visits under section 4-20 (a) of the Child Welfare Act. However, the expert witness has advised against such visits with the father, because the child has strong negative reactions afterwards, and the foster parents have taken this into account. The foster parents will consider resuming the contact when the child gets older.
- (28) Furthermore, according to the preparatory works to section 4-20 of the Child Welfare Act, the applicants' withholding of consent to contact cannot be given weight in their disfavour when considering adoption.
- (29) The child also reacts negatively after visits from the child welfare service, and if she is adopted, the supervision by public authorities will cease.
- (30) The municipality of X has submitted this prayer for relief:
- "Sør-Østerdal District Court's judgment of 16 June 2014, in case 14-019463TVI-SOST, is to be upheld."**
- (31) The respondent – A – has mainly contended:
- (32) An adoption is irreversible, and consent to adoption must be profoundly justified.
- (33) It has not been substantiated that it is in the child's best interests to sever all ties with her biological father. A is generally suited and has a strong wish to have contact with his daughter. It was the mother's neglect that caused the transfer of care, and the negative reactions reported after the visits were not related to A's conduct. He has also, in the light of the expert's recommendation, accepted that there will be no contact for a certain period of time.
- (34) When balancing the facts of the case at hand against the judgments in Rt. 2007, page 561 and Rt. 2015, page 110 – where the Supreme Court consented to adoption – it is evident that several of the circumstances that were crucial in those cases are not present here.

(35) It must also be noted that a consent to adoption in our case will facilitate forced adoption in a number of subsequent cases.

(36) A has submitted this prayer for relief:

"The appeal is to be dismissed."

(37) *My view on the case.*

(38) I have concluded that the appeal cannot succeed.

(39) The case concerns deprivation of parental responsibility and adoption against the will of the biological father. The question is whether B is still to be in foster care or if the foster parents may adopt her. Under section 36-5 subsection 3 of the Dispute Act, the court is to review all aspects of the case, and the review must be based on the situation at the time of the judgment.

(40) The right to forced adoption is regulated by section 4-20 of the Child Welfare Act. The County Social Welfare Board may decide to transfer the parental responsibility and at the same time consent to adoption, provided that the conditions in subsection 3 a) – d) are met:

"a) it must be regarded as probable that the parents will be permanently unable to provide the child with proper care or the child has become so attached to persons and the environment where he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her and

b) adoption would be in the child's best interests and

c) the adoption applicants have been the child's foster parents and have shown themselves fit to bring up the child as their own and

d) the conditions for granting an adoption under the Adoption Act are satisfied.

(41) In the case at hand, it has not been disputed, and I therefore trust, that the conditions in c) and d) are met.

(42) Nor has it been disputed that the condition in a) has been met, since B has become so attached to her foster home that removing her would cause her serious problems. I share that view. From the age of one year and ten months – for about four years and nine months – she has been living in the foster home. The court of appeal has quoted the following statement by psychologist Lynum of 2 June 2014:

"The foster parents are the girl's psychological parents and those who are best fit to provide her with proper care in the future. There is nothing in the foster parents' care indicating that they should not be able to provide the child with such care and make all decisions involving her.

The child has had a good and stable development in the foster home. She has a long-term and secure relationship with her foster parents.

...

It would be a serious loss to the child if she were to sever her ties with her foster parents. My opinion is that removing the child by restoring the parental responsibility would be so traumatic to her that it cannot be recommended. There is a risk of serious future difficulties even if one assumes that new care persons will give her proper and supportive care in the loss of her foster parents."

- (43) I endorse these considerations. The decisive issue is thus whether adoption will be in the child's best interests, and whether there are, on this basis, sufficiently weighty reasons for adoption. These conditions are summarised as follows in paragraph 46 in the Supreme Court judgment in Rt. 2015, page 110:

"A forced adoption has a strong impact on the biological parents. The emotional pain of your child being adopted is usually profound. The family ties severed by forced adoption are protected under ECHR Article 8 and Article 102 of the Norwegian Constitution. Adoption is also a radical measure for children, which under the UN Convention on the Rights of the Child Article 21 may only be decided if this is in the best interests of the child. The interests of the parents take second place where crucial factors indicate adoption of the child, see Article 104 (2) of the Norwegian Constitution and the UN Convention on the Rights of the Child Article 3 no. 1. I refer here to ECtHR's judgment in the case *Aune v. Norway* of 28 October 2010, paragraph 66, which states, in connection with the proportionality assessment under ECHR, Article 8 no. 2, that the adoption must be based on "an overriding requirement pertaining to the child's best interests". This case is the same case that was settled by the Supreme Court in Rt. 2007, page 561. I therefore find that the mode of expression in paragraph 51 of this Supreme Court judgment - that there must be "particularly weighty reasons for adoption" - suggests the use of the same norm."

- (44) Hence, the doctrine of "the child's best interests" in section 4-20 subsection 2 (b) of the Child Welfare Act is supplemented by a requirement for particularly weighty reasons. The concerns for the child that suggest adoption must be so strong that the concern for maintaining the biological ties between the child and its parents must give way. Because an adoption order is irreversible, it must only be made when it "with a relatively high degree certainty can be held that adoption will be in the child's best interests", see Rt. page 557 on page 562 and Rt. 2001 page 14 on page 21.
- (45) The majority of the court of appeal has made a specific and nuanced balancing of the circumstances in favour of adoption against those that speak against it for the time being. I mainly endorse this approach.
- (46) Both the majority and the minority of the court of appeal assumed that an adoption could entail a permanent severing of the ties between the girl and her biological father.
- (47) What nevertheless speaks in favour of adoption, is that B is a vulnerable child who has had an extremely difficult start in life and who needs stability, security and predictability. In the expert statement before the Supreme Court it is set out that "legalisation of the child's and the foster parents' relationship through adoption will provide the best support, stability and security for her in her further development".
- (48) I also refer to what the majority of the court of appeal stated in this regard:

"The majority acknowledges, like the minority, that B is a vulnerable girl who has a special need for security and affiliation. This is particularly due to the neglect she experienced at an early age. B needs stability and predictability.

B is strongly connected to her foster parents. She has lived in the foster home for four years, and has no longer a close relationship with her father. As it appears from the

expert statement, removing B from her foster parents may cause her severe problems. The strong ties and B's need for affiliation with her foster parents indicate that consent to adoption should be given. General concerns as to whether adoption is best for the development of children who are placed in foster care early, indicate the same".

(49) This assessment also refers to circumstances that the Supreme Court emphasised in Rt. 2015 page 110. I mention in particular paragraphs 50 and 60-64.

(50) When the minority of the court of appeal concluded that there were weighty reasons for adoption, it was for the reasons to which I have now referred.

(51) However, in the individual assessment, it is significant that nothing in B's relationship with her biological father is likely to cause instability and conflict or disturb the child's relationship with her foster parents. The majority of the court of appeal holds that A has been "firm in his vow not to reclaim the care. According to the evidence presented, there is no reason to doubt this. Nor is there any reason to assume that A otherwise intends to oppose the placement or the access arrangements". This is enforced by A's written statement before the Supreme Court, reading:

"Although I wish, of all my heart, that B could live with me, I have accepted the placement in foster care with access rights sometime in the future. But I have not accepted adoption."

(52) A appears to be a father who wants the best for his child, who understands what this involves and who is willing to be guided when necessary. The court of appeal has described him as a "kind, good and hard-working fellow", and he receives only good references. To make up for his lack of experience with children, he has practiced in a kindergarten, among other things.

(53) The court of appeal has held that the contact visits between A and his daughter have mainly been described as positive. After the most recent visits – in 2014 – it has been reported, however, that the girl has had negative reactions. The causes of this change are unclear, but nothing indicates that it has to do with her father's conduct. In any case, these negative reactions cannot be decisive to the adoption issue, since the contact between A and his daughter is to be suspended for some time according to the court of appeal's judgment. I refer to the majority of the court of appeal in this regard:

"However, due to B's strong reactions after spending time with her father, further visits cannot be scheduled for the time being, as that would not be in the child's best interests. On this point, the court refers to the expert's descriptions of the child's conduct after the visits. B needs stability, and access should not be reconsidered until at the end of the next school year. With a modest approach to the access issue as B gets older, it cannot be excluded that B will benefit from contact with A, which suggests that adoption should not be authorised unless contact between father and child is guaranteed. In the majority's view, a postponement of a possible adoption will not affect B to such an extent that it is clearly in her best interests if adoption were authorised today."

(54) I agree with this conclusion.

(55) My impression is that the foster parents are not opposing possible future contact between B and her biological father. I refer to the taking of D's – the foster father's – testimony before the Supreme Court:

"The contact with A should wait until she feels secure enough to handle it. The witness does not have anything against A, whom the witness perceives to be a nice guy. A has been at the foster parents' house, without there being any problems. They do not oppose contact with A when B says she is ready for it. While A was in a relationship with E, the witness and his wife did not feel secure about what might happen during the visits. Now this has changed, since it is only a question of contact with A.

He is somewhat uncertain about when B ought to learn about her biological background. But it will be natural to seek the advice of the local child welfare service regarding timing and procedure. Having a relationship with A is not a problem."

- (56) Against this background, and what has been stated about A's abilities and understanding of his daughter's situation, I do not see why B should not benefit from having contact with her biological father when she gets a little older. Out of concern for the child's secure and stable base at the foster home, I find – like the majority of the court of appeal – that the child does not have much to lose from a postponement of the adoption issue until her needs and relationship with her biological father have been further clarified. As of today, it has not been substantiated that the advantages of adoption are so considerable that the biological ties between father and child must give way.
- (57) As there are no weighty reason for adoption as per today, the appeal must be dismissed.
- (58) I vote for this

J U D G M E N T :

The appeal is dismissed.

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| (59) | Justice Øie: | I agree with the justice delivering the leading opinion in all material respects and with his conclusion. |
| (60) | Justice Indreberg: | Likewise. |
| (61) | Justice Falch: | Likewise. |
| (62) | Justice Skoghøy: | Likewise. |
| (63) | Following the voting, the Supreme Court gave this | |

J U D G M E N T :

The appeal is dismissed.