W A R N I N G

The court directs that the following notice shall be attached to the file:

This is a case under Part III of the *Child and Family Services Act* and is subject to one or more of subsections 48(7), 45(8) and 45(9) of the Act. These subsections and subsection 85(3) of the *Child and Family Services Act*, which deals with the consequences of failure to comply, read as follows:

> **45.**—(7) *Order excluding media representatives or prohibiting publication.*— The court may make an order,
>
> . . .
>
> (*c*) prohibiting the publication of a report of the hearing or a specified part of the hearing,
>
> where the court is of the opinion that . . . publication of the report, . . ., would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding.
>
> (8) *Prohibition: identifying child.*— 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.
>
> (9) *Idem: order re adult.*— The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.
>
> . . .
>
> **85.**—(3) *Idem.*— A person who contravenes subsection 45(8) or 76(11) (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.

COURT FILE No.: Toronto C48509/09
DATE: 2013-01-15
Citation: *Children's Aid Society of Toronto v. B.S,* 2013 ONCJ 492

ONTARIO COURT OF JUSTICE

B E T W E E N :

CHILDREN'S AID SOCIETY OF TORONTO,

Applicant

— AND —

B.S.,

J.P.,

S.P.

Respondents

Before Justice Curtis
Motion Heard on 10 October 2012
Reasons for Judgment released on 15 January 2013
Mira Pilch . . . . . for the applicant Children's Aid Society of Toronto
Ed Rice . . . . . .for the respondent B.S.
Anna Rice, articling student . . . . . .for the respondent J.P.
Herbert Stover. . . . . for the respondent S.P.

CURTIS, J.:

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Over-view

1. This is the decision in a motion for summary judgment brought by the Children's Aid Society of Toronto ("CAST") in a protection application, asking for a finding that the children Z.D.C.S. and S.S. are in need of protection, and a disposition that they be made crown wards, without access.

2. The issue for the court to determine is whether there is a triable issue with respect to the orders that CAST seeks.

Background

3. The mother is B.S., ("the mother"). The mother has had six children, none of whom is in her care. This court case is about the two youngest children:

    Z.D.C.S., born […], 2010, two years old at the time of the motion, and,

    S.S., born […], 2012, […] months old at the time of the motion.

4. The father is J.P., ("the father").

5. S.P. is the paternal grandmother ("the paternal grandmother").

Litigation History

6. CAST has been involved with the mother intermittently since 1998, and has been continuously involved with her since 2009. All six of the mother's children have been removed from her care due to concerns for their safety. None of the six children is in the care of their fathers. The youngest three children, C.S., Z.D.C.S. and S.S., are all children of the father J.P., and were never in the mother's care, as all were apprehended at birth.

7. These are the details regarding the mother's six children.

8. K.P. (born […] 1998) is 14 years old. K.P.'s father is P.P.. K.P. was apprehended on 27 February 1998, and then returned to her mother for eight days under a supervision order, and was apprehended again on 16 April 1998. K.P. was placed in the care of F.P. (her paternal grandmother) on 29 February 2000 under a supervision order. K.P. is in the joint legal custody of her paternal grandmother, and K.P. (her paternal aunt) pursuant to a custody order made 12 September 2000. The mother has not had contact with K.P. since 2000.

9. A.S.1 (born […] 2003) is nine years old. A.S.1's father is P.P.. A.S.1 was apprehended from the mother on 4 August 2009 after the mother breached the conditions of a supervision order prohibiting J.P. (the father of C.S., Z.D.C.S. and S.S., none of which children were then yet born), from living with her or having contact with the children. A.S.1 was placed with K. and J.S. (the maternal aunt and uncle) under a supervision order with the mother's consent in March 2010, but he returned to care on May 2010, as the maternal aunt and uncle could not care for him. A.S.1 was made a crown ward on consent on 27 January 2011.

10. A.S.2 (born […], 2006) is six years old. With A.S.1, A.S.2 was apprehended from the mother on 4 August 2009 after the mother breached the conditions of a supervision order prohibiting J.P. from living with her or having contact with the children. A.S.2 was placed with K. and J.S. (the maternal aunt and uncle) under a supervision order with the mother's consent in March 2010. A.S.2 is in the legal custody of K. and J.S., pursuant to a court order (under s. 57.1 *C.F.S.A.*) made 2 March 2011 by Brownstone, J., and unopposed by the mother.

11. C.S. (born […] 2009) is now three years old. C.S.'s father is J.P. (the father of Z.D.C.S. and S.S.). C.S. was apprehended from the hospital the day after she was born. C.S. was made a crown ward by Zuker, J. on 30 March 2012 on a summary judgment motion.

12. Z.D.C.S., apprehended at birth on […], 2010, two years old, was initially placed with K. and J.S. (the maternal aunt and uncle) on 2 March 2011 under a supervision order. However, the maternal aunt and uncle advised CAST on 4 January 2012 that they could no longer provide permanent care for her and she returned to CAST care. She has been in care over a year at the time of the summary judgment motion.

13. S.S., born […], 2012, […] months old, was apprehended at birth, and has been in care […] months at the summary judgment motion.

Positions of the Parties

14. CAST is asking that the children be found in need of protection under s. 37(2)(b)(i) (physical harm to the children resulting from failure to care for the children) of the *Child and Family Services Act*, R.S.O. 1990, c. C. 11, as amended ("*C.F.S.A.*").

15. CAST bases the protection findings on the risk of harm to both children if placed with the parents, separately or together. CAST's protection concerns regarding the parents are these:

    a) The mother's overall level of parenting capacity in inadequate and has not changed or improved. She is unable to meet the children's needs on a consistent basis, and she is unable to learn and implement effective parenting techniques;

    b) The father has a long history of criminal behaviour and convictions, aggressive behaviour, and violence. He has made no efforts to address the issues of anger and violence related to the CAST protection concerns; and,

    c) the mother has not made safe decisions for her children, particularly regarding her relationship with the father. The father has been violent with the mother and at least one of the children (A.S.1). CAST has cautioned her repeatedly about the risk of this relationship to herself and to her children. Neither the mother nor the father addressed these concerns, and in fact, both made efforts to hide their relationship from CAST.

16. The mother filed an Answer regarding each of Z.D.C.S. and S.S., seeking the return of both children to her care. The mother also brought a motion for a parenting capacity assessment

and for additional access to the children. The mother specifically asks to extend access to unsupervised daytime and overnight access.

17. The father filed an Answer regarding Z.D.C.S. only, seeking Z.D.C.S. to be placed in his care, failing which, that Z.D.C.S. be placed with the paternal grandmother, failing which, that Z.D.C.S. be placed with the mother. The father did not file an Answer regarding S.S. and is in default in this case.

18. Only the mother filed material in response to summary judgment motion.

19. If the protection findings are made, CAST is asking for a disposition of crown wardship no access, for the purposes of adoption. CAST says that crown wardship without access is the right disposition as since the children came into care, the parents have not been able to demonstrate adequate parenting skills or stability in their lives that would ensure the children's physical and emotional health and well-being.

20. If the children are made crown wards, the paternal grandmother is seeking access to the two children.

21. The mother wants a trial regarding the disposition of crown wardship and argues that her plan presents a genuine issue for trial.

The Law on Summary Judgment

22. A party may make a motion for summary judgment under Rule 16 of the Family Law Rules, O. Reg. 114/99, as amended ("the Rules"). These are the portions of rule 16 that are relevant to this case:

> **When Available**
>
> 16.(1) After the respondent has served an answer or after the time for serving an answer has expired, a party may make a motion for summary judgment for a final order without a trial on all or part of any claim made or any defence presented in the case.
>
> **Evidence Required**
>
> (4) The party making the motion shall serve an affidavit or other evidence that sets out specific facts showing that there is no genuine issue requiring trial.
>
> **Evidence of Responding Party**

(4.1) In response to the affidavit or other evidence served by the party making the motion, the party responding to the motion may not rest on mere allegations or denials but shall set out, in an affidavit or other evidence, specific facts showing that there is a genuine issue for trial.

Evidence Not From Personal Knowledge

(5) If a party's evidence is not from a person who has personal knowledge of the facts in dispute, the court may draw conclusions unfavourable to the party.

No Issue for Trial

(6) If there is no genuine issue requiring a trial of a claim or defence, the court shall make a final order accordingly.

23. The onus is on the moving party to persuade the court that there is no genuine issue for trial. If there is not, the court is required to make a final order and grant summary judgment: *F.I. v. K.F.*, 2000 CarswellOnt 455 (Ont. Sup. Ct.).

24. On a motion for summary judgment, the court is required to take a hard look at the merits of the case to determine if there is a genuine issue for trial. The onus is on the society to show that there is no genuine issue for trial. *Children's Aid Society of Hamilton v. M.N.,* [2007] O.J. No. 1526 (Ont. Sup. Ct.).

25. The court's role on a summary judgment motion is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material requiring a trial. Because summary judgment is now explicitly contemplated by Rule 16, this may "broaden the use of the procedure as it will no longer be characterized as an extraordinary remedy. Nevertheless, the considerations of due process, statutory requirements and the best interests, protection and well-being of the children will determine ultimately the appropriateness of summary judgment." *Children's Aid Society of the Regional Municipality of Waterloo v. T.S. [1999]* O.J. No. 5561 (Ont. Ct.).

26. When the court looks at whether there is a genuine issue for trial, the question is not whether there is any evidence to support the responding party's position, but rather whether the evidence is sufficient to require a trial: *Children's Aid Society of the County of Dufferin v. J.R.*, (2002) CanLII 45515 (Ont. Sup. Ct.).

27. Summary judgment should proceed with caution. It is not, however, limited to or granted only in the clearest of cases. The court must ensure the best interests of the child are adequately addressed on the available evidence. If the evidence does not raise a triable issue as to where the best interests lie, those best interests themselves call for a resolution without the delay associated with the trial and the resulting prolongation of the state of uncertainty about the child's future: *Jewish Family and Child Services of Toronto v. A.(R.)*, 2001 O.J. No. 47 (Ont. Sup. Ct.).

28. Rule 16 (4.1) requires that a responding party, however, may not rest on mere allegations or denials, but shall set out in an affidavit or other evidence, specific facts showing there is a genuine issue for trial: *Native Child and Family Services of Toronto and D.C.*, 2010 ONSC 1038 (Ont. Sup. Ct.), para. 6.

29. A party answering a motion for summary judgment cannot just rest on bald denials; they must put their best foot forward, showing that there is a genuine issue for trial: *Children's Aid Society of Toronto v. K.T.*, 2000 O.J. No. 4736 (Ont. Ct.).

30. Not every disagreement between the parties means that a trial is required. Only a disagreement about a fact that a party is required to prove constitutes disagreement about a material fact: *Children's Aid Society of the Regional Municipality of Waterloo v. H. (T.L.),* [2005] O.J. No 2371 (Ont. Ct.).

31. A child's need for permanency planning within a timeframe sensitive to that child's needs demands that the legal process not be used as a strategy to "buy" a parent time to develop an ability to parent. In child protection proceedings, the genuineness of an issue must arise from something more than a heartfelt expression of a parent's desire to resume care of the child. There must be an arguable notion discernible from the parent's evidence that she faces some better prospects than what existed at the time of the society's removal of the child from her care and has developed some new ability as a parent: *Children's Aid Society of Toronto v. R.H.*, [2000] O.J. No. 5853 (Ont. Ct.).

32. No genuine issue for trial exists where there is no realistic possibility of an outcome other than that as sought by the applicant: *Children's Aid Society of the Niagara Region v. S.C.*, [2008] O.J. No. 3969 (Ont. Sup. Ct.), para 43.

The Protection Findings

33. CAST is seeking a protection finding pursuant to s. 37(2)(b)(i) of the *C.F.S.A.*:

> **Child in need of protection**
> (2) A child is in need of protection where,
> (b) there is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's,
> (i) failure to adequately care for, provide for, supervise or protect the child.

Recent Findings regarding the Mother and the Father: the Decision of Zuker, J. from 30 March 2012

34. There was a summary judgment motion on a status review application regarding C.S. heard in March 2012. The decision of Zuker, J. was released on 30 March 2012 (less than seven months before this motion for summary judgment). Zuker, J. made an order for crown wardship no access regarding C.S..

35. These are the findings made by Zuker, J. in that decision that are relevant to the issues for decision in this summary judgment motion:

a) If C.S. is to be parented by her mother, the risk to this child would be overwhelming;

b) as a child, the mother had been diagnosed with a mild intellectual disability. The mother has admitted this;

c) at the completion of the Therapeutic Access Program in May 2010, the mother was unable to meet the children's needs on a consistent basis;

d) The mother is a victim of physical abuse at the hands of the father. The mother admits that the father has assaulted her and other women in the past. The father was convicted of assaulting the mother and physically assaulted A.S.1 in 2009;

e) The mother continues to maintain a relationship with the father. The relationship between the mother and the father has been one of volatility and conflict;

f) The father has not addressed his anger and violence despite clear recommendations from CAST to do so since 2009;

g) These parents require extended therapy to address their long-standing issues;

h) It is not in C.S.'s best interests to wait to see whether her mother, in particular, acquires the skills necessary to parent her;

i) The risk to C.S. remains substantial; and,

j) The child's opportunities for a permanent and stable placement cannot await the time that would be required for the mother to establish that she had acquired the stability and necessary parenting skills and that the risk to the child was satisfactorily addressed.

36. These findings are significant, detailed, relevant, and directly related to the issues for determination on this summary judgment motion. Many of the findings are findings regarding exactly the issues before the court on this summary judgment motion. These findings were made in March 2012, a matter of only months before this summary judgment motion.

37. The importance of these findings and the recent timing of the findings are extremely significant in this summary judgment motion. The court may consider the past conduct of a parent towards any child that parent is caring for (*C.F.S.A.* s.50(1)). The findings were not appealed. There is an evidentiary burden on the parents to specifically address these findings on this summary judgment motion. There is a burden on the parents to show the court what has changed since these findings were made.

Evidence regarding the Protection Findings

38. There is substantial evidence to support the protection findings sought by CAST, and both children are found to be in need of protection under s. 37(2)(b)(i) *C.F.S.A.*.

39. Unless there is evidence that things have changed since those findings were made in March 2012, the detailed and very recent findings made by Zuker, J. on 30 March 2012, regarding C.S. support a finding that the children Z.D.C.S. and S.S. are in need of protection. The mother did not dispute those findings, and did not provide evidence that the circumstances that gave rise to those findings have changed. In fact, these findings are so detailed and so recent that the mother should have consented to the protection finding on this summary judgment motion.

The Mother's Motion for a Parenting Capacity Assessment

40. The mother brought a motion for a parenting capacity assessment. This is odd timing for such a motion, that is, following one recent motion for summary judgment (in March 2012), and during a second motion for summary judgment, both motions seeking crown wardship without access.

41. The mother has been involved with child protection agencies for many years (since 1998), and has been involved with CAST continuously since 2009. She is an experienced child protection litigant. She has been represented by the same lawyer, Mr. Rice, since the start.

42. This request by the mother should have been brought forward at an earlier stage in the court case, particularly as four other children were removed from her care by child protection agencies.

43. The mother participated in the Therapeutic Access Program ("TAP") in 2009 and 2010, and the program produced a summary report dated 11 May 2010. The TAP is a teaching vehicle. This report is not a parenting capacity assessment. The summary report made specific findings about the mother's parenting. It might have been suitable to seek a parenting capacity assessment sometime after that report to see if the mother had made any changes in accordance with the recommendations of the TAP summary report. More than two years have passed since that report was produced.

44. It is too late for the mother to bring such a request to court. She has had many years in which to make this request, and particularly, regarding Z.D.C.S. and S.S., she has had two years since the litigation started regarding Z.D.C.S.. This motion is dismissed.

Disposition

Alternative Plans for the Care of the Children

45. At the motion for summary judgment the only plan offered was the mother's plan for the care of the children. There were no alternative plans, from family or community, for the care of the children.

46. These other family plans were offered during the court case regarding Z.D.C.S. and S.S., but none were still being proposed at the summary judgment motion:

    a) Z.D.C.S. was initially placed with K. and J.S. (the maternal aunt and uncle) on 2 March 2011 under a supervision order. However, the maternal aunt and uncle advised CAST on 4 January 2012 that they could no longer provide permanent care for her and she returned to CAST care;

    b) After Z.D.C.S. returned to care, the paternal grandmother indicated a desire to plan for Z.D.C.S., but withdrew this plan when she had plans to move to another province in summer 2012; and,

    c) In April 2012, the paternal aunt M.F. ("the paternal aunt") put forward a plan to care for S.S. (who was not yet born). This plan was not approved as M.F. was very young (17 years old) with no parenting experience, she did not appreciate or even know of the mother 's parenting limitations, and she saw herself as back-up for the mother, not as the primary care-giver.

The Children

47. Z.D.C.S. appears to be meeting all her developmental milestones adequately. She is in excellent physical health and has no special medical or health issues. She continues to flourish.

48. S.S. is a happy, healthy infant who is meeting her milestones and flourishing.

Plans for the Children

49. Z.D.C.S. and S.S. live in the same foster home, and it is not a potential adoptive home. Should the children become crown wards, CAST plans to look for a suitable adoptive placement for them together.

50. The mother supports herself with income from the Ontario Disability Services Plan ("ODSP"), which she says she qualifies for due to mild cognitive delay.

51. There was a great deal of material filed by the mother on the summary judgment motion. The mother's evidence consisted of a affidavit specifically in response to the motion, and also seven affidavits of hers filed earlier in the court case (including an affidavit of hers sworn in 2009, before either of these two children were born). As well, the mother relied on

an affidavit from the paternal aunt filed earlier in the court case. All of the evidence presented by the mother was taken into account by the court.

52. The mother's evidence did not specifically nor adequately address the protection concerns raised by CAST. The parenting concerns that CAST has identified and that were found to exist in March 2012 by Zuker, J. still exist.

53. The mother's evidence suggests she is "planning to plan" for the return of the children to her care, not that she is now ready for the return of the children to her care. Her evidence is that she will, in the future, do things that are needed for the return of the children (e.g., get counselling, get a new apartment, take parenting courses).

54. Planning to plan for the return of the children is not enough. On a summary judgment motion the mother must put her best foot forward.

55. The mother participated in the Therapeutic Access Program from November 2009 to May 2010. During this six month period, the mother received a great deal of support, teaching and prompting to help her to overcome her parenting challenges and to take responsibility for her children. The TAP summary report dated 11 May 2010 revealed that, despite constant and repeated interventions, the mother was unable to meet her children's needs on a consistent basis.

56. The mother said that her parenting ability has improved dramatically since the TAP summary report. Yet she provided no evidence to support this bald statement. She described the report as historical in nature, and said that it has no current relevance to her parenting ability. However, Zuker, J. found on 30 March 2012 that nothing had changed since that report, regarding the mother's parenting abilities, and that the mother's statement that her parenting abilities had changed since then did not disclose a triable issue. There is no evidence of any steps that the mother has taken that address these concerns and that have resulted in changes to the mother's parenting.

The Impact of the Findings of Zuker, J. regarding Disposition

57. The mother has had more than six months since the findings of Zuker, J. regarding her parenting. She has had six months with a clear indication of the problems she needs to

address to regain her children. She has been involved in child protection litigation for many years, regarding all of her children. The mother is a very experienced child protection litigant. She has been represented by the same lawyer for many years, from the start of these court cases. She ought to have taken steps in those six months to address the protection concerns and the findings set out by Zuker, J. in his reasons for decision.

Disposition

Disposition Legal Principles

58. Once a finding is made that the children are children in need of protection, the court must determine what order for their care is in their best interests.

59. Section 57(1) of the *C.F.S.A.* sets out the types of orders available to the court after a child is found to be in need of protection:

> 57. (1) Where the court finds that a child is in need of protection and is satisfied that intervention through a court order is necessary to protect the child in the future, the court shall make one of the following orders, in the child's best interests:
>
> Supervision order
> 1. That the child be placed with or returned to a parent or another person, subject to the supervision of the society, for a specified period of at least three and not more than twelve months.
>
> Society wardship
> 2. That the child be made a ward of the society and be placed in its care and custody for a specified period not exceeding twelve months.
>
> Crown wardship
> 3. That the child be made a ward of the Crown, until the wardship is terminated under section 65 or expires under subsection 71 (1), and be placed in the care of the society.
>
> Consecutive orders of society wardship and supervision
> 4. That the child be made a ward of the society under paragraph 2 or a specified period and then be returned to a parent or another person under paragraph 1, for a period or periods not exceeding an aggregate of twelve months.

60. The decision process on a disposition hearing, following a finding that the children are in need of protection, has been set out by Perkins, J. in *Children's Aid Society of Toronto v. T.L. and E.B.*, 2010 ONSC 1376 (Ont. Sup. Ct.) (CanLII), para. 25, as follows:

> 1. Determine whether the disposition that is in the child's best interests is a return to a party, with or without supervision. If so, order the return and determine what, if any, terms of supervision are in the child's best interests and include them in the order. If not, determine whether the disposition that is in the child's best interests is society wardship or Crown wardship. (Section 57)
>
> 2. If a society wardship order would be in the child's best interests, but the maximum time for society wardship under section 70(1) has expired, determine whether an extension under section 70(4) is available and is in the child's best interests. If so, extend the time and make a society wardship order. If not, make an order for Crown wardship.

61. Section 57(1) is limited by section 70 of the *C.F.S.A.*, which provides that the court shall not make an order for society wardship that results in a child being a society ward for a period exceeding twelve months, if the child is less than six years old on the day the order is made, unless the time is extended as provided in section 70(4) of the *C.F.S.A.*. The children are both under six years old. Z.D.C.S. has been in care for more than one year. S.S. has been in care for about six months. An order for society wardship is not available for Z.D.C.S..

62. A further order for society wardship is not available for Z.D.C.S., unless the court makes an order extending the time period allowable under s. 70 *C.F.S.A.*. The mother specifically asked for such an order to be made. The court can only make such an order if it is in the best interests of children to do so. These children need certainty, finality and permanence. It is not in the best interests of these children for their status to continue to be unresolved. The only options now available for the children are to return to the care of one of their parents (or someone else's care) under a supervision order, or a crown wardship order.

63. Section 57(2) *C.F.S.A.* requires the court to inquire into what efforts the society has made to assist the child before intervention. CAST has been involved with this mother for many years, through her parenting of four previous children, none of whom are currently in her care, and all of whom were removed from her care through the child protection justice system. The society worker made efforts to refer the parents to programs to assist them (e.g., parenting programs, counselling for the mother about the relationship with the father). The parents did not did not follow through with the referrals.

64. Section 57(3) of the *C.F.S.A.* requires the court to consider less disruptive alternatives than removing a child from the care of the persons who had charge of the child immediately before intervention, unless these alternatives would be inadequate to protect the child. For reasons articulated below, returning the children to the mother, or the father, even with a supervision order, would not be adequate to protect the children in this case and would not be safe.

65. Section 57(4) of the *C.F.S.A.* requires the court to look at community placements, including family members, before deciding to place a child in care. No alternative plans were proposed at the motion for summary judgment.

66. In applying these provisions, the court must determine what is in the best interests of the children. The criteria to determine the children's best interests are set out in s. 37(3) of the *C.F.S.A.*:

> **Best interests of child**
> 37. (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:
>
> a) The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
>
> b) The child's physical, mental and emotional level of development.
>
> c) The child's cultural background.
>
> d) The religious faith, if any, in which the child is being raised.
>
> e) The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
>
> f) The child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community.
>
> g) The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.
>
> h) The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent.

i) The child's views and wishes, if they can be reasonably ascertained.

j) The effects on the child of delay in the disposition of the case.

k) The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.

l) The degree of risk, if any, that justified the finding that the child is in need of protection.

m) Any other relevant circumstance. R.S.O. 1990, c. C.11, s. 37 (3); 2006, c. 5, s. 6 (3).

67. A crown wardship order is the most profound order that a court can make. To take someone's children from them is a power that a judge must exercise only with the highest degree of caution, only on the basis of compelling evidence, and only after a careful examination of possible alternative remedies: *Catholic Children's Aid Society of Hamilton-Wentworth v. G. (J)* (1997), 23 R.F.L. (4th) 79 (Ont. Ct. [Gen. Div., Div. Ct.]).

68. In determining the best interests of the child, the court must assess the degree to which the risk concerns that existed at the time of the apprehension still exist today. This must be examined from the child's perspective: *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.*, [1994] 2 S.C.R. 165 (S.C.C.).

69. The significance of the child-centered approach is that good intentions are not enough. The test is not whether the parents have seen the light and intend to change, but whether they have in fact changed and are now able to give the child the care that is in his or her best interests. There is not to be experimentation with a child's life with the result that in giving the parents another chance, the child would have one less chance: *Children's Aid Society of Winnipeg (City) v. R.* (1980), 19 R.F.L. (2d) 232 (Man. C.A.). There has to be some demonstrated basis for a determination that the parents are able to parent the child without endangering his or her safety: *Children's Aid Society of Brockville, Leeds and Grenville v. C.*, 2001 CarswellOnt 1504 (Ont. Sup. Ct.).

70. An order for crown wardship is a final order of powerful and long-lasting consequence. It changes forever the life of the child who becomes a crown ward, and it changes forever the life of the parent. No one in the family is untouched by this order, and no one will ever be

the same. It is an order that is not to be made lightly, or without careful thought and consideration regarding all the options available for the child. Crown wardship is the capital punishment of family law. It is a decision that is the most serious and important decision any court can make.

Analysis re Disposition

71. These are the options available regarding disposition for these children:

a) returned to the care of either of their parents, with or without a supervision order;

b) placed with other family or community members; or,

c) an order for crown wardship.

The Mother's Lack of Judgment Regarding her Relationship with the Father

72. The mother's evidence on the motion is that she has not seen the father since November 2011. Zuker, J. found in March 2012 that the mother continued to maintain a relationship with the father. CAST conceded that there is no evidence that the mother has reconciled with the father. However, there have been several separations and reconciliations in the past. Even after CAST removed children from her care partly due to his involvement in her life and the life of her children, the mother went on to have two more children with the father. The possibility of the father's continued involvement in the mother's life continues to pose serious risks to the children.

73. Although CAST has verified that the father assaulted the child A.S.1 in 2009, when the child was five years old, the mother continues to deny that this happened.

74. The society worker recommended counselling for the parents to address the conflictual manner in which they relate to one another, and the violence in their relationship, and as well recommended individual counselling for the mother regarding her experience of domestic violence. The parents have not engaged in any therapeutic interventions to address the dysfunction in their relationship.

75. The mother has been consistent in pursuing her relationship with the father, even in the face of clear information from CAST that there were serious concerns about the involvement of the father in her life and in the lives of the children. The mother has repeatedly shown lack of judgment regarding her relationship with the father. How can the court have any confidence in the mother's ability to protect the children when she has exercised such fundamentally poor judgment?

Examination of the Disposition Options

76. The evidence which supported the protection findings is also relevant and influential regarding disposition. Since the first recent involvement with CAST in March 2009, the parents have had ample time and opportunity to work on these issues, but have not provided CAST or the court with information related to the protection concerns, and have not addressed these serious protection concerns.

Why Not a Supervision Order?

77. One option is to return the children to one or more of the parents, subject to a supervision order. That is not a suitable option as the children would not be safe with either the mother or the father under a supervision order.

78. The mother has lied to the CAST about her relationship with the father, and about other things, has not followed through with recommendations from CAST that she needs to get counselling to assist her in dealing with the violent relationship she has with the father.

79. Any plan for the return of the children to the mother would involve a supervision order, at least initially. The efficacy of a supervision order rests on the compliance of the person being supervised, and the ability of the supervising agency (and therefore, the court) to monitor compliance. Much of the information relied upon by the agency during a supervision order is self-reported. Trust between the agency and the person supervised (and therefore, the court) is an essential element of a supervision order. There is no foundation for a working relationship or a supervision order under the circumstances in this case. Any

supervision order involving the children and the mother would be an ineffective instrument for the protection and safety of the children. The mother is not a suitable candidate for a supervision order, which requires a sense of co-operation and a willingness to work with CAST.

80. The children are entitled to certainty, finality and to grow up in a safe and stable family, where they are valued and protected from harm. They will not have this if they are returned to the mother or to the father.

The Summary Judgment Request

81. The mother's evidence on the motion offered no details of the current status of any treatment or other program she may currently be in. She offered no explanation as to why she did not follow through with CAST recommended programs.

82. The mother attended a program regarding domestic violence against women at Family Services Toronto. She provided a letter from a counsellor dated 17 November 2011. Her participation in this program pre-dated the order of Zuker, J. for summary judgment and crown wardship regarding C.S. in March 2012. Other than this information, there is no evidence that she has received any counselling or therapy.

83. The question for the court on a motion for summary judgment is not whether there is any evidence to support the mother's position, but rather whether the evidence is sufficient to require a trial. There is not sufficient evidence to require a trial in this case.

84. The court has all the necessary material facts to determine the disposition issue. There is very little dispute in this motion about the material facts. The mother, instead, offers varying explanations for the material facts, most of which explanations are inadequate or not believable.

85. The real issue was what decision the court should make based on the facts. This is a question of law. In such circumstances, rule 16(8) of the Rules applies: if the only genuine issue is a question of law, the court shall decide the issue.

86. If the mother's evidence on the motion is her "best foot forward", (see *Children's Aid Society of Toronto v. K.T.*, 2000 O.J. No. 4736 (Ont. Ct.)), it discloses no genuine issue for trial. There is no realistic possibility of an outcome other than that sought by the CAST (see *Children's Aid Society of the Niagara Region v. S.C.*, [2008] O.J. No. 3969 (Ont. Sup. Ct.)). There is no need to have a trial judge decide this issue. The motion for summary judgment is granted.

87. It is not in the best interests of Z.D.C.S. and S.S. to delay their permanent placement any longer. The proper disposition for these children now is clear. The mother is not capable of caring for these children, nor is the father, and they should not be returned to the care of either of the parents.

88. It is not in the children's best interests, in these circumstances, for the court to choose a disposition that is in any way uncertain or not final. The only option that meets these criteria is crown wardship.

Access

Access Legal Principles

89. The test for access to crown wards is set out in s. 59 (2.1) of the *C.F.S.A.*:

> **Access: Crown ward**
> (2.1) A court shall not make or vary an access order made under section 58 with respect to a Crown ward unless the court is satisfied that,
>
> (a) the relationship between the person and the child is beneficial and meaningful to the child; and
>
> (b) the ordered access will not impair the child's future opportunities for adoption.

90. The process for a decision regarding access, following a decision that the children should be made crown wards, was also set out by Perkins, J. in *Children's Aid Society of Toronto v. T.L. and E.B., supra,* 2010 (Ont. Sup. Ct.), para. 25, as follows:

> 1. If a Crown wardship order is to be made, and a party has sought an access order, determine whether the relationship between the child and the

person who would have access is both meaningful and beneficial to the child. (Section 59 (2.1)(a)). If not both meaningful and beneficial, dismiss the claim for access. If so, go to the next step.

2. Determine whether the access would impair the child's future opportunities for adoption. (Section 59 (2.1) (b)). If so, dismiss the claim for access. If not, go to the next step.

3. Determine whether an access order is in the child's best interests. If not, dismiss the claim for access. If so, make an access order containing the terms and conditions that are in the child's best interests. (Section 58).

91. Once there has been an order for crown wardship, the legislation reflects an intention to shift the focus away from providing services to facilitate the re-integration of the child back to the natural family, towards a focus on long-term, permanent placement, preferably through adoption: *Children's Aid Society of Ottawa v. R.L.,* 2004 CarswellOnt 3080, 132 A.C.W.S. (3d) 718, [2004] O.T.C. 665 (Ont. Sup. Ct.), para. 57; *Children's Aid Society of Niagara Region v. C. (J.),* 2007 CarswellOnt 1680, 36 R.F.L. (6th) 40, [2007] W.D.F.L. 2003, 223 O.A.C. 21, 281 D.L.R. (4th) 328 (Ont. Div. Ct.), para. 22.

92. There is a presumption against court ordered access for a crown ward in order to facilitate permanency planning: *Children's Aid Society of Niagara Region v. C. (J.),* 2007 CarswellOnt 1680, 36 R.F.L. (6th) 40, [2007] W.D.F.L. 2003, 223 O.A.C. 21, 281 D.L.R. (4th) 328 (Ont. Div. Ct.), para. 22.

93. Once the decision is made in favour of crown wardship, the burden of satisfying the court that an access order should be made, and of satisfying all the conditions for that purpose, is on the party asking for the access order. This is an extremely difficult onus for parents to discharge, but appellate authority has repeatedly confirmed that the burden is on the party seeking access: *Catholic Children's Aid Society of Toronto v. M.(C.),* [1994] 2 S.C.R. 165 (S.C.C.), p. 50; *Children's Aid Society of Toronto v. D.P.,* 2005 CarswellOnt 4579, [2005] W.D.F.L. 4375, [2005] W.D.F.L. 4373, 19 R.F.L. (6th) 267, 202 O.A.C. 7, 93 A.C.W.S. (3d) 853, [2005] O.J. No. 4075 (Ont. C.A.).

94. Access is the exception and not the rule in the context of a crown wardship order. Section 59(2) of the *C.F.S.A.* creates a presumption that any right of access is revoked: *Nouveau-Brunswick (Ministre de la santé & des services communautaires) c. L. (M.),* [1998] 2 S.C.R.

534, 230 N.R. 201, 204 N.B.R. (2d) 1, 520 A.P.R. 1, 165 D.L.R. (4th) 58, 41 R.F.L. (4th) 339, [1998] S.C.J. No. 52, 1998 CarswellNat 557 (S.C.C.), para. 44.

95. The onus is on the persons seeking access to a crown ward to prove on a balance of probabilities that:

> (1) the relationship between the person and the child is meaningful to the child;
>
> (2) the relationship between the person and the child is beneficial to the child; and,
>
> (3) access will not impair the child's future opportunities for a permanent or stable placement.

96. The parent has the onus of establishing all three portions of the test in section 59 (2.1) of the *C.F.S.A.*. This is a very difficult test for the parent to meet: *Children's Aid Society of Niagara Region v. C. (J.), supra*, 2007 (Ont. Div. Ct.).

97. The meaning of the phrase "beneficial and meaningful" was considered in *Children's Aid Society of the Niagara Region v. M.J.* , 2004 CarswellOnt 2800, [2004] W.D.F.L. 510, 4 R.F.L. (6th) 245, [2004] O.T.C. 634, [2004] O.J. No. 2872 (Ont. Sup. Ct.), para. 45-47:

> What is a "beneficial and meaningful" relationship in clause 59 (2)(a)? Using standard dictionary sources, a "beneficial" relationship is one that is "advantageous". A "meaningful" relationship is one that is significant. Consequently, even if there are some positive aspects to the relationship between parent and child, that is not enough - it must be significantly advantageous to the child.
>
> I read clause 59 (2)(a) as speaking of an existing relationship between the person seeking access and the child, and not a future relationship. This is important, for it precludes the court from considering whether a parent might cure his or her parental shortcomings so as to create, in time, a relationship that is beneficial and meaningful to the child. This accords with common sense, for the child is not expected to wait and suffer while his or her mother or father learns how to be a responsible parent.
>
> Even if the relationship is beneficial and meaningful, I think that, as a final precaution, there still must be some qualitative weighing of the benefits to the child of access versus no access, before an order is made.

Access Analysis

The Parent's Access to the Children

98. The mother attends her visits regularly and on time. During access, however, the mother continues to have difficulty meeting the needs of more than one child at a time. During the TAP, the mother's visits had to be shortened from four hours to two hours, as the mother could not cope. Currently, she frequently brings another person to visits with her so that together they may better manage caring for the children. R.S. ("maternal grandmother") started to attend the mother's visits with her on 4 July 2012. CAST workers observed that the maternal grandmother provides primary care for S.S. when she attends visits.

99. At visits, the mother appears to be more focused on having her own emotional needs met than meeting those of her children. There was evidence about this in the report of the TAP in May 2010, and there was also current evidence from society workers' observations of the mother's recent visits with the children. When the mother attends visits, she interacts with the children but also socializes with the other parents, in lieu of paying full attention to the children. She also continues to make and receive phone calls during visits, including texting and listening to music, although she has been repeatedly advised that this is not how she should spend her access time.

100. The mother appears to value her time with Z.D.C.S. more than her time with S.S., and CAST workers observed that this may be because Z.D.C.S., who is older, is better able to meet the mother's own emotional needs in ways that are meaningful to the mother.

101. The father has not had access to Z.D.C.S. since 20 June 2011 when his access was suspended, by order of Brownstone, J., due to his aggressive and threatening behaviour to CAST workers at a visit, and in front of the two children C.S. and Z.D.C.S.. He has not had any access to S.S..

102. The mother specifically sought to extend her access to the children to unsupervised daytime and overnight access. The paternal grandmother made a specific request for access to Z.D.C.S. (only), to whom she has had a total of six visits.

103. Neither the mother's access, the father's access, nor the access of the paternal grandmother is beneficial or meaningful from the children's perspective. While the access

may be enjoyable, there is insufficient evidence that there is a bond between them that is important to the children. The access and the relationship to either of the parents, or the paternal grandmother, are not significantly advantageous to the children.

104. Even if the access were beneficial and meaningful to the children, the court must be satisfied that access will not impair the child's future opportunities for a permanent placement. The children are adoptable. Given their ages, and their adoptability, the parents cannot establish that access would not impede a permanent adoption plan for them.

105. The mother, the father, and the paternal grandmother have not met the onus on them to rebut the presumption against access to a crown ward outlined in subsection 59(2) of the *C.F.S.A.*. The parents and the paternal grandmother cannot meet the onus in s. 59(2.1) *C.F.S.A.* regarding access to the children.

106. The parents' and the paternal grandmother's claims for access to the children are dismissed. There shall be an order for no access to the children.

Orders

107. These are the statutory findings regarding these children:

- Z.D.C.S. is a female child who was born on […], 2010. B.S. is the mother. J.P. is the father. The child is not Catholic and is not Jewish. The child is not Indian and not Native. She was apprehended on 1 November 2010 in the City of Toronto; and,

- S.S. is a female child who was born on […], 2012. B.S. is the mother. J.P. is the father. The child is not Catholic and is not Jewish. The child is not Indian and not Native. She was apprehended on 20 April 2012 in the City of Toronto;

108. The children are found to be in need of protection under ss. 37(2)(b)(i) *C.F.S.A.*.

109. Z.D.C.S. and S.S. shall be crown wards without access for the purposes of adoption.

Released: 15 January 2013

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Justice Carole Curtis