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.
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> . . .
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> **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.

Toronto Registry No. 04FA-012956
DATE: 2005-02-09

SUPERIOR COURT OF JUSTICE

B E T W E E N :

CHILDREN'S AID SOCIETY OF TORONTO,
Appellant,

— AND —

M.W. and W.C.,
Respondents.

Before Justice Susanne R. Goodman
Heard on 13 December 2004
Endorsement inscribed on 9 February 2005

CHILD PROTECTION — Form of order — Ancillary order — Access — Making or varying access order with respect to Crown ward — General — Second chance for parent — Statutory limit on temporary care of child had expired and still, father was far from being able to provide permanent, stable long-term placement for safe, loving and happy childhood — Least disruptive option for child's protection was Crown wardship but trial judge had such faith in father's ability to overcome his substance-abuse problems that he allowed father to have access to child in hope that child would soon return to his care rather than be adopted by strangers — Trial judge apparently concluded that clause 59(2)(*b*) of *Child and Family Services Act* could be interpreted to include future placement in access parent's home as "future opportunit[y] for a permanent or stable placement" of child — On appeal, access order struck down — Where statutory ceiling on temporary care has expired, subsection 59(2) may not be used to give parent another chance to prove necessary ability to care for his or her child properly because it would effectively extend society wardship in defiance of statutory ceiling, something that trial judge was not entitled to do — Moreover, fresh evidence on appeal strongly suggested that father in this case had suffered relapse in his addiction — Crown wardship affirmed but without access.

CIVIL PROCEDURE — Conduct of trial — Adjournment — General — Child protection cases — Because of strict timelines in section 70 of *Child and Family Services Act* and in rule 33 of *Family Law Rules*, court should scrupulously examine grounds for request and allow it only sparingly — Where parent entered drug rehabilitation program of known and set duration, he should have made motion for adjournment

then or soon thereafter, but not on morning of trial itself — Trial judge refused father's last-minute request for adjournment in absence of highly compelling, unavoidable circumstances — Appeal court affirmed trial judge's child-focussed approach in denying request for adjournment.

STATUTES AND REGULATIONS CITED

Child and Family Services Act, R.S.O. 1990, c. C-11 [as amended], clause 37(2)(*b*), subsection 37(3), section 58, subsection 59(2), subsection 59(3) and section 140.

Family Law Rules, O. Reg. 114/99 [as amended], clause 17(8)(*b*).

CASES CITED

Children's Aid Society of Lanark County and Town of Smiths Falls v. W.(S.) and A.(S.), [2004] O.J. No. 1897 (Ont. Div. Ct.).

Mira R. Pilch ..... for the appellant society

Herbert J. Stover ..... for the respondent mother, M.W.

No appearance by or on behalf of the respondent father, W.C., even though served with notice

Appeal from the decision of Justice Harvey P. Brownstone in *Children's Aid Society of Toronto v. M.W. and W.C.*, 2004 ONCJ 127, 132 A.C.W.S. (3d) 713, [2004] O.J. No. 3160, 2004 CarswellOnt 3166 (Ont. C.J.).

[1] JUSTICE S.R. GOODMAN (*endorsement*):— This was an appeal by the children's aid society from the final order of Justice Harvey P. Brownstone, dated 21 June 2004, in which he ordered that B.W.C., born on […] 2002, be made a Crown ward, with graduating access to him by his father, Mr. W.C. The order was to be silent as to access by his mother, Ms. M.W. On 13 December 2004, I heard this appeal and granted the relief sought — that is, I set aside the access and silent-as-to-access orders that had been made in relation to the father and mother respectively and made an order that neither parent have access to the child. The following are my reasons for having done so.

[2] The father did not appear on this appeal when it was first scheduled for hearing on 13 November 2004. As appears from affidavits of service, Mr. W.C. was served personally with the notice of appeal in July 2004. The material in support of the society's appeal was served on Mr. W.C. personally on 20 September 2004 at the Wellesley Street address that the society had for him. I was advised that the society had received no material from Mr. W.C. responding to the appeal. Ms. Pilch advised me that she had one conversation with Mr. Irving I. Frisch (counsel for Mr. W.C. at trial) on 21 October 2004. She advised me that Mr. Frisch had felt comfortable telling her that Mr. W.C. was aware of the appeal and was not intending to take part in it. She advised Mr. Frisch that she would be prepared to talk to Mr. W.C. or, alternatively, he could contact the worker. Mr. W.C. could contact either of them. Mr. Stover advised me that, on 19 October 2004, he received a voice-mail from Mr. Frisch in which he indicated that he had got hold of Mr. W.C. and that he was "not resisting" the appeal. Further documentation was sent to Mr. W.C. by mail to the Wellesley Street

apartment on 4 November 2004. An affidavit of service indicated that, when an attempt was made to deliver material to Mr. W.C. on 6 November 2004, a person who appeared at the door indicated that Mr. W.C. was in treatment and was expected back in about 2½ weeks. (I have no idea whether that information was true and I have not relied upon it in my determination of the appeal itself.) As no one was sure that Mr. W.C. had ever received notice of the specific date of the appeal, given the seriousness of the appeal to him, I decided to take one last precautionary step and, on 15 November 2004, I ordered the society to deliver a letter to the apartment, notifying Mr. W.C. of the actual date of the hearing before me to deal with both the motion to admit fresh evidence and the appeal itself. It seemed to me that someone at the apartment knew Mr. W.C. and might well either advise him of mail he received or forward mail to him. According to a further affidavit of service filed, the society delivered the letter on 16 November 2004. In the affidavit of service of the process server, sworn on 26 November 2004, he deposed that when he put the letter through the mail slot, someone was in the apartment but would not open the door. Mr. W.C. did not appear today for the appeal. Given all of these circumstances, including Mr. W.C.'s lack of involvement in the appeal and his counsel's comments regarding his decision not to respond to the appeal, together with the circumstances of the child, who has essentially been left in limbo since 21 July 2004, the appeal proceeded.

[3] On the appeal, Mr. Stover advised me that it was the position of Ms. M.W. (B.W.C.'s mother) that I should allow the appeal and order Crown wardship, ***with no access to either parent*** [emphasis added by me]. Mr. Stover advised me that Ms. M.W.'s position was that the trial judge had erred. He ought to have either returned B.W.C. to his father's care, with supervision or, if that was not possible, then made B.W.C. a Crown ward, with no access.

[4] The society had apprehended B.W.C. from the father's care on 2 December 2002. When apprehended, he was nine months old. At the time the trial started on 14 June 2004, B.W.C. had been in the continuous care of the society since his apprehension on 2 December 2002 (therefore, just over 18 months). He was 2 years and 4 months old at the trial. He is at present 2 years, 11 months old.

[5] On 7 February 2003, the parties consented to a finding that B.W.C. was in need of protection, pursuant to clause 37(2)(*b*) of the *Child and Family Services Act*, R.S.O. 1990, c. C-11 (as amended). The order from which this appeal was being taken was made after a 3-day trial in June 2004, on the dispositional stage. In his reasons for the order granting access to Mr. W.C., the trial judge commented (at paragraph **[1]**) that, in "the very unusual circumstances of this case", Mr. W.C. would "most likely be in a position to demonstrate within the next few months that it will be in B.W.C.'s best interests to terminate the Crown wardship and return B.W.C. to him."

[6] Again, the child was born on […] 2002. Although his parents lived together briefly after his birth, he resided with his father, subject to a society supervision order, between 26 February 2002 and 2 December 2002. At that time, Mr. W.C. lapsed into drug use and used a monetary moving allowance advanced to him by social assistance to purchase drugs. During the weekend of 29 November 2002 to 1 December 2002, B.W.C. was in the care a fellow

shelter resident while his father was abusing drugs. He acknowledged that he could not continue to care for B.W.C. and returned B.W.C. to the society on 2 December 2002. He acknowledged that he needed drug treatment. He disclosed to the society for the first time that he had a longstanding drug and alcohol addiction that he had been battling since age 16. Mr. W.C. began a residential treatment program on 3 January 2003, following a stay at a detoxification centre. After completing this programme on 31 July 2003, he moved into a shelter for men recovering from addiction. He then exercised access to B.W.C. between 1 August and 23 September 2003. From that date until 28 October 2003, he missed his weekly visits and only contacted the society once to say that he could not attend a visit. The society, therefore, suspended his weekly visits as of 31 October 2003. The society learned on 3 November 2003 that Mr. W.C. had relapsed into drug use for a 2-to-3-week period in September 2003. He entered a residential treatment facility for the second time on 25 November 2003. He exercised no access to B.W.C. before 30 March 2004. He did not call the society to enquire about the child or seek a visit until 12 March 2004. He started to see B.W.C. again weekly on 30 March 2004. He completed the second residential programme (of 6-months) on 2 June 2004.

[7] At the time of trial this past June, Mr. W.C. had no family or community support other than that of the professional service providers involved with him. The trial judge called him a "single parent in the truest sense of the word". Shortly before trial, he was provided with a bachelor apartment through the resettlement programme at the Good Shepherd Ministries. At the start of the trial, he had not yet moved into the apartment; was not aware of services, including day care, in the area; was not employed; and had no plan for any alternate care arrangement for B.W.C. at times when he would be attending at aftercare and AA (Alcoholics Anonymous) meetings.

[8] At the start of the trial, Mr. W.C.'s counsel sought a three-month adjournment. He submitted that, given that Mr. W.C. had just secured housing and finished treatment, he had not had a chance to prove that he was, in essence, able to parent B.W.C. There was no "substantial"' period of abstinence from drugs while in the community. The trial judge refused the adjournment. In doing so, he very appropriately and succinctly expressed the numerous reasons for not further delaying the matter by an adjournment:

- B.W.C. had been in care for almost twice the length of time that he could be in the society's care under the Act;
- three months of abstinence would not prove much, as it seemed that the father had once abstained for about 8 months and yet returned to drug use (while B.W.C. was in his care in 2002);
- B.W.C. had been living in a foster home — "in limbo" — since December 2002.; and finally,
- the 6-month extension period under the Act had lapsed by the time of trial.

Given Mr. W.C.'s circumstances at the start of trial (that is, having housing and having finished the residential treatment), the trial judge said that, if Mr. W.C. wished another chance with the child, the trial was the time to do it. He said that he was not "in the business of conducting experiments on children lives". He said that, unless he was satisfied that the

child should be returned to his father's care, it would not be done. He said that "this was as good a time as any for that decision to be made" and he added that "frankly, there is absolutely no authority to delay this case any longer." In denying the adjournment request, the trial judge expressed correctly that "[c]hildren only have so long that they can wait for their parents to be ready or not ready, but every child needs a permanent home". In my view, the reasons provided by the trial judge in refusing the adjournment request truly reflect the approach to child protection cases mandated by the statutory provisions of the *Child and Family Services Act*.

[9] When the trial started, the trial judge clearly appreciated that he had two choices to make — either he could return B.W.C. to his father's care (with or without supervision) or he could make B.W.C. a Crown ward. In making an order for Crown wardship at the end of the trial, the trial judge properly found that Mr. W.C. had done "too little too late". He found that there were too many uncertainties in Mr. W.C.'s'life for B.W.C. to be placed with him at that time. He stated expressly that "it is neither in keeping with the law nor in B.W.C.'s best interests to give Mr. W.C. any more time." He said that B.W.C. had to be made a Crown ward, that was the least disruptive alternative that would protect him and meet his interests, as defined in subsection 37(3) of the *Child and Family Services Act*. Yet, he then went on to grant him gradually increasing access (so that B.W.C. could gradually detach from his then current caregivers and re-attach to his father). The trial judge was convinced, "beyond a reasonable doubt" that, "within a relatively short time", Mr. W.C. would be in a position to resume custody of B.W.C. permanently and successfully. He held that this was in B.W.C.'s best interests. In applying subsection 59(2) of the Act, he found that the relationship between B.W.C. and his father was beneficial and meaningful to B.W.C. and that it was a relationship worth preserving. He also said:

> **[31]** . . . because I have found that there is every likelihood that B.W.C. will in the reasonably near future be returned to Mr. W.C. permanently, I have concluded that access will not impair B.W.C.'s future opportunities for a permanent and stable placement.

The trial judge stated that, given B.W.C.'s young age and high degree of adoptability, his prospects for permanency planning would not be impaired by having access to his father "for a short time", because he expected the society to move swiftly to terminate the access at the first indication that Mr. W.C.'s plan was falling through, so that B.W.C. could then be placed for adoption. The court anticipated that Mr. W.C. would be given "a few months" to implement a plan of care, because of the strong likelihood of success. He was of the view that a placement for B.W.C. with his father would be infinitely better for him than an adoption by strangers. The court held that access would gradually increase with a view to a termination of the Crown wardship — provided that Mr. W.C. complied with a number of specific conditions that the trial judge set. He was being given a "unique, precious and extremely rare opportunity" to prove that he could fulfill his promise to B.W.C. If, in the next few months, ***any*** (emphasized by the trial judge) aspect of Mr. W.C.'s life was not in keeping with B.W.C.'s best interests, the judge urged the society to move under subsection 59(3) of the Act to terminate the access and to urge the case management judge to fast- track the case to a swift conclusion by way of summary judgment, or even possibly an order at a case conference under clause 17(8)(*b*) of the *Family Law Rules*, O. Reg. 114/99 (as

amended), "given the obvious urgency in terms of B.W.C.'s need for a long-term placement". Respectfully, the trial judge erred in granting access to the father.

[10] Once the trial judge ordered that B.W.C. become a Crown ward, there was a presumption against access and the onus was then on Mr. W.C. to demonstrate that it was in his child's best interest for access to be granted. See, for example, *Children's Aid Society of Lanark County and Town of Smiths Falls v. S.W. and S.A.*, [2004] O.J. No. 1897 (Ont. Div. Ct.). In that decision, the Divisional Court stated that:

> **[8]** . . . The person seeking access has the onus of proving that the relationship between the person and the child is beneficial and meaningful to the child, and that the ordered access will not impair the child's future opportunities for a permanent or stable placement.

[11] In my view, in a situation where there is no possibility of a period of further society wardship (which would permit a child to be placed with his or her parent), subsection 59(2) does not provide authority for an access order then to be made for the purpose of permitting the parent a chance to take further steps to show that he or she is able to parent his or her child properly. The Act is clear that a parent's right to have the child returned to his or her care ends when his or her claim to have the child returned to him or her is disposed of at trial. If a child under 6 years of age has been in the society's care for more than 18 months and the child cannot be returned to his or her parent's care, then Crown wardship is the only alternative for the child. Pursuant to section 140 of the Act, once such an order is made, the society must then take steps toward adoption of the child. The Act mandates that the court shift its focus away from the rehabilitation of the parent and toward permanency planning for the child.

[12] In the context of the other provisions of the statute, very respectfully, I do not agree with the trial judge's apparent conclusion that clause 59(2)(*b*) is capable of an interpretation that would include a future placement in the access parent's home as a "future opportunit[y] for a permanent or stable placement" of the child. Such an interpretation is, simply, equivalent to the granting of a further period of society wardship under the Act than is not contemplated by the statute.

[13] *Children's Aid Society of Lanark County and Town of Smiths Falls v. S.W. and S.A.*, *supra*, dealt with a somewhat similar situation — one in which a mother who had a history of drug and alcohol addiction had posed such a risk to the children that they could not at the time of the status review hearing be returned to her care. The court ordered Crown wardship in respect of some of the children, with access by the mother. So long as the mother could demonstrate that she was able to commit to a life of sobriety, the trial judge was of the view that it was in the best interests of the children to have contact with her. The trial judge had held that giving the family six months to determine whether the mother could control her dependency on drugs and alcohol would be counterproductive to the children's best interests. In that case, somewhat like the case before me, the trial judge had suggested that, if the mother fell into her old habits after the access order was made, the society could apply for a review of the access order. The mother appealed the Crown wardship order and the society appealed the access order.

[14] In the just-mentioned case, the Divisional Court found that the trial judge had not shifted his focus from the rehabilitation of the mother and toward permanency planning for the children. In failing to do so, the trial judge had fallen into error. The effect of the order was to extend the society wardship order for another six months, which the judge was not entitled to do. Further, the Divisional Court stated that the trial judge had failed to give proper consideration to the issue of permanency planning for the children by, for example, failing to consider certain evidence that was highly relevant to that issue.

[15] Here, with great respect, the trial judge erred similarly. In my view, the trial judge failed to give sufficient weight to facts including, the lack of a possibility of a long-term placement of the child with the foster parents; the high adoptability of the child, despite a somewhat problematic family history; two long-term periods (each 6 or 7 months in length) of residential treatment for addiction during the time that this child was in foster care; and the relatively little time that the father had spent with the child overall while the child was in care. I note, again, that the trial judge himself correctly found that the child should become a Crown ward and that placement of the child should not be delayed. Very respectfully, however, the trial judge erred when he found that this access would not impair the child's future opportunities for a permanent or stable placement. Having found at trial that this child could not be returned to his parent's home and having accepted that the child was adoptable, the trial judge could not reasonably have been satisfied that the father had met the prerequisite to access found in clause 59(2)(*b*).

FRESH EVIDENCE

[16] In my respectful view, on the evidence before the trial judge, it is very questionable whether he gave sufficient weight to the evidence regarding the father's actual time with the child and his addiction history when he found that the child's relationship with his father was a beneficial and meaningful one. However, a consideration of the fresh evidence presented on the appeal leads me to the clear conclusion that, certainly by the time of the appeal, this was not the case. (As well, the fresh evidence clearly confirmed that the access order in favour of Mr. W.C. was impairing opportunities for B.W.C.'s stable or permanent placement.) I admitted fresh evidence on the appeal, this being an affidavit of Rhian Grundy-Evans, sworn on 2 November 2004. In that affidavit, Ms. Grundy-Evans deposed that she is the family service worker with carriage of the file since the order for Crown wardship was made on 21 June 2004. She deposed that Mr. W.C. had attended the society's office weekly in July and up to the first week of August 2004, to visit with B.W.C. He missed the visit on 10 August 2004. His whereabouts since that time were unknown to the society. Further, he had missed drug tests scheduled for 10, 18 and 27 August 2004. This was so, even though the society had left a message on his answering machine the day before each test, as pre-arranged with Mr. W.C. Ms. Grundy-Evans further stated that she had left 10 voice-mail messages for Mr. W.C. between 9 August and 8 September 2004. None were responded to, even though the voice-mail remained activated and continued to have an outgoing message on it. A letter that was sent to Mr. W.C. by courier on 14 September 2004 was returned by Purolator, unopened. Ms- Grundy-Evans further deposed that, on 21 September 2004, she spoke to Murray Creighton at St. Michael's Treatment Centre. He said

that Mr. W.C. had not been involved in his care treatment for a couple of months. Elizabeth Pakula, also of St. Michael's Treatment Centre, advised Ms. Grundy-Evans that, as of 21 September 2004, Mr. W.C. had not been to the centre for at least a month. On 21 September 2004, Ms. Grundy-Evans spoke to Josepha Martyres, Mr. W.C.'s counsellor at Central Neighbourhood Housing, who advised her that, although she had tried to stay in touch with Mr. W.C. regarding helping him to make day-care arrangements for B.W.C., he had only seen her once, more than a month before. Ms. Grundy-Evans went to see Mr. W.C. at his apartment on four occasions, at different times of the day, as late as 15 and 18 October 2004. She did not locate him.

[17] I also note that the affidavit material indicated that, although there was no provision for access in the order made at trial, Ms. M.W. did visit with B.W.C. on 15 July 2004. However, she did not attend a visit that the society had offered to her in August and had not contacted the society since that time.

[18] These cases are often extremely hard cases to determine. No doubt, this particular case became a difficult one for the trial judge. At the end of the trial, notwithstanding all of the evidence to which the trial judge referred in finding that the child should be made a Crown ward, he was convinced that this father would "get his act together" (again, my words). The findings of trial judges are entitled to great deference and appellate courts should be loath to interfere with them. Unfortunately, particularly after admitting the fresh evidence, the evidence in this case did not support a finding that Mr. W.C. would be able successfully to do what he needed to do (within any reasonable period of time) to prove that he could properly parent his son. As a result, it could not be said at the time of the appeal that the relationship between Mr. W.C. and B.W.C. was beneficial and meaningful for B.W.C., which finding is also a prerequisite to an order for access under subsection 59(2).

[19] For the reasons above, the trial judge, having erred in granting access to the father under section 58 of the *Child and Family Services Act* and the mother seeking an order that she have no access to the child, the access-related terms of the order of Justice Brownstone, dated 24 June 24 2004, were set aside by me and I ordered that neither parent shall have access to the child.