

Re R. (An infant)

Supreme Court (in chambers)
Unsworth, C.J.
23 December 1974

Adoption — whether Attorney General may act as guardian ad litem without express appointment — Adoption of Children Ordinance, s. 16.
Adoption — whether English rules apply — whether references to the Official Solicitor should be read as Attorney General.
Adoption — whether application under obsolete rules invalid.

Three preliminary questions of law arose on an application under the Adoption of Children Ordinance (Cap. 3).

- Held:** (i) The reference to rules of court in s. 16(3) of the Adoption of Children Ordinance (Cap. 3, 1964 Ed.) includes English rules applied by subs. (4).
- (ii) References in the English rules to the Official Solicitor should be read in Gibraltar as references to the Attorney General.
- (iii) The bringing of the application under the 1959 rules, instead of the 1971 rules, was a mere irregularity.

Sir Joshua Hassan, Q.C., for the applicant.
The Attorney General (J.K. Havers Q.C.) guardian ad litem.

23 December 1974: The following ruling was read—

This is an application under the provisions of the Adoption of Children Ordinance in which three preliminary points of law have arisen for consideration.

The first two points raise the question of whether the Attorney General is properly acting as guardian ad litem. The Attorney General has in fact been so acting under the English Adoption Rules which provide that the Official Solicitor shall, if he consents, be the guardian ad litem. Does this rule apply to Gibraltar and is the Attorney General here the Official Solicitor?

Doubt has arisen as to whether this particular rule applies to Gibraltar in view of the wording of s. 16 of the Adoption of Children Ordinance. S. 16 reads as follows:—

"16. (1) The court having jurisdiction to make adoption orders under this Ordinance shall be the Supreme Court or, at the option of the applicant, but subject to any rules of court under this section, the magistrates' court.

(2) Rules of court in regard to any matter to be prescribed under this Ordinance and directing the manner in which applications to the court are to be made and dealing generally with all matters of procedure and incidental matters arising out of this Ordinance and for carrying this Ordinance into effect shall be made by the Chief Justice.

(3) For the purpose of any application under this ordinance and subject to any rules of court under this section, the court shall appoint some person or body to act as guardian ad litem of the infant upon the hearing of the application with the duty of safeguarding the interests of the infant before the court.

(4) Until such rules as aforesaid shall take effect, any rules from time to time in force in England shall have effect, so far as applicable, as if duly made under the provisions of the Ordinance."

No rules have been made under the section and, if rules of court under sub-s. (3) of that section are restricted to rules *made under the section*, then the English rules under which the Attorney General is acting do not apply and the guardian ad litem would have to be appointed by the court. In my view the rules of court under sub-s. (3) are not so restricted. The sub-section refers generally to "*any rules of court under the section*" and includes both rules made under sub-s. (2) and the English rules referred to in sub-s. (4). In reaching this conclusion I have not been unmindful of the argument that sub-s. (3) would be unnecessary unless the words "rules of court under the section" mean rules made under the section. This may be so under the present wording of the English rules but that wording could be changed and, in any event, the point would not lead me to depart from what I consider to be the natural meaning of the wording of sub-s. (3).

The next point for consideration is whether the reference in the English rules to the Official Solicitor should be construed in Gibraltar as a reference to the Attorney General. In my view this depends on whether such a construction applies by virtue of the *mutatis mutandis* principle. This principle has been applied by r. 2 of the Gibraltar Supreme Court Rules to rules of procedure such as those now under consideration. I would not go so far as to say that every reference to the Official Solicitor must under r. 2 necessarily be construed as a reference to the Attorney General in Gibraltar as the two offices do not correspond. It seems to me, however, that references to the Official Solicitor must be construed as references to the Attorney General in respect of duties which the Attorney General has in fact been exercising by virtue of legislation or well established practice. I am satisfied that the Attorney General has for a long time past been performing the duties of guardian ad litem in adoption cases and I accordingly construe the reference to the Official Solicitor as a reference to the Attorney General.

There remains for consideration a further point, namely, whether I can properly proceed with this application in view of the fact that it has been made in accordance with the 1959 English rules and not the 1971 rules which now apply. In my view this is not fatal provided that the procedure adopted is consistent with that prescribed by the 1971 rules. This is so except in one respect in which I have directed that the 1971 procedure should be complied with before the hearing.