

WARNING

The court hearing this matter directs that the following notice should be attached to the file:

This is a case under Part III of the *Child and Family Services Act* and is subject to subsections 45(8) of the Act. This subsection and subsection 85(3) of the *Child and Family Services Act*, which deals with the consequences of failure to comply with subsection 45(8), read as follows:

45.—(8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

. . .

85.—(3) A person who contravenes subsection 45(8) (publication of identifying information) or an order prohibiting publication made under clause 45(7)(c) or subsection 45(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than three years, or to both.

ONTARIO COURT OF JUSTICE

B E T W E E N :

CHILDREN'S AID SOCIETY OF TORONTO,
Applicant,

— AND —

C.K. and J.S.,
Respondents.

Before Justice Stanley B. Sherr

Heard on 11 February 2008

Reasons for Judgment released on 13 February 2008

CHILD PROTECTION — Form of order — Custody order to one or more persons — Consent of proposed custodian(s) — Validity of consent — Nature of alleged consent — Whether consent was informed — Even though section 57.1 of *Child and Family Services Act* is silent on point, court must be satisfied that proposed custodian:

- (a) has been advised to consult with independent lawyer before signing consent;
- (b) understands nature and consequences of consent; and
- (c) has given voluntary consent to custody order under section 57.1.

In this case, children's aid society had merely filed statement of agreed facts in which child's aunt (who had not appeared before court) had purportedly given her consent to accepting child's custody but society's lawyer could not assure court about aunt's understanding of this consent nor indicate whether aunt had gotten independent legal advice before giving her alleged consent — Court was concerned whether aunt had understood consequences of custody order under section 57.1 that would place her and child outside child protection sphere — Court was also concerned whether aunt had fully explored option and benefits of pursuing her custodial claim under *Children's Law Reform Act* rather than under section 57.1 of *Child and Family Services Act* — Under these conditions, it would not be in child's best interests to make custody order at this time and case was adjourned until court was assured that aunt's consent was indeed informed.

STATUTES AND REGULATIONS CITED

Child and Family Services Act, R.S.O. 1990, c. C-11 [as amended], subclause 37(2)(b)(i), clause 37(2)(g), subsection 37(3), subsection 57(1) and section 57.1.
Child, Family and Community Service Act, R.S.B.C. 1996, c. 46 [as amended], section 54.1.
Children’s Law Reform Act, R.S.O. 1990, c. C-12 [as amended], section 28.
Family Law Act, R.S.O. 1990, c. F-3 [as amended].
Family Law Rules, O. Reg. 114/99 [as amended], Form 33D.

CASES CITED

[*British Columbia \(Director of Child, Family and Community Service\) v. British Columbia \(Public Guardian and Trustee\)*](#), 2006 BCSC 649, 29 R.F.L. (6th) 145, [2006] B.C.J. No. 931, 2006 CarswellBC 1014 (B.C.S.C.).

Mira R. Pilch counsel for the applicant society
No appearance by or on behalf of the respondent mother, C.K., even though served with notice
No appearance by or on behalf of the respondent aunt, J.S.
Lisa M. LaBorde counsel for the Office of the Children’s Lawyer, legal representative for the child

JUSTICE S.B. SHERR:—

1: INTRODUCTION

[1] The Children’s Aid Society of Toronto (the society) has brought a status review application seeking an order granting the respondent, Ms. J.S. (the aunt) custody of her niece, N.L.K. (born on 27 July 1995), pursuant to section 57.1 of the *Child and Family Services Act*, R.S.O. 1990, c. C-11, as amended (the Act).

[2] N.L.K.’s mother, Ms. C.K. did not serve and file an answer and plan of care or attend at court. I noted her in default on 11 February 2008.

[3] In support of their request, the society submitted a Form 33D (Statement of Agreed Facts) under the *Family Law Rules*, O. Reg. 114/99, as amended, signed by the society, the aunt and the child. These parties consented in this document to the disposition sought by the society. The aunt did not attend at court.

2: BACKGROUND

[4] The society apprehended N.L.K. and her younger brother from Ms. C.K.’s care on 22 February 2006 as Ms. C.K. was exhibiting significant mental health issues. Ms. C.K. has not taken steps to address these issues. Her behaviour has often been volatile and difficult for her family and the society to deal with. Her access to the children has been inconsistent and fraught with problems. Fortunately, the aunt presented a plan for N.L.K. and N.L.K. has resided with her pursuant to court orders since 12 November 2006. N.L.K. has done well in this placement and the society has no protection concerns regarding the aunt. N.L.K.’s brother was made a Crown ward after a summary judgment motion on 12 July 2007 and is no longer before the court.

[5] The society facilitated and supervised Ms. C.K.'s access to the children until August of 2007. Since August of 2007, family members have supervised Ms. C.K.'s access. The statement of agreed facts filed indicates that this access has been problematic. Ms. C.K. quickly loses her temper and can be very challenging to control.

3: DISCUSSION

[6] I have decided to adjourn this matter as I am not satisfied at this point that the aunt has given an informed consent to this disposition.

[7] Section 57.1 of the Act reads as follows (emphasis mine):

57.1 Custody order.—(1) Subject to subsection (6), if a court finds that an order under this section instead of an order under subsection 57(1) would be in a child's best interests, the court may make an order granting custody of the child to one or more persons, other than a foster parent of the child, *with the consent of the person or persons*.

(2) *Deemed to be order under Children's Law Reform Act.*— An order made under subsection (1) and any access order under section 58 that is made at the same time as the order under subsection (1) shall be deemed to be made under section 28 of the *Children's Law Reform Act* and the court,

(a) may make any order under subsection (1) that the court may make under section 28 of that Act; and

(b) may give any directions that it may give under section 34 of that Act.

(3) *Order restraining harassment.*— When making an order under subsection (1), the court may, without a separate application under section 35 of the *Children's Law Reform Act*,

(a) make an order restraining any person from molesting, annoying or harassing the child or a person to whom custody of the child has been granted; and

(b) require the person against whom the order is made to enter into such recognizance or post such bond as the court considers appropriate.

(4) *Same.*— An order under subsection (3) is deemed to be a final order made under section 35 of the *Children's Law Reform Act* and may be enforced, varied or terminated only in accordance with that Act.

(5) *Appeal under s. 69.*— Despite subsections (2) and (4), an order under subsection (1) or (3) and any access order under section 58 that is made at the same time as an order under subsection (1) are orders under this Part for the purposes of appealing from the orders under section 69.

(6) *Conflict of laws.*— No order shall be made under this section if,

(a) an order granting custody of the child has been made under the *Divorce Act* (Canada); or

(b) in the case of an order that would be made by the Ontario Court of Justice, the order would conflict with an order made by a superior court.

(7) *Application of s. 57(3).*— Subsection 57(3) applies for the purposes of this section.

- [8] The important elements of this section are as follows:
- (a) The custody order in section 57.1 can only be made once there has been a finding that a child is in need of protection. N.L.K. was found to be a child in need of protection on 5 October 2006 by Justice Marvin A. Zuker under subclause 37(2)(b)(i) and clause 37(2)(g) of the Act.
 - (b) Once the finding has been made, the test is whether it is in a child’s best interests to make this type of order as opposed to an order under subsection 57(1) of the Act. Criteria for a child’s best interests are set out in subsection 37(3) of the Act.
 - (c) The society or any other party can apply for a party or other persons to have custody of the child. These “other persons” are not required to be parties to the action, but they must consent to the custody order (as does any party).
 - (d) Section 57.1 custody orders and any access orders made at the same time as these custody orders are deemed to be orders made under section 28 of the *Children’s Law Reform Act*, R.S.O. 1990, c. C-12, as amended. Any subsequent variations of this order are brought under the *Children’s Law Reform Act* and the society would not be a party.

[9] A section 57.1 custody order will have significant implications for the aunt, including:

- (a) The society will no longer be obliged to assist her in dealing with Ms. C.K.’s difficult behaviour.
- (b) If Ms. C.K. or the aunt move to vary the section 57.1 order, the society will no longer be directly involved in such an application. The aunt will likely be on her own.
- (c) She will have not only all of the rights, but all of the obligations of a custodial parent.
- (d) If she wishes to seek child support, she will still need to bring a separate application under the *Family Law Act*, R.S.O. 1990, c. F-3, as amended.
- (e) The section 57.1 order, on its face, will name the society as a party to the action. This is the order that she will be presenting to schools and service providers. This is the order she will be presenting when she wishes to travel with N.L.K. Is this the form of order that she wishes to present to a third party? Will eyebrows be raised? Will it be problematic when she travels out of the country with N.L.K.? Is she aware of the alternative option of bringing a custody application under the *Children’s Law Reform Act* and the possible benefits of doing so?

[10] In [*Director of Child, Family and Community Service of British Columbia v. Public Guardian and Trustee of British Columbia*](#), 2006 BCSC 649, 29 R.F.L. (6th) 145, [2006] B.C.J. No. 931, 2006 CarswellBC 1014 (B.C.S.C.), the court reviewed section 54.1 of the Child, Family and Community Service Act, R.S.B.C. 1996. c. 46, as amended, which states that the court may rely on the consent given by the person to whom custody is to be

transferred (when the person is not a parent of the child) if the court is satisfied that that person:

- (a) has been advised to consult with independent legal counsel before signing the consent;
- (b) understands the nature and consequences of the consent; and
- (c) has given voluntary consent to the order transferring custody under this section.

[11] The Ontario legislation does not contain any criteria about accepting consents from the person or persons to whom custody will be transferred. In my view, the British Columbia criteria, set out above, form a good starting point of factors for the court to consider before accepting consents under section 57.1 of the Act. It is incumbent upon the court to be satisfied that the consent required under section 57.1 of the Act is an *informed consent*; the implications for the person or persons to whom custody will be transferred, as well as the child, are too critical to require otherwise. The person or persons to whom custody will be transferred should strongly be encouraged to seek independent legal advice before executing these consents. If they choose not to do so, at the very least, the person or persons to whom custody will be transferred should come to court, so that the judge can be satisfied that their consent is informed. Although it is not the case here, the concern about the consent's being informed is even more pronounced where the person or persons to whom custody will be transferred are not parties to the action and may not have sufficient information to make an informed decision.

[12] In this case, the statement of agreed facts merely sets out a factual history and the disposition agreed to. There is no indication in the agreement that the aunt has given an informed consent. Counsel for the society had no knowledge of the aunt's obtaining independent legal advice prior to executing the consent. Given this, it is not in the child's best interests to agree to the disposition sought either until the society provides proof that the aunt has obtained independent legal advice or until the aunt has come to court and I am satisfied that she is giving an informed consent. Ideally, the society will provide an affidavit from a solicitor verifying that the aunt has received independent legal advice and:

- (a) she has been made aware that the society will no longer be obliged to be involved with the family;
- (b) the society will not be a party to any future change of custody or access motions;
- (c) her rights and obligations as a custodial parent have been explained to her;
- (d) the option (and possible benefits) of proceeding under the *Children's Law Reform Act* have been discussed with her;
- (e) she understands the nature and consequences of the consent; and
- (f) the consent appears to be voluntary.

[13] Once I am satisfied that the aunt has given an informed consent, I am still required to consider whether the disposition sought is in N.L.K.'s best interests. The society is encouraged to provide me with updated evidence establishing this.

[14] The case is adjourned until 18 March 2008 at 10:00 a.m.