Memorandum of Law and Argument

Regarding Change of Name for a young person who has withdrawn from parental control

Application by KAB (birth name), preferred name, AMR
3 April 2013

The *Change of Name Act*, R.S.O. 1990, c - C.7, ("*CNA*") section 4 provides as follows:

CHANGE OF NAME OF PERSON OVER SIXTEEN

Application for change of name

4. (1) A person at least sixteen years of age who has been ordinarily resident in Ontario for at least one year immediately before making the application may apply to the Registrar General in accordance with section 6 to change his or her forename or surname or both. R.S.O. 1990, c. C.7, s. 4 (1).

Exception, confidential change of name

(1.1) The residency requirement set out in subsection (1) does not apply in respect of an applicant for a change of name that has been certified as described in subsection 8 (2) by the Attorney General or a person authorized by the Attorney General. 2009, c. 33, Sched. 2, s. 9.

Notice to spouse, etc.

(2) An applicant who is a spouse or has filed a joint declaration that has not been revoked shall give the other spouse or other person notice of the application. R.S.O. 1990, c. C.7, s. 4 (2).

Consent required where applicant under 18

(3) An application by a child requires the written consent of every person who has lawful custody of the child. R.S.O. 1990, c. C.7, s. 4 (3).

Application to dispense with consent

(4) If the required consent cannot be obtained or is refused, the child may apply to the court for an order dispensing with the consent. R.S.O. 1990, c. C.7, s. 4 (4).

How application determined

(5) The court shall determine an application under subsection (4) in accordance with the best interests of the child. R.S.O. 1990, c. C.7, s. 4 (5).

Application - Overview

1. Pursuant to s. 4(1) of the *CNA*: "A person at least 16 years of age … may apply to the Registrar General …to change his or her forename or surname or both."

2. Section 4(3) of the *CNA* states that an application for a name change by 16 and 17 year olds "requires the written consent of every person *who has lawful custody* of the child". [emphasis added]

3. The Applicant seeks an Order dispensing with parental consent pursuant to s. 4(4) of the *CNA*, which provides that if consent cannot be obtained … the child may apply to the court for an order dispensing with consent.

4. Consent of a person with lawful custody of the child cannot be obtained because there is no person with lawful custody of this child. There is no custodial parent because the Applicant has withdrawn from parental control. And, in any event the Applicant cannot obtain a signature from her mother because the Applicant feels it would be unsafe and unhealthy to make such a request, and that it would jeopardise the already tenuous relationship that exists between the Applicant and her mother.

5. It is the Applicant's position that no notice to her mother is required for two reasons. First, it is the Applicant's position that her mother is not a proper party under s. 7, and specifically under s. 7(3)(b) of the Family law Rules - Courts of Justice Act, O.Reg. 114/99 ("*FLR*"). Second, no notice to non-custodial parents is required by s. 4 of the *CNA*.

6. I have not been able to find any case law on any aspect of s. 4 of the *CNA*. Which of course includes no jurisprudence regarding applications by young people who have withdrawn from parental control, nor regarding what constitutes "cannot be obtained", nor regarding who should be named as a party.

7. There are cases which deal with applications by custodial parents to change a child's name pursuant to s. 5 of the *CNA*.

Withdrawal from Parental Control

8. In the province of Ontario, a young person 16 years and older is entitled to withdraw from parental control, and live independently. The withdrawal may be voluntary or involuntary, but regardless the entitlement exists.

There is legislative reference to this right in the:

- *Family Law Act*, R.S.O. 1990, c.F.3 (s.31);
- *Children's Law Reform Act*, R.S.O. 1990, c.C.12 (s.65), and;

- *Child and Family Services Act*, R.S.O. 1990, c.C.11 (ss. 43, 137 & 146).

9. The Applicant (who's birth name is AB, but who's chosen name is AR will be referred to herein with female pronouns) has been forced to involuntarily withdraw from parental control because of her family's denial of her true identity, and because of an unsafe and unhealthy home life. In particular, the Applicant's gender identity was the source of conflict and difficulty, and was the underlying issue that attracted the involvement of child protection authorities during her childhood. (Applicant's Affidavit ("Affidavit") dated 13 Feb. 2013, paras 5-8)

10. Since 22 August 2012 the Applicant has lived independently, being entirely responsible for her own life: for school, for accommodation, for income, for health care, as well as her own emotional and social well being.

11. It is our position that in a situation where a young person has withdrawn from parental control, as here, there is no parent who has any entitlement to exercise any incident of custody – there is no parent with lawful custody.

12. The Applicant acknowledges that a name change has been found to be an incident of custody in cases considering s. 5 of the *CNA* - the section governing applications to change a child's name made by a custodial parent. (See for example, *Felix v. Fratpietro*, [2001] O.J. No. 37 para 22, and *McLane v. Kilby*, [2006] O.J. No. 372 (OSCJ) para 7).

13. In the case before this Court there is no one entitled to exercise this incident of custody, as there is no custodial parent.

14. In both cases mentioned above, non-custodial parents sought to prevent a custodial parent from changing the child's name. In *Felix* the non-custodial father was given 30 days to seek a remedy regarding potential custodial rights. In *McLane* the court grants an injunction restraining the custodial parent from seeking the name change of an 8 year old for one year, finding that the name change was premature and not in the child's best interests.

15. Significantly, under s. 5(6) *CNA* non-custodial parents are entitled to notice of the custodial parent's intention to change a child's name. There is no equivalent notice requirement to non-custodial parents under s.4 – non-custodial parents are not entitled to notice.

16. In the case before this Court there is no mechanism whereby the Applicant's mother could seek to regain any incident of custody (except perhaps the obligation to provide child support). The young person's right to withdraw from parental control is entirely their own, there is no legal mechanism to prevent or reverse the decision.

Only the Applicant is properly a party to this Application

17. It is the Applicant's position that the only person who must be named as a party is the Applicant, and that the Applicant's mother is not properly a party. While she may or may not be interested in what her child is doing, as a non-custodial parent she has no legal interest in this Application. Further, there is no requirement in the *CNA* that the Applicant's mother be given notice.

18. This case is brought to the Court by way of application pursuant to s. 2 of the *Family Law Rules*, Courts of Justice Act, O.Reg. 114/99 ("*FLR*") - a case brought to the court for a final order.

19. Section 7(3)(b) requires that a person starting a case shall name as a respondent:

(i) every person against whom a claim is made, and
(ii) every other person who should be a party to enable the court to decide all the issues in the case.

(i) The Applicant is not making a claim against anyone. There is no right or obligation regarding any person, other than the Applicant, arising as a result of this Application.

(ii) Further there is no person other than the Applicant who should be a party to enable the court to decide all the issues in this case. Specifically the Applicant's mother's participation is not required to decide all the issues.

20. We submit that the Application before the Court is more similar to a declaration than a resolution between opposing parties. The Application is akin to a declaration in that we ask you to find that consent of a lawful custodian cannot be obtained: first, because there is no lawful custodian, or, in the alternative, that consent cannot be obtained because the Applicant cannot and will not seek such consent as she believes it would be unsafe and unhealthy to do so.

21. There is no fact, opinion or legal position that the Applicant's mother could provide to the court regarding the Applicant's withdrawal from parental control, or regarding the Applicant's feelings about seeking her mother's consent, that would better enable the Court to decide all the issues. The decision to withdraw is entirely the purview of the Applicant, and is unassailable. There is nothing the mother can say or do to prevent or reverse that fact. The same is true of the Applicants fear of seeking her mother's signature.

22. As a result of such a finding, we ask the Court to make an Order dispensing with parental consent pursuant to s. 4(4) of the *CNA*.

The *CNA* and requirements for giving notice

23. In addition to the above, while there are notice requirements in both sections 4 and 5 of the *CNA*. There is no requirement in s. 4 that a non-custodial parent be given notice.

24. Section 4(2) requires that an applicant who is a spouse or who has filed a joint declaration give notice to the other spouse or person.

25. Section 5(6) requires that a non-custodial parent be given notice where a custodial parent is making the application, but there is no equivalent where the young person is making the application.

Appeals

26. Section 11(1) of the *CNA* provides that "An appeal from an order under subsection 4(4) or 5(4) (dispensing with consent) may be made to the Superior Court of Justice by the applicant or by the person whose consent is dispensed with."

27. We submit that this provision would only be applicable where there had been a custodial parent, whose consent was dispensed with.

Best interests of the child

28. Pursuant to *CNA* s. 4(5) there is a statutory imperative to determine the application in accordance with the best interests of the child.

29. The Applicant submits that it is very clearly in her best interests to be able to change her name to accord with her lived identity.

30. Further that it is in her best interests to have the court acknowledge that she has withdrawn from parental control, and that with that burden of responsibility should come the freedom to make decisions, such as the decision to change her name free from requirements that perpetuate her experiences of discrimination and abuse.

31. Finally the Applicant submits that resolving this matter as expeditiously as possible will help to provide a much needed additional layer of security and protection from discrimination, as well as improve her health and well being by removing this barrier to finding her personal identity.

Change of Name application has been refused – the Applicant seeks an Order of this Court

32. On 13 February 2013, the Applicant applied to the Registrar General for a change of name. With that application she included a hand written note indicating that she is living independently and has no custodial parent. (Applicant's Affidavit, dated 3 April 2013 ("Affidavit #2"), paras 2-4)

33. The Applicant received notice that the application had been denied on 26 February 2013. The notice states that the application had been denied for two reasons: 1- that the "reasons" required in Part 1, C, on page 4 must be filled out, and; 2- that Form 7, Part 3, on page 10, "written consent of every person who has lawful custody of the child" as per s.4(3) of the *Change of Name Act*, R.S.O. 1990, c C.7, must be filled out. (Affidavit #2 para 5)

34. The Applicant resubmitted her change of name application with a letter from counsel (dated 6 March 2013) outlining the Applicant's position that there is no person with lawful custody of the young person and seeking reconsideration. (Affidavit #2, para 6)

35. During the week of 25 March 2013, the Applicant received notice (dated 19 March 2013) that her application had again been denied. (Affidavit #2 para 7)

36. On 28 March 2013, counsel to the Registrar General, Mr. James Stubbing, contacted counsel to advise that he had received the letter, and that while he does not have instructions from his client, he does not think the Registrar General will "make a different decision" without an order from the court. (Affidavit #2, para 8)

37. On the morning of 3 April 2013 counsel to the registrar general sent a letter outlining 3 alternative requirements of the Registrar General in this matter:

a) written consent of every person having lawful custody; or
b) a certified order of this Court dispensing with the consent of all persons with lawful custody; or
c) a certified copy of a court order indicating that no person has lawful custody.

37. As a result the Applicant seeks from this Court, either an order dispensing with consent pursuant to s. 4(4) of the *CAN*, or an order indicating that no person has lawful custody of the Applicant.