W A R N I N G

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

This is a case under Part V of the *Child, Youth and Family Services Act, 2017*, (being Schedule 1 to the *Supporting Children, Youth and Families Act, 2017*, S.O. 2017, c. 14), and is subject to subsections 87(7), 87(8) and 87(9) of the Act. These subsections and subsection 142(3) of the Act, which deals with the consequences of failure to comply, read as follows:

> **87.—**(7) *Order excluding media representatives or prohibiting publication.*— Where the court is of the opinion that the presence of the media representative or representatives or the publication of the report, as the case may be, 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, the court may make an order,
>
> **. . .**
>
> (*c*) prohibiting the publication of a report of the hearing or a specified part of the hearing.
>
> (8) *Prohibition re 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) *Prohibition re identifying person charged*.— 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.
>
> **. . .**
>
> **142.—**(3) *Offences re publication.*— A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(*c*) or subsection 87(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.

2018 ONCJ 917 (CanLII)

ONTARIO COURT OF JUSTICE

CITATION: *Children's Aid Society of Peel v. C.D.,* 2018 ONCJ 917
DATE: 2018-12-04
COURT FILE No.: Brampton 20083-12

2018 ONCJ 917 (CanLII)

B E T W E E N :

THE CHILDREN'S AID SOCIETY OF PEEL,
Applicant

— AND —

C.D.

D.M.

G.B.

S.J.
Respondents

Before Justice Philip J. Clay
Heard on October 22, 23, 24, 25, 26, 29, 30, and 31 November 1, 2, 5, and 7, 2018
Reasons released on December 4, 2018

Ms. M. Pilch ……counsel for the Applicant Society
Mr. R. Sharpe……counsel for the respondent C.D.
D.M ……found to be in default
G.B. ……acted on his own behalf
S.J.……..……not present

CLAY J.:

INTRODUCTION

[1] This Peel Children's Aid Society ("PCAS") brought an Application on May 3, 2016 with respect to four of C.D.'s children after their apprehension on April 28, 2016. The said children have not returned to the care of their mother since their apprehension. The Honourable Mr. Justice P.W. Dunn heard a summary judgment motion on November 29, 2017. He made statutory findings but found that there were genuine issues for trial with respect to protection findings and disposition. Over the course of time the Society's position changed due to changed circumstances such that the application before the court is the sixth amended protection application.

NOTE: This judgment is under a publication ban described in the WARNING page(s) at the start of this document. If the WARNING page(s) is (are) missing, please contact the court office.

[2] The children involved are; M. M. (“M”) born […], 2003, the daughter of C.D. and D. M., the twins Aa. B. and As. B., (“As and Aa respectively”) the daughters of C.D. and G.B., born […], 2011 and D.J. (“D”) born […], 2015, the daughter of C.D. and S.J. At the time of trial M. who is globally developmentally disabled was residing with her foster mother, the twins were residing with their father G.B. and D. was residing in a foster home.

[3] The Society’s request was for protection findings for all four children and for the following disposition orders: M. to be placed in extended Society care, the twins to be placed into the custody of their father G.B. pursuant to s. 102 of the *Child and Youth Family Services Act*, (“CYFSA”) and D. to be placed in the temporary care of the Society for a period of four months.

[4] C.D. sought an order returning all four children to her care and she was amenable to a period of Society supervision. G.B. sought a custody order for the twins. S.J. had moved to Antigua. He had temporary custody of D. before he left. He gave D. to C.D. in June 2017 without the knowledge of the Society. D. was apprehended from C.D on August 30, 2018. C.D.’s alternate position with respect to D. was that she be in the kin care of C.D.’s first cousin C.S.

[5] There had been other child protection proceedings involving C.D and her children or step-children over the years. This led to a pre-trial motion.

PRE-TRIAL MOTION

[6] Mr. Sharpe had given notice at the trial management conference (“TMC”) that he wished to bring a motion with respect to excluding evidence based upon the principle of *res judicata*. He was granted leave to bring such a motion before the trial judge at the beginning of the trial.

[7] Mr. Sharpe then brought an oral motion to exclude from the trial any evidence which predated the termination of child protection proceedings on November 18, 2015. The Society’s document brief and the submissions of counsel set out that the mother has been involved in three separate child protection proceedings over the years concerning her children or step-children. In anticipation of the motion the Society had limited its affidavit evidence to post November 18, 2015 events. Its document brief contained the reasons for decision, either in written form or by way of the filing of a transcript, for every child protection and criminal proceeding in which C.D. was involved.

[8] I heard the motion on October 22 and gave a written decision on October 25 which was before any Society evidence for the period prior to November 18, 2015 was heard. I ruled that findings of fact by a court should be admissible even if the actual evidence upon which such findings were based is found to be inadmissible due to issue estoppel. Admitting the decisions themselves does not run the risk of different findings being made by different judges on the same evidence. I permitted the filing of the Society’s document brief as evidence but did not permit the Society to call witnesses to address pre November 18, 2015 events.

Service and default

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[9] C.D. had filed an answer to the original protection proceeding in July 2016. Her claim then was the same as her claim at trial. She sought a return of all four of her children to her care. She was not required to file a fresh answer to the amended application. D.M. was noted in default in prior proceedings and an order was made on November 19, 2017 dispensing with service upon him in this proceeding. G.B. had filed an answer to the original protection proceeding in June 2016, and as the request in his answer for custody of his daughters was the same as his request (and the Society's position) at trial he was not required to file a fresh answer to the amended proceedings.

[10] S.J. had filed an answer to the original protection proceeding but he had moved to Antigua in June 2017. He had provided the Society with his email address and he was served with the sixth amended application by way of a substituted service order. At the opening of trial 60 days had not expired since service. As S.J. had stated in an email that for immigration reasons he was unable to return to Canada I am prepared to shorten the time period for an answer to the period prior to the opening of trial. S.J. had not filed an answer by October 22, 2018, and he is found to be in default.

Briefs filed

[11] Pursuant to the order at the TMC the Society and C.D. were to file their direct evidence by way of affidavit**.** The Society filed their affidavit brief prior to the opening of trial and Mr. Sharpe was permitted to file C.D.'s affidavit of October 17, 2018 at the opening of trial.

[12] Both parties filed document briefs and the Society filed an expert evidence brief. The briefs were received subject to proof such that the contents would not be marked as an exhibit unless and until they were found to be admissible after they were identified by their author or submitted on consent.

[13] The expert briefs contained the reports and curriculum vitae of three purported experts. The Society stated that they were not relying on one report so it was removed from the brief. One expert, Dr. V. Murphy was qualified and was produced for cross-examination and the report of Dr. M. Kalia was admitted on consent without the necessity of calling the author.

Cumulative periods of care

[14] The child M. was in care from June 22, 2012 to February 5, 2014 when she was returned subject to a temporary supervision order. She has been in care continuously since her apprehension on April 28, 2016 to the time of trial which amounts to a total period in care of 46 months.

[15] The twins were in care from April 28, 2016 until they were placed with their father G.B. on Jan. 27, 2017, and this amounted to a total of 27 months. D. was in care from April 28, 2016 until she was placed with her father S.J. in October 2016. She has been back in care since August 30, 2016 for a cumulative total of nearly eight months.

Protection findings

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[16] There have been no protection findings made since the May 3, 2016 protection application was filed**.**

[17] There were some differences in the findings sought by the Society with respect to each child. I will set out the subsection numbers together with the colloquial manner in which each finding is commonly referred to for each child.

[18] For M. and Aa. the Society sought findings under s. 74 (2) (a) (i) actual physical harm by failure to provide care (ii) actual physical harm by pattern of neglect (b) (i) risk of physical harm by failure to provide care (ii) risk of physical harm by pattern of neglect. For As. and D. the Society sought findings under the said s. 74 (2) (b) (i) and (ii).

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ISSUES

1) Should the children M., Aa., As. and D.. or any of them be found to be in need of protection?

2) If so which sub-section of s. 74 (2) should apply to each child found to be in need of protection?

3) a) Should the child M. be placed into extended Society care or returned to her mother C.D. subject to supervision.

   b) Should the children Aa. and As. be placed in the custody of their father G.B. or returned to their mother C.D. subject to supervision.

   c) Should the child D. be placed into the temporary care of the Society for four months, placed into the temporary care of a kin caregiver for four months subject to the temporary supervision of the Society or returned to her mother C.D. subject to the temporary supervision of the Society.

4) a) if the child M is placed into extended Society care what access should she have to her mother C.D. and her siblings Aa., As. and D.?

   b) if the children Aa. and As. are placed in the care of the father G.B. what access should the children have to their mother C.D. and their siblings M. and D. ?

   c) if the child D. is placed in the care of the Society or a kin caregiver what access should D. have to her mother C.D. and to her siblings M., Aa. and As.

   d) if the child D.. is placed in the care of her mother C.D. what access should she have to her siblings M., Aa. and As.?

EVIDENCE

CHILD PROTECTION FINDINGS

Pre-Apprehension care

[19] All four children had been residing with C.D. since February 2014. There was no other adult in the home. They had previously been in care but were returned home pursuant to a supervision order. That order was terminated and the prior child protection were concluded on November 18, 2015.

M.

[20] M. has global developmental delays. She is also thought to have a type of autism. She was 14 years old at the time of trial but had the cognitive ability of a child of about three years old. M. was non-verbal. There was evidence that she was a pleasant, happy child. She was assessed by Dr. Vincent Murphy on January 19, 2017. Dr. Murphy's report was filed as an exhibit and he was qualified as an expert in child development. He said M's receptive language level was at the level of a child of two years and five months. She had an understanding of about 100 words. She could follow basic one step directions. If she could not express herself she could point to assist a caregiver. Dr. Murphy said that M's gross motor skills were impaired and she walked with an awkward gait. She could feed and dress herself. M.'s fine motor skills were such that she had difficulty holding a pencil or buttoning a coat. C.D. understood her daughter's challenges and ensured that she attended for speech therapy at ErinOaks. C.D. attended the meetings at M.'s school and was actively involved with the school in ensuring that her daughter received the services that she required.

[21] Dr. Murphy said that M. had a dual diagnosis as she also had an impairment in social awareness and self-awareness. Her presentation in this regard was similar to someone on the autism spectrum. Dr. Murphy said that M. needed consistency with routine. She required a very high level of supervision and support. A caregiver would need to follow the same steps every morning. Dr. Murphy conceded that M. could probably manage to be left alone for brief periods of time for example while a parent gets supper ready and she is within ear shot. M. could not manage her own hygiene although she could be trained for instance to brush her teeth. M. needed a caregiver who had a higher level of organizational skill than an average parent. She was in a special class – and had more appointments to manage than the average child.

[22] Although C.D. was a Muslim and raised her children to be Muslim she registered M. into the Catholic school system because there was a specialized classroom in the local Catholic school and she wanted her three school aged children to attend the same school. In October 2015, M. transferred from S[…] School in Brampton to St. Nicholas school in Bolton. There she was placed in a specialized classroom that catered to children with dual diagnosis. There were three other children in the classroom. The teacher was Ms. Nicolina Grisolia and she was assisted by child and youth workers.

M's teacher

[23] Ms. Grisolia has been a special education teacher at St. Nicholas since 2008. She had five years in experience in special education. She said that the four children in her specialized classroom in the 2015-16 school year had various diagnosis and varying needs. She was assisted in her classroom by two educational assistants. The teacher said that she attended the conference whereby plans were made for M. to transfer from S[…]'s. The teacher said she was not told of any prior allegations of abuse or Society involvement.

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[24] She said she had a communication book that was sent home with each student. C.D. had written in the book every day the child attended school. Ms. Grisolia said she had good communication with C.D. Ms. Grisolia kept a record or timeline of events and she used that timeline in preparing the affidavit that was filed.

[25] She provided a letter to the investigating officer and filed an affidavit and gave evidence at the trial. She said that M. was not an aggressive child and that she was not noted to be clumsy. She said that due to their own challenges the four students in her class did not tend to interact with each other very much. Ms. Grisolia also supervised the students at recess and the lunch break. She had not observed M. to fall down or to be physically interfered with by other students. She did not get hurt at school.

[26] Ms. Grisolia said that throughout the time that she was M.'s teacher there were times when M. attended school with cuts and bruises to her face and head. Due to the number of minor injuries the teacher began to keep a record sometime in October 2015. On October 20 she noted a bump on M.'s head, the following day her eye appeared to be even more swollen and the next day she missed school. On Friday, November 6, M. was absent and on Monday, November 9, she attended school with two big scrapes and two small scrapes on her forehead between her eyes. The teacher stated in her oral evidence that the bridge of M's nose was swollen. When she asked C.D. about the injury C.D. replied, "sometime she don't listen". On December 2, M. attended school with a cut on her left temple and a bump on the same side. On February 1, 2016, M. attended school with a swollen lip and a swollen left cheek. The teacher asked C.D. to let her know how M. gets injured. On this occasion C.D. said that a sibling had thrown a toy at her. On March 8, 2016, M. attended school with a welt on her nose.

[27] On March 22, M. attended school with a bruised eye. Given the frequency of the injuries the teacher thought it necessary to inform the PCAS. Shortly thereafter Ms. A. Mensah a child protection worker attended at the school and met with Ms. Grisolia and her principal Ms. D'Agostino.

PCAS investigation

[28] Ms. L. Oxley had previously been the child protection worker assigned to C.D. prior to the Society closing the file on November 18, 2015. She was re-assigned after the March 22 call. She spoke to C.D. at her home. The mother denied hitting M. C.D. said that the March 22 injury was caused when M. was in the bathroom trying to wash her clothes and she hit her herself on the vice clamps that were attached to a faucet. C.D. explained the other injuries to M. by stating that the twins threw toys at her and there were many times when M. and her sisters were in the bedroom playing when she might has sustained a minor cut or bruise.

[29] Ms. Oxley had another meeting at the home on April 5. She had no concerns when she observed the four children there. Ms. Oxley called the family physician Dr. K. Marshall the next day and she did not report any concerns. Ms. Oxley tried to persuade C.D. to work voluntarily with the Society. When C.D. declined to do so Ms. Oxley said that the Society would then be required to go to court to obtain a supervision order. That did not happen prior to a new report from Ms. Grisolia on April 28.

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[30] C.D.'s evidence was that she had good reasons for not cooperating with the Society. The PCAS had apprehended her children in June 2012, and she did not get them back until February 2014. She said she had done nothing wrong. She denied ever hitting any of her children or any children that were in her care. She felt that ever since the Society had been required to close their file in November 2015 their workers had looked for ways to find fault with her. She was particularly aggrieved by Ms. Oxley who had been the worker from March 2013 to November 2015. C.D. felt targeted by the Society.

[31] C.D. stated that when M missed school, which she did quite often, it was for many different reasons including doctor's appointments, M. missing the bus and illness. There was evidence that on some, but certainly not all of the absences C.D. had provided a reason for the absence. There was also evidence that there was no proof of doctor's appointments and the school did not verify the reasons.

The April 28 injury

[32] Ms. Grisolia said that M. had unexplained absences on April 26 and 27 and on April 28 she attended school with an injury to her face. In her affidavit she stated that she observed "a red bruise under her left eye and cheekbone". C.D. had left a voicemail message for Ms. Grisolia that morning. When the teacher called back C.D. told her that M. had sustained the injury to her face by hitting herself with a zipper.

[33] Notwithstanding the explanation the teacher called the Society. The report was received by Society worker Ms. M. Williams. She filed an affidavit and was cross-examined. She was on the community care giver serious incident team. This team received any referrals of serious incidents made by teachers or day care providers. In this way the Society sought to avoid the "cognitive bias" that could possibly influence workers who had been involved with the family before. She said that where a family has a history with the Society it was important to have a "fresh set of eyes" involved to avoid any concern about "groupthink" developing within the team that had worked with the family.

Joint investigation

[34] Ms. M. Williams contacted the Peel Regional Police Special Victims Unit and with them developed a joint investigation plan. It was agreed that the Society would attend the school to observe M.'s injuries and the Society would contact the Hospital for Sick Children's Suspected Child Abuse and Neglect ("SCAN") team. The police would interview the twins As. and Aa. (as M. was non-verbal she would not be interviewed).

[35] Ms. Oxley attended at St. Nicholas school and used her phone to take photographs of M.'s face. She sent the photographs to Ms. Williams. One of the photos was filed as an exhibit and what it depicted was a contested issue. There was no doubt that there was an area of redness on the left cheek and a scratch above the area of redness.

[36] Ms. Williams attended at S[…]'s school to meet the twins. She noted that Aa. had no visible injuries. Ms. Williams observed a linear mark on As.'s left cheek which appeared to be a scar. She also noted a slight cut at the very top of As.' head where her hairline began. This five millimetre cut did not require medical attention.

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[37] Ms. Williams accompanied As. and Aa. to the police station. The children were taken into separate rooms for their interviews. Aa. was interviewed by Constable Melo and As. by Constable DiNardo. Both officers gave evidence.

Constable DiNardo

[38] Constable DiNardo had been a Peel police officer for 16 years, the last five years with the Special Victims Unit ("SVU"). In that role he dealt with child abuse cases and sexual assaults. He had taken a two week course on interviewing children and he had interviewed children ranging in age from 3 to 17.

[39] On April 28, 2016, he interviewed As. at the police station. Prior to so doing he had had been told by Ms. Williams by telephone that M. had attended at school with an injury to her face. He spoke to Ms. Grisolia and was aware of M.'s developmental delay and knew that she could not be interviewed. He received a letter from Ms. Grisolia. The letter said that on April 28 M. was taken off the school bus by the educational resource workers and the bus driver said that C.D. had asked her to communicate that they were not to touch M.'s face but they did not know why. Ms. Grisolia wrote that she observed that M. had a red raised bump on her left cheek. "Bruising was evident". The teacher wrote that that morning the C.D. called in to say that M. had hit herself with a coat zipper.

[40] Constable DiNardo received the photographs of M. taken by Ms. Oxley. He also searched the police data base and was aware that C.D. had been charged with assault on a child previously and that she had been acquitted at trial.

[41] The 31 minute interview with As. was videoed and a transcript was filed. The transcript was not certified. It was prepared by an administrative assistant at the police station from the video. Constable DiNardo said that she does as close to a verbatim transcript as possible. The officer had watched the video again the night before testifying and said that there was nothing said in the video that was omitted from the transcript.

[42] As. was only four years old and the officer said she spoke softly ("inaudible" was noted in response to general opening questions). The officer made positive statements to her and encouraged her to speak up. The relevant part of the transcript is set out below;

> As. - Aa. spit at me
> Cst. She spit at you that is bad eh? What did mommy do after she spit at you?
> Aa She tell me…
> Cst. She did what?
> As. She beat her up
> Cst. She beat her? What did she do?
> As. And Aa. cried
> Cst. She cried eh? You said she beats her, what do you mean? What I don't understand?
> Aa. Um to say sorry
> Cst. To say sorry, um so your sister she spit on you right, which is bad, and that is breaking the rules, and then you said your mom beat on her? Okay when you say your mom beat on her what do you mean, what did your mom do?
> As. Um they will just say sorry to me
> Cst. She made her say sorry to you ? Okay what else did you mom do?
> As. (inaudible) Aa not going to do it again.

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> Cst. That is good. And um, what did your mom do to Aa.
> As Aa is going to be nice now.
> Cst. Ya, good that is good, what did your mom do to her
> As. My mom let's Aa be nice

A little further in the questioning As. said that he sister kicked her;

> Cst. She kicked you okay. Did you mom see what happened? What did your mom do?
> As. She beat Aa.
> Cst. She beat her again okay when you say she beats her can you help me understand, I don't understand what do you mean what did she do?
> As. Um Aa pushing me in the couch
> Cst. Okay but you said that you mom beat Aa right? What do you mean, what did you mom do to her?
> As. (inaudible) and Aa get back in my spot.
> Cst. Okay well what did your mom, you said your mom beat Aa., what did you mean by that
> As. Um, mommy let Aa apology.
> Cst. Okay um, but when you say that your mom beat Aa,right . What did she do to her, can you explain it to me show, can you show me? Show me what your mom did Aa. Okay my mommy did this, Aa has to go in time out
> Cst. Ya you were sayig before that your mom, um your mum beat her. Can you show me what your mom did, what did she do?
> As. My mom did, mummy did beat Aa understand (inaudible)

[43] Constable DiNardo did not remember any gestures that the child may have made while being questioned. The video was not shown at the trial (it was shown at C.D.'s criminal trial at which she was acquitted of two charges of assault one on Aa and one on M.).

[44] I set the transcript out in some detail as the mother's position is that she has never hit any of her children or any children in her care. In his cross-examination of the officer Mr. Sharpe noted that it was the officer who said to the child five times that mommy beat Aa. until the child finally made that statement. In his submissions he maintained that the child's earlier statements that "she beat Aa" did not mean that "mommy" beat Aa. He argued that "she" could have been any one of the five females (mother and four daughters) in the house at the time.

[45] Mr. Sharpe argued that the child's statements were often not responsive to the questions and that they cannot be relied upon to suggest in any way that C.D. had hit Aa.

[46] There is no doubt that As. did not provide any detail of what happened. However, I find that when As. said "she" beats her she meant that her mother beat Aa. No other explanation makes any sense. The child said Aa. spit at her, she was asked what the mother did and she responded "she beats her". She did not elaborate as to what the mother did, despite the best efforts of the officer to have her do so, but she did state that Aa. had to apologize to her. I find that whatever "beat" meant it appears to have been done as a form of physical discipline to elicit an apology for bad behaviour. It also appears that the apology was given.

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Constable Melo

[47] Constable S. Melo stated that she had been with the Peel Regional police service since 2001 and had spent the last five years with the SVU. She said that she assisted with the joint investigation by conducting the interview with child Aa. She said that she did not recall if she had any information about the family before doing the interview.

[48] Unlike Constable DiNardo's interview with As. there was not a full transcript of the interview with Aa. A summary of the child's statements was completed by Constable Innes of the SVU after watching the video. Constable Melo said she had only seen that summary the morning of this trial. She required the summary to refresh her memory as to what had been said. She said that while her questions were not set out she had been trained to ask open ended questions when interviewing young children and she was aware that young children can be easily influenced by the interviewer. She said the interview lasted ten minutes.

[49] The relevant section of the summary read as follows;

> As. pushes
> Mommy slapped M. because she was bad
> M. peed on my panties
> M. bathed
> Mommy is still angry at M.

[50] Constable Melo had no memory of the actual question asked that elicited the response "Mommy slapped M. because she was bad". The officer said that she had obtained a statement from the child and she provided that information to Constable DiNardo. That ended her involvement with this matter.

Police interview of C.D.

[51] Constable DiNardo said that after the two interviews of the children had been conducted he just relayed information to other officers in the unit so that the next steps could be determined. The officer said he had decided that he had reasonable grounds to arrest C.D. for assault upon Aa. and M.

[52] After making the decision to arrest C.D. Constable DiNardo decided to interview her and he asked her to come to the station. The transcript of this one hour interview was filed. The officer began the interview by telling C.D. that she was under arrest for assault. He then read her rights. C.D waived the right to a lawyer and her right to silence.

[53] Constable DiNardo said he had seen the mark on M.'s cheek and it was a "pretty good mark". He testified that what he meant was that it was a significant injury. Under cross-examination he conceded to Mr. Sharpe that in his initial incident report he had described what he had seen on M's left cheek as a "minor scratch". No marks were observed on the twins.

[54] He told C.D. that Aa. had said that she had seen her hit M. and he wanted to hear her side of the story. C.D. responded that Aa. could not have seen her hit M. as the twins

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had already left for school. She was home with M. She said she "cuss them out and M face but I never took, do it what is it called" She tried to clarify that she did not do it "willingly."

[55] C.D. said she was making her lunch with her youngest D. on the counter. M.'s school bus was honking outside. She picked up M.'s jacket and threw it towards M. and that is what caused the injury. Later she said that there were actually two jackets and when M. reached out to catch them one fell on the floor and the other one M. caught by pulling it into her face. She said the child was scratched by the zipper on the jacket.

[56] In the interview with the police C.D. said that when she saw the mark " And I kiss it and I said I am so sorry M. but I am in a hurry I am so sorry…"

[57] The following exchange was set out in the transcript;

> Cst. Ya and when I say a good mark I mean it took some force to do that mark.
>
> C.D. No I swear to God I did not. I throw the two jacket at her that is it.

[58] Later on C.D. acknowledged seeing the red mark and stated;

> So if I was hiding it she would not go to school today you guys wouldn't be involved because she wouldn't have to go to school today I could have call in sick and she don't go in school for the rest of the week until it is better. So I wasn't hiding anything I sent her to school".

[59] Constable DiNardo pursued the issue of how much force would need to be exerted to cause the mark that he saw. He said it would require a person to "whip the jacket pretty hard" and C.D. responded;

> I never whip it I just throw it and I have no maybe I go with force, maybe the force too because I didn't throw it hard, it is both of them and you don't live with M. so you don't know what you have to do with her"

[60] Further on in the interview C.D. describe her busy mornings getting three children off to school while caring for her toddler. She said if anybody did not have their shoes on "I am going to beat" and if they don't have their jacket on "I am going to beat". She said that she said she is going to beat but "I don't beat because I am scared of Children's Aid". She then said "I don't beat them I don't hit them".

[61] C.D. was then asked why M. had missed the two days of school immediately prior to April 28. C.D. said that she woke up late and then she said how their basement apartment was so cold and M. was coughing. It is noted that C. D. called the school to advise that M. had an injury to her face on April 28 but she did not call the school with any explanation on the previous two days.

The apprehension

[62] At the end of the interview Constable DiNardo advised that C.D. would be kept in custody overnight and he asked her if she had anyone that could look after the children. She said that she could not reach her boyfriend S.J. who was working out of town and no one else was available. All four children were then apprehended.

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[63] Constable DiNardo explained that C.D. was held over for a bail hearing for the safety of her children. Mr. Sharpe noted that there were no allegations that related to the year old child D., there were no restrictions recommended to the Crown by him on C.D.'s contact with D. His point was that D. would not have had to have been apprehended had the officer just released C.D. that night as she could have taken D. home with her. The PCAS evidence was clear that they had made no decision on apprehension until the police completed their investigation and made a decision on whether or not to charge C.D. and whether or not to hold her overnight for a bail hearing. Mr. Sharpe said that the PCAS had the police facilitate an apprehension by keeping C.D. overnight. Constable DiNardo said that the sequence of events was simply that once the police made a decision to keep C.D. overnight for the bail hearing the PCAS needed to decide what to do. He denied the allegation that the PCAS and the Peel police colluded in causing an unnecessary apprehension of D.

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SCAN report

[64] A decision was made to have M. seen by SCAN on April 29, 2016. Ms. Oxley took her there. Dr. Michelle Shouldice gave evidence and was qualified as an expert in pediatric medicine and the assessment of injuries in children. She had been the director of SCAN from 2003-2014. Her job title now was head of pediatric medicine and acting head of adolescents at the Hospital for Sick Children. She brought to court the notes taken, and diagrams drawn, at SCAN.

[65] Dr. Shouldice stated that she supervises other pediatricians and residents. Dr. Lord did the examination and completed the diagram and Dr. Shouldice checked her work and signed off on the notes and diagram. SCAN was advised that M. had global developmental delays and was non-verbal. The notes indicated that they were provided with information about the March 22 injury and other injuries reported by the school. The notes also stated that SCAN was advised that the mother had stated that the April 28 injury was due to M. being hit by a zipper. The doctors were told that Aa. said that C.D. beat M. and that As. said she slapped Aa. It was noted that the twins had no marks.

[66] The SCAN notes stated that M had a "cheek bruise-non-specific in terms of injury type, size and location". Dr. Shouldice said the red bruise could have been inflicted by force over the cheek bone. She did not see any swelling. She said what was observed was a bruise and not acne. There was some acne near the hairline and near M's nose. The diagram showed that the bruise measured 4 x1.5 cm.

[67] The diagram showed that there were hypo-pigmented linear marks above the bruise of 1 cm and 2 cm respectively. The doctor said that the mark that had scabbing may have been missed in the examination or it may be a healing scratch or the scabbing look may relate to how it was caused. I concluded from her evidence that it was possible that one of these marks was the scratch noted the day before and one was an earlier scar.

[68] The doctors noted other injuries on M's body included curvilinear marks that could be bite marks on her back and near her shoulder. The doctor confirmed that those marks were not there when M. was examined by SCAN in 2012. There were also hyper-pigmented marks on the upper left arm which were unusual for an accidental injury. The doctor said that "hypo" meant that the skin was less pigmented and "hyper" meant that it was more pigmented. Dr. Shouldice said that with children who have pigmented skin (and

M. is black) whether a mark is hypo or hyper does not tell anything about the injury. The doctor could not specifically date any of the other injuries noted. She agreed with the suggestion that the production of melanin which impacts the skin colour can be the result of many factors. Dr. Shouldice said she thought that it was very unlikely that the red mark is just M's natural colouration.

Criminal trial re: M. and Aa.

[69] The assault charges were tried by the Honourable Justice D. McLeod of the Ontario Court of Justice on July 12, 2017. His reasons for judgment were filed as an exhibit. Justice McLeod noted that three witnesses testified; Aa. As. and Ms. Grisolia. Based upon the evidence heard the Crown invited Justice McLeod to enter an acquittal on the second count which was the allegation that C.D. had hit the child Aa. The court was left to deal with the allegation made by Aa. that C.D. had slapped M. on the left side of her face with her hand.

[70] The court noted that the Crown position was that even though the testimony of the twins particularly As. had its inconsistencies looked at in the totality it should lead to a conviction. The photograph was said to be corroborating evidence and the judge made reference to the bruising observed in the picture. The defence submitted that the evidence of the twins was too unreliable and must leave the court in a state of reasonable doubt. Justice Mcleod found the twins evidence to be unreliable. As. never saw C.D. slap M. in the face and the only slapping she had seen was in M.'s buttocks area. Aa. did remember C.D. slapping M. but at another point said she did not remember M being slapped at all.

[71] Justice McLeod also noted difficulties with the photo in that the court;

> does not have the ability to see the other side of the girl's face to see if there is any symmetery between what is seen there and what presents on the other side.

[72] Justice McLeod also stated that he did not find that Aa.'s credibility was in issue. He felt she had done her best to give evidence. He then referred to *R .v. W.D.* a decision of the Supreme Court of Canada with respect to the analytical process that a judge must engage in when considering whether a case has been made out by the Crown beyond a reasonable doubt. He entered an acquittal.

[73] The burden of proof in a civil matter (including a child protection matter) is proof on the balance of probabilities not proof beyond a reasonable doubt. In this matter I am unable to find on a balance of probabilities that M. was slapped in the face by C.D. on April 28. I accept the evidence from Dr. Shouldice at SCAN that the scratch and bruise on the cheek could have been caused by an accident. I do not believe though that a tossed jacket fumbled into the face would cause the cheek to turn red and be swollen to the degree reported by Ms. Grisolia.

Child protection findings based on care since November 18, 2015

[74] In this matter though I do not need to decide exactly how the injury was caused. I know that the injury did not happen outside of the home as M. did not leave the home from April 26 to her attendance at school on the morning of April 28. C.D. was the only adult with M. in the home during the time period when this injury was suffered. The expert from SCAN was unable to say when the injury occurred. I find it could have occurred before the twins

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left for school or even the evening before. There could have already been a bruise on the cheek when the coat was tossed, if it was in fact tossed, such that the scratch and the bruise were not caused at the same time. The key point though is that a vulnerable non-verbal developmentally delayed child suffered an injury to her face while in the direct care of her mother.

[75] This was not an isolated injury. I accept the evidence of Ms. Grisolia that M. had suffered other unexplained injuries in the period of time between October 2015 and April 28, 2016. The teacher said that she had not been made aware of the family's child protection history when M. joined her school. She had no reason to be particularly attuned to M. possibly being abused at home. She said that M. did not fall at school and was not hit or interfered with by other students. All of the M's injuries occurred at her home. It is understandable that M. might have been hurt by sibling interaction but C.D. never called her to state that that had occurred. The explanation for the March 22 marks around the eye was that the child was washing clothes in the bathroom and hit her head. Even if that were true this would show that M. was unsupervised by her mother.

[76] I find that M. is a child in need of protection due to her suffering actual harm either caused by C.D.'s hitting her or by C.D's lack of supervision of her as a vulnerable child who required constant supervision.

[77] I do not find that Aa. suffered actual physical harm. However, C.D.'s inability to control her frustration and anger had caused her to threaten her children with beatings. I find that based upon the twins statements that it is likely that C.D. hit her children when she was very upset. While neither twin may be able to tell a police officer, or a court, exactly what happened and when I find that their separate statements to Constable DiNardo and Constable Melo that "mommy slaps' or "Mommy beats" are very unlikely to have been totally made up. There was a considerable amount of evidence in this matter that all of the children had a close and loving relationship with their mother. They had no reason to make up that she was hitting them. They did not even seem to understand the possible consequences of such a statement. They just talked in the manner of children of their age and they independently said that their mother hit them or their sister. They did not seem to think that there was anything unusual about that. They effectively said that there was bad behaviour, mommy beat the offending child, the bad behaviour stopped and there was an apology.

Prior proceedings

[78] I need to determine if these children are still in need of protection today such that a disposition needs to be made. The prior proceedings do add context to the current proceeding and pursuant to s. 93 of the *CYFSA* the document brief with the prior decisions and reasons was filed as evidence of past parenting.

First child protection proceeding

[79] The first proceeding was in 2004 and concerned the then 13 and 14 year old sons of D. M. and their respective mothers. C.D. was a step-parent to the boys, and a party to the proceeding, as the boys had been residing with D. M. and C. D prior to the Society's involvement. That proceeding resulted in two final orders made by the Honourable Justice J. D. Karswick on May 18, 2005. One for the child De. M. and the other for the child L. M.

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Each order found the respective child to be in need of protection pursuant to the following subsections of s. 37 (2); (a) (i) (which can be summarized as physical harm from failure to provide care) a) (ii) (physical harm by pattern of neglect ii) , b) (i) (risk of physical harm by failure to provide care) (b) ii) (risk of physical harm by a pattern of neglect) and (g) (risk of emotional harm). Both children were made Wards of the Crown. The document brief contains the final orders but not the reasons for decision. Therefore, Justice Karswick's findings of fact are not before this court. All other reasons for decision, transcripts or Statements of Agreed Fact referred to below are found in the Society's document brief.

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Second child protection proceeding

[80] The second child protection proceeding began in June 2012 and concerned the eldest three children in this proceeding and C.D.'s step-child K.B. (the daughter of G.B.). A temporary care hearing was held in this matter. The transcript of Justice Pawagi's oral reasons for decision showed that she found that all four children should remain in the temporary care of the Society. On August 28, 2013, K.B. was placed in the care of her biological mother Sh. J. under supervision. At that same time the criminal trial of C.D. for allegedly assaulting K.B. was heard by Justice T. Wolder. His reasons for decision were released on December 6, 2013. He made certain findings of fact but ultimately concluded that he was not persuaded beyond a reasonable doubt and he acquitted the mother of all charges.

[81] On February 5, 2014, the three eldest children in this proceeding were placed with C.D. subject to Society supervision. On September 30, 2015, I heard a summary judgment motion with respect to statutory and child protection findings concerning K.B. and the three eldest children. I released my reasons for decision on October 15, 2015, and I found all four children to be in need of protection. K.B.'s finding was on physical harm and the risk of physical harm and other grounds. The three other children's findings were based upon the risk of physical harm from failure to provide care or from a pattern of neglect.

[82] On November 18, 2015, the parties filed a Statement of Agreed Facts whereby the three eldest children in this proceeding were placed in the care of the mother C.D. pursuant to s. 57 (9) of the *CFSA.* (This section provides that children can be returned to a parent where they have been found to be in need of protection but no further order is required to protect the children in the future)

Current child protection proceeding

[83] The child D. was born on […], 2015. As noted above the mother C. D. was acquitted on criminal charges of assaulting the children M. and Aa. Those two children plus As. and D. were apprehended from the mother's care on April 29, 2016. They have not returned to the mother's care since. On December 23, 2016, Justice Dunn heard a temporary care motion with respect to the four children. In his reasons for decision released on January 30, 2017, he found that all four children should be in the temporary care of the Society with supervised access to the mother C.D.

[84] As noted above on November 29, 2017, Justice Dunn heard a summary judgment motion with respect to statutory and protection findings and disposition. He made statutory findings (with the exception of D. an oversight which was addressed by a consent finding that I ultimately made on October 18, 2018). Justice Dunn found that "this case is too

complex to be considered in a summary judgment motion as there are serious credibility issues not resolvable by reading affidavits". He set out the genuine issues that required a trial and suggested "areas where further information could be helpful to the court or cross-examination of person(s) may be beneficial or both".

[85] Finally, a place of safety hearing was held regarding D. when the Society learned in August 2018 that she was not residing with her father S. J. in Antigua but had in fact been residing for some time with the mother C.D. My endorsement of September 4, 2018 sets out the reasons for my temporary order that D. be placed in the care of the Society.

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C.D.'s position

[86] As noted above C.D. took the position that she had never hit any child in her care. She provided an explanation for the injuries observed on M. There were no observed injuries to the other three children. I have found that M. was injured while under her direct care and supervision. It is common ground that the only evidence that C.D. directly inflicted injuries on her children was that of the twin's statements and they were only four years old at the time of the alleged events.

[87] At the time of the apprehension on April 28, 2016, C.D. was living in a basement apartment with a 12 year old globally developmentally delayed child, two four year old twins and a one year old child. She had no caregiving help. It would be understandable if she said she was overwhelmed and often tired and frustrated although she did not state that. C.D. did not concede that she ever had any difficulties parenting her children. The theory of her entire case was that the fathers of her children did have issues with anger and aggression towards her and that she had protected her children by moving out of bad relationships. She said that the Society was persecuting her and she queried if it was because she was black and Muslim. She said that there was absolutely no evidence of any protection concerns with respect to her parenting.

Physical aggression with children

[88] C.D. was living with G.B. when their twins were born on […], 2011. Her eldest daughter K.Q., then 15, was living with them. While I had made a ruling in this trial that there was to be no evidence concerning child protection proceedings prior to November 18, 2015, there was some evidence that emerged from the narrative as to who was living where and when. There was evidence that G.B. wanted to sponsor his eight year old daughter K.B. to immigrate to Jamaica from Canada and that C.D. very reluctantly agreed. K.B. was developmentally delayed. There was evidence that K.B. arrived in December 2011 just after the twin's birth.

[89] On January 30, 2012, G.B. was arrested and charged with sexual interference for touching K.Q. on at least two occasions. He was arrested and removed from the home. This resulted in C.D. being the sole caregiver for the infant twins, M., K.B. and K.Q. in her basement apartment. The Society became involved with C.D. over allegations that she had physically abused K.B. The five children were apprehended in June 2012. A temporary care hearing was held before Justice M.B. Pawagi in November 2012. A transcript of her oral reasons for decision of November 26, 2012 was filed with the court.

[90] Justice Pawagi reviewed C.D.'s history to that point with the Society. At that time C.D. was using the surname B. and the names in the transcript were not initialized. For ease of reference I will refer to persons by the initials used in this proceeding. Justice Pawagi began by stating that she was prepared to return K. Q. to her mother subject to a supervision order. She then said;

> With respect to the three younger children, I find that there is risk such that a supervision order would not alleviate that and the basis for that is the evidence that was provided by the Society. It goes back to 2002 to 2004 where there were serious concerns noted with respect to her two steps sons… (De. M and L. M)….-allegations of physical discipline, deprivation of food and being left alone, and I am specifically noting that on July 6, 2004 the Peel Police contacted the Society to report that the M. boys were found living in an abandoned house and that they had reported being beaten by …(D. M. and C. D)….and forced to drink toilet water. They detailed the allegations both with respect to…(D.M. and C.D)….and at the end of that the M. boys were made Crown wards.
>
> …C.D. and M. then go to Jamaica. The file is opened again in October 2006 when K. Q. discloses physical discipline by her mother…(C.D.)…She said that she had been punched in the stomach, hit on the head and in the face with a clothes hangar and that a one inch mark on her face had been caused as a result. She reported that her mother regularly used hitting and kicking as a means of discipline with *(sic)* since K. Q. had arrived from Jamaica two years earlier. There is also a report on February 8, 2008 where staff at the daycare M. attended say that they witnessed C.D. punch K. Q. in the face causing her to stumble backward and she is charged with assault at this time.
>
> I am turning to the allegations with respect to… (K. B)…. This is a five year old *(sic)* step-child of C.D. who comes into her care approximately in January 2012. The allegations are initially reported by Mr. Clark…(K. B's)….kindergarten teacher and the summary is as follows….That he advises the Society that…(K .B.)…seemed happier when she began school in January 2012 and that by June 2012 she appeared sad all the time. Then there are a series of allegations, June 4 he observes her with a bruise on her cheek and under her eye and that she had defecated in her pants and that she had been having accidents previously. On June 12th he observed fresh bruises on her face and swollen cheek and scratches on her neck. On June 13 he observes new bruises, observes that her tongue has appeared to be split and takes a picture of that.

[91] K.B. was taken to the SCAN unit at Sick Kids. Dr. Sarah Schwartz listed the injuries that she presented with upon admission. They were as follows;

a) Bruises of the face, thighs and buttocks,

b) Hyperpigmented (darker skin) marks to the face and neck,

c) Mouth injuries including a tongue laceration and a torn frenulum,

d) A subconjunctival hemorrhage in her left eye,

e) Fractures of the right clavicle,

f) Fracture of the left 1st rib,

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g) Fracture of the 1st cervical vertebrae,

h) Subdural hematomas (bleeding around the brain),

i) Brain contusions and shearing injuries of the corpus callosum,

j) Extramedullary hemorrhage in the spine, and

k) Healed complete transections of the hymen on genital exam.

[92] Dr. Schwartz noted that the SCAN program concluded that K.B.'s injuries were not caused by any pre-existing medical conditions. Several of the injuries were severe and unusual. The multiple injuries in multiple locations on the body made the injuries highly suspicious for inflicted injury. The doctor said that upon sustaining many of the injuries K.B. would have experienced a great deal of pain.

[93] After noting the injuries sustained Justice Pawagi noted that the evidence was that all of the injuries with the exception of the one in the genital area would have occurred within days or weeks prior to her admission to hospital. This was the time when she was in the care of C.D. after G.B. had been removed from the home.

[94] Justice Pawagi noted C.D.'s only explanation for the injuries was that M caused them. She found that to be inconsistent with all of the other evidence before the court and found it likely that C.D. caused the injuries to K.B. She stated that the evidence was that the child was unwanted and was treated in a cruel manner and as an interloper in the home.

Criminal trial re: K.B.

[95] C.D. was criminally charged with assaulting K.B. during the period between March and June 13, 2012. The reasons for judgment of Justice T. Wolder were released on December 5, 2013. Justice Wolder found on the evidence that during this period of time there were four persons in the home who interacted with the child on a regular basis C.D. G.B., M. and K.Q. (the twins were infants). Justice Wolder found that;

> It is clear from the evidence that the accused was the primary caretaker in the home in which the child… (K. B)… lived. The bruising that K.B. sustained was from time to time was obvious. It was obvious to her home room teacher and to the school principal. It would also have been obvious to the accused.
>
> I am satisfied that there appeared to be a lack of concern for K.B.'s well-being in the home and that the accused would have been fully aware that the child was being harmed and was sustaining injuries while residing in her home. There is no evidence that anyone, other than school officials, ever took steps to address the harm that the child was sustaining at her home during the months of March through June 2012.

[96] Later on his decision Justice Wolder stated that;

> I am satisfied beyond a reasonable doubt that K.B. was abused while in the home of her father and the accused. I also find that she was abused by numerous individuals in the home. I am also satisfied that the accused and her father …G. B…. failed to protect the child from the abuse that she sustained in the home.

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[97] Ultimately Justice Wolder had a reasonable doubt as to whether C.D. intentionally inflicted injuries on K.B. and he acquitted her on all five counts.

[98] On October 15, 2015, I released my reasons for judgment after a summary judgment motion regarding protection findings with respect to K.B. M. and the twins. I commented on Justice Wolder's reasons as follows.

> It appears clear from the decision that Justice Wolder understood from the evidence before him that… (C.D. and G. B)…. were living together at the time that…(K. B…) suffered injuries as he referred to the home of the father and the accused. The evidence before me makes it clear that (G. .B…) moved out of..(C.D.'s).. home in January 2012. …(K.B.)… went to live with her father between April 9 and May 2, 2012. The Society's position based upon the SCAN report was that most of the injuries occurred within 10 days of June 23. The only other people in the home other than C.D. who could have inflicted injuries were the siblings and the only real evidence of another person who could have caused her harm was evidence related to…(K.B.'s).. rough treatment at the hands of M.

[99] The child K. Q. was returned to the care of her mother after the temporary care and custody hearing on November 26, 2012. K.B. was placed with her mother Sh. J. in the summer of 2013 and C.D. has had no further contact with her. The children M., Aa, and As. were returned to the care of C.D. under a temporary supervision order on February 5, 2014. This meant that when the protection findings were made on October 15, 2015, there were no children still in care. I declined to make an order that no disposition was required under s. 59 of the *CFSA.* That order was made on consent after the filing of a Statement of Agreed Facts on November 18, 2015.

[100] C.D. takes the position that she has never hit any of her children. She relies on the fact that she was acquitted of all the charges against her both in 2013 (K.B.) and 2017 (M. and Aa.) It is true that with very young or developmentally delayed children as witnesses the Crown was unable to meet the burden of proof upon them of beyond a reasonable doubt. However, a review of all of the judgments leads to the inescapable conclusion that C.D. did hit children in her care.

[101] The evidence of past parenting buttresses the evidence of parenting after November 18, 2015. The pattern was the same. A vulnerable child attending school with injuries and explanations for them that strain credibility. There was also evidence at this trial of ongoing anger management issues that have caused C.D. to act out violently even when it presented a risk to the safety of her child.

Criminal Charge in 2017

[102] Officer Dhami was called to give evidence. He had been with the Peel Regional Police since 2012. His occurrence report of Feb. 23, 2017 was filed as an exhibit. On the day in question the officer was dispatched to 39 Pluto Drive, Brampton to investigate an alleged domestic assault. C.D. had called the police and said that she had been punched several times in the face and her face was swollen. She had declined an ambulance.

[103] When the officer arrived at the scene C.D. advised that she had exaggerated the assault and there had only been a verbal assault. She said she had been in a relationship with S. J. since August 2016. Her four children had been in the care of the PCAS since

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April 28. Officer Dhami testified that C.D. told him she and S. J. had an argument over her scheduled visit with her children. He was late in arriving home. She became so upset that she grabbed a knife and slashed all four tires on his vehicle. S. J. then did the same thing to her vehicle. At that point she called the police and made up a story of physical assault.

[104] When Officer Dhami had C.D. in custody on the street he heard a child crying and male appeared holding a young girl. The officer spoke to C.D. and learned that the child was her daughter D. The officer called for additional units as he had two adults in custody and their child in the hands of the basement tenant. The tenant had responded to the child's crying from the top floor of the house. C.D. and S. J. were taken to the police station and both were charged with mischief under. Those charges have been resolved.

[105] When C.D. gave her evidence she admitted lying to the police and slashing S. J.'s tires. She noted that D. was living with S. J. as the child had been temporarily placed with her father S.J. in August, 2016. I reviewed the order made by Justice A.W. Sullivan on August 15, 2016. On the order S. J.'s address is listed as 39 Pluto and C.D. had a different Brampton address. The child was placed with S. J. subject to Society supervision and C.D.'s access to D. was subject to Society approval.

[106] The occurrence report showed that both C.D. and S. J. lived at 39 Pluto. It appeared that the Society was unaware that the parties were living together with D. at the time. It also appeared that the Society were unaware of the mischief charge.

[107] There are a few aspects of this incident that are relevant to ongoing protection concerns. C.D. was left caring for nearly two year old D. when S. J. was not home. C.D. then got into an argument in which she was so angry she grabbed a knife and went outside leaving the child alone in the house. She slashed S.J.'s tires, then made a false report to the police and did not bother telling the police that her child was alone in the house. Fortunately the basement tenant had the presence of mind to go upstairs to retrieve the crying child. At a time when she was not even to be with her daughter C.D. was left caring for her and she could not do so without putting her in danger.

C.D's support system

[108] C.D. is seeking a return of four children to her care. Three of the children are under seven years old and the fourth has global developmental delays. The evidence was that C.D. had a very limited support system. C.D. herself told her counsellors that her biggest support was her now 22 year old daughter K. Q. who is now a full time university student in Ottawa. K .Q. did come back from university when her mother was in crisis at the time of the August 30 apprehension of D. There is no doubt that mother and adult daughter share a bond and that K. Q. enjoys spending time with her siblings. However, given her age and stage in life K. Q. cannot be expected to be present on a consistent basis in C.D.'s home to provide parenting assistance.

[109] C.D. called Dr. Karen Marshall as a witness. She has been a family doctor since 1997 and has been a specialist in family practice since 2002. C.D became her patient in April 2006. Dr. Marshall reviewed her August 12, 2016 report and noted that she documented that C.D.'s children looked well cared for. She confirmed that she was aware that M. has global delays. She was the one who had referred M. to a pediatrician, Dr. Contreras who referred her to ErinOaks for speech therapy. Dr. Marshall effectively said

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that when she saw C.D. with her children the mother seemed to be caring and concerned and she followed up on referrals that she made. Under cross-examination Dr. Marshall was directed to eight appointments that C.D. had made for herself and cancelled between June 7, 2016 and May 29, 2018. C.D. put Dr. Marshall forward as a support to her, but she has not seen her, with or without the children, since September 6, 2017.

[110] Ms. Pilch for the Society said that C.D. only focused on meeting her own needs and how others can assist her in meeting them. C.D.'s paternal aunt L. D. testified that "C.D. only calls me when she needs something". C.D. spoke of her warm relationship with her first cousin C.S. notwithstanding that with all of the turmoil in her life C.D. had not talked to C.S. in ten years. She only spoke to her in August 2017 at the suggestion of her mother who lives in Jamaica and is the sister of C.S.'s father.

[111] Naheed Zuberi was called to testify for C.D. She has known C.D. for ten years as she is the outreach secretary for the local Ahmidayah Muslim community. Ms. Zuberi presented as a kind, helpful person who would go out of her way to assist anyone in her community who asked for help. She noted that as C.D. lived in Malton (east Brampton) that the "sisters" serving that area of the city would be the ones who could provide direct help with food, transportation or whatever was needed for a family. She said though that C.D. would not outwardly ask for help.

[112] Ms. Zuberi said that she recently met C.D. with her youngest child D. She had no concerns when she observed D. playing with her mother. She said she was prepared to help C.D. find child care for D. It was clear that Ms. Zuberi was completely unaware of the fact that there was a court order in effect by which D. was to be in the care of her father S. J. subject to Society supervision.

Summary

[113] For all of the reasons set out above I find that the child protection concerns still exist and that they cannot be ameliorated without a further court order.

DISPOSITION EVIDENCE

[114] At this point it is necessary to consider the sub-sections of s. 101 of the *CYFSA* that are relevant to the facts in this matter. They read as follows;

> 101 (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 or an order under s. 102 , in the child's best interests:
>
> Supervision order
>
> 1. That the child be placed in the care and custody of a parent or another person, subject to the supervision of the Society, for a specified period of at least three months and not more than 12 months.
>
> Interim Society care

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2. That the child be placed in interim Society care and custody for a specified period not exceeding 12 months.

Extended Society care

3. That the child be placed in extended Society care until the order is terminated under section 116 or expires under section 123.

Consecutive orders of interim Society care and supervision

4. That the child be placed in interim Society care and custody under paragraph 2 for a specified period and then be returned to a parent or another person under paragraph 1, for a period or periods not exceeding a total of 12 months.

Court to inquire

(2) In determining which order to make under subsection (1) or section 102, the court shall ask the parties what efforts the Society or another person or entity has made to assist the child before intervention under this Part.

Less disruptive alternatives preferred

(3) The court shall not make an order removing the child from the care of the person who had charge of the child immediately before intervention under this Part unless the court is satisfied that alternatives that are less disruptive to the child, including non-residential care and the assistance referred to in subsection (2), would be inadequate to protect the child.

Community placement to be considered

(4) Where the court decides that it is necessary to remove the child from the care of the person who had charge of the child immediately before intervention under this Part, the court shall, before making an order under paragraph 2 or 3 of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family under paragraph 1 of subsection (1) with the consent of the relative or other person.

Custody order

102 (1) Subject to subsection (6), if a court finds that an order under this section instead of an order under subsection 101 (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.

Deemed to be order under s. 28 *Children's Law Reform Act*

(2) An order made under subsection (1) and any access order under section 104 that is made at the same time as the order under subsection (1) is 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.

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[115] Prior to a consideration of the appropriate disposition the court must consider s. 101(2) and review the efforts the Society has made to assist the child before intervention under this part of the *Act*.

Efforts of Society to provide services

[116] Mr. Sharpe said that the Society offered no services and did not recommend a single program to C.D. to get her children back. Ms. Pilch submitted that this section allows the court to consider the services offered to the family during the entire period of Society involvement from June 2012 to just four months before the children were apprehended in April 2016.

[117] I find that the court can look at the provision of services in the context of the entire history of C.D.'s involvement with the PCAS. It is noted from the Statement of Agreed Facts filed on November 15, 2015, that C.D. did participate in the Society's Therapeutic Access and Assessment Program (TAAP) from November 2013 until the children were placed back in her care subject to a temporary supervision order on February 14, 2014. Prior to the children's return C.D. had participated in individual counselling from January 10, 2013 to August 23, 2013. Notwithstanding this assistance C.D. physically disciplined her children particularly M. almost as soon as the Society supervision ended. The court must look at not only whether services were offered but whether the services were effective in addressing the underlying cause of the behaviour that led to child protection concerns.

[118] Ms. Pilch submitted that the concerns that resulted in the file's reopening in March 2016 demonstrate that if the programs and counselling had resulted in a change in behaviour it was not permanent. She further submitted that C.D. may have been able to parent effectively in the TAAP program but when she faced a difficult real world environment of providing full time care for four children 24 hours a day, 7 days a week C.D. was unable to do so without a resurgence of her anger, frustration and poor impulse control.

[119] After the April 28, 2016, apprehension C.D. was so upset with the Society that she refused to consider any advice or services offered by its workers. When the Society did offer further anger management programming C.D. declined it as she said she was undergoing counselling through Family Services of Peel.

[120] Mr. Sharpe called Ms. Mohanty of Family Services of Peel as a witness. She has been a counsellor since 2006 and had worked with C.D. in the past. She said that clients call and are assigned a counsellor and C.D. was assigned to her. The first appointment was on November 16, 2016 and C.D. was 30 minutes late so she could only give her the welcome package. On November 24, Ms. Mohanty listened as C.D. set out her current issues. She said she needed to gather more information to establish goals for the counselling. On December 7, 2016 C.D. told Ms. Mohanty that she wanted to discuss coping with stress. C.D. then missed her next appointments which were during the period of time when she was charged with mischief for the tire slashing incident. She saw Ms. Mohanty for the last time on April 7, 2017. Ms. Mohanty said that with only three full sessions they were not able to establish and work on goals. She said that it was usually in the fourth session when the therapist and patient write down goals and sign off on them. They did not reach the fourth session. Ms. Mohanty said that a client is able to have up to

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twelve appointments so it must have been C.D. that cancelled the counselling before any progress could be made.

[121] The evidence of the Society witnesses was that C.D. had made it very clear that she did not want to work with them or accept any advice. The relevant workers all said that any course addressing anger management was acceptable and C.D. could arrange her own programs. Ms. Simamba the current child protection worker said that "…C.D…. could have gone to any program "as long as she owns the need". The Society position is that C.D. never really thought she had an anger management problem and therefore she had no interest in seeking out assistance.

[122] There was evidence though that C.D. attended other programs. Ms. Faren Hale-Vokey from the Elizabeth Fry Society testified. From 2015 to 2017 she was the court liaison adult court counsellor at the Brampton court house. She admitted that she had little independent recollection of working with C.D. Their organization does not have psychologists on staff. They simply look at how a female offender's behaviours and thoughts culminated in the charge that brings them before the court. They work on different ways to emotionally regulate and communicate. Ms. Hale-Vokey said they rely upon the information disclosed by the client. The counsellors do not contact the PCAS for verification or input. The counsellor said that a person needs to acknowledge the anger in order to learn how to cope with it.

[123] C.D. called Victoria Bazely from the Family Education Centre in Peel to give evidence. She has a BSW and M.Ed. and she facilitates a parenting program. It is four week course with four hours every Saturday. C.D. attended the course that ran from October 13 to November 3, 2018. She noted that C.D. missed the third session of the program which covered positive communication skills, problem solving and discipline. This meant that she missed one quarter of the course. Nevertheless C.D. was considered to have completed the program and she received a certificate. It is noted that this program began the week before the scheduled trial and followed a long period in which no anger management or parenting programs were taken.

[124] I find that in all of the circumstances of this matter the Society did meet the onus upon it to assist the mother by offering or providing services that would assist her and thereby assist the children.

Supervision order?

[125] The provisions of s. 101 (3) require that the court make the least disruptive order necessary to protect the child. This means that I must first consider whether the children, or any of them, could be returned to the mother subject to a supervision order.

Lack of honesty and openness

[126] Ms. Pilch for the Society stated that the evidence was clear that C.D. has not been open and honest with the Society and had completely refused to work with the Society to address the child protection concerns. In her evidence C.D. denied that she had ever hit a child in her care or been responsible for any injuries that they have suffered. C.D. simply stated that the Society had chosen to persecute her when there was absolutely no evidence that should lead to a child protection concern. She minimized or dismissed all

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concerns and reacted to them by seeking evidence that it was the Society through its foster parents, or the father of her twins, who had actually caused harm to her children.

[127] There was a great deal of evidence that C.D. was obsessed with finding fault with others. C.D. has ninety minute visits with her children each week. She always takes her daughters to the washroom for extended periods of time. In her evidence she stated that she gave M. a shower every visit. She had her 14 year old daughter take her clothes off so her mother could examine her for injuries and wash her all over. She did not think that M. felt in any way uncomfortable with her doing this. On occasion she did find marks or bruises on her children. She asked the Society worker to investigate each time and they did provide her with a response on the next visit. To be fair to C.D. any parent would be very concerned with noting bite marks on their child and the placement of M. in a group home appeared in hindsight to be ill advised. The burn to M's chest area was another example of a legitimate inquiry but C.D. refused to accept the explanation that it was caused by a seatbelt or harness and insisted that her daughter was being intentionally abused.

Access remained fully supervised

[128] The children were apprehended on April 30, 2016, yet the visits never became unsupervised. C.D. actually had separate visits with D. that S. J. joined in when they were together. C.D. gave up those separate weekly visits in favour of one visit with all of the children once a week. The evidence was that C.D. missed quite a few visits sometimes without any explanation. The current worker Ms. Simamba testified that the mother cancelled her visits on October 5 and 12, 2018 with this trial about to begin on October 22 (she attended October 19).

[129] There was no doubt from the observations of the visit supervisors that C.D. had many parenting strengths. She was loving and affectionate with her children, and she was able to effectively direct and manage their behaviour. There were some very concerning things said though. C.D. did not deny telling the twins that G.B. was not their father. She was clear in her evidence that she felt that she was the only one who truly loves her girls and the only one who could protect them from harm. I find that C.D. meets her needs through her children but she is not always sensitive to their needs.

Deception with D.

[130] The Society position is that C.D. is ungovernable. The strongest evidence of that was her deception with respect to D. A court order was made on August 15, 2016 placing D. in the temporary care of her father S.J. subject to Society supervision.

[131] C.D.'s access with D. was to be approved by the Society in advance. It now appears likely that C.D. and S. J. began to reside together from the time of the placement. It also appears likely that C.D. was the primary caregiver for D. We know that she took her to see Dr. Marshall and to counselling with Ms. Mohanty. Officer Dhami noted both C.D. and S. J. to be residing at 39 Pluto Drive in February 2017. C.D. admitted that S. J. left D. with her when he left for Antigua on June 30, 2017. C .D. was very bitter about the fact that S. J. had to leave Canada. She said that the apprehension of the children caused her to lose her housing and forced her onto welfare (due to the loss of child tax benefits). She was then unable to continue sponsoring S. J.'s immigration which led to him being forced to leave the country and to be unable to return. By January 2018, C.D. had found work from 7:30 to

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4:00 p.m. daily. She arranged private daycare for D. and carried on her life knowing that the Society thought that D. had gone with her father to Antigua for a family funeral.

[132] C.D. did not concede that there was anything wrong with her breaching a court order and effectively continuing a lie to the Society and the court which likely began in August 2016 and certainly occurred after June 2017 when S.J. left the country. She simply stated that "I was protecting my daughter". C.D. knew that if she told the Society that S. J. left D. with her the child would most likely be apprehended. I state most likely rather than certainly because later events show some inconsistency in the Society's position. What occurred with the care of D. from June 2017 to her apprehension on August 30, 2018 is a cautionary tale. Supervision orders are only effective if the Society actively supervises. When D. was finally discovered to be in C.D.'s care on August 17, 2018 the Society inexplicably left her there with very unclear expectations. The Society's actions resulted in an interesting submission by C.D.'s counsel.

August 2018 decisions regarding D.

[133] Mr. Sharpe conceded that C.D. should not have breached the court order even though his client's evidence was quite clear that she felt justified in so doing and she did not regret it. Mr. Sharpe said that parents are traumatized when their children are apprehended and C.D. was unable to bring herself to call the Society when she knew that so doing would lead to the apprehension of a child that she was quite capable of caring for. In fact the evidence was that D. seemed to be quite well cared for when on August 17 the police and the Society located her at the home of C.D.'s aunt L. D. C.D. and D. had been temporarily living with L. D. until they could obtain housing. L. D. was clear in her evidence that it was not a long term plan.

[134] The gross error in judgment by C.D. was then converted by her counsel into an ultimately positive set of facts for C.D. and negative inferences against the Society. The argument on behalf of C.D. was that she had cared for her then two year old child for over a year. She had attended to her medical needs, she had found a babysitter when she needed to work and the child was healthy and happy with her. The deception only worked due to the complicity of S. J. C.D. testified that he was deported. S. J. had told his lawyer at the time that he was in Antigua with his daughter D. as he had to go to his home country due to a death in his family. This was reported to the court and there seemed to be an assumption that S. J. would soon be back with the child. The Society relied on this lie for about a year. It was only in June of 2018 that it appeared that the Society became concerned about not having seen S. J., the father they were supervising, nor the child in his care, for about a year. In fact C.D. had the child in her care all of this time. She attended her visits with the other children but due to her refusal to interact with the Society before or after visits they had no idea that D. was with her.

[135] On August 17, 2018, the Society on call worker Mr. Dannsah-Appiah with the direction of a Society supervisor Mr. Ansu attended at the home of L. D. where the police had located D. When C.D. heard that the police were looking for D., C.D. contacted C.S. As noted she is C.D.'s first cousin. C.S. has now been put forward as a kin care provider but C.D. only reached out to her when she was absolutely desperate for help in the immediate pre-trial period and then only when she was strongly encouraged to do so by her mother in Jamaica.

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[136] After observing the child with C.D., and speaking to the case supervisor Mr. Ansu, Mr. Dannsah-Appiah stated that the child could be left at L. D.'s home, where C.D. temporarily resided, subject to certain conditions. Mr. Dannsah-Appiah testified that it was made clear to C.D., L. D. and C.S. that the child was being left in the care of L. D. and she was to supervise C.D. at all times with the child. Mr. Dannsah-Appiah testified that he told C.D. that she could not be with the child unsupervised at any time. The evidence of C.D. and L. D. was that Mr. Dannsah-Appiah knew that L. D. worked and that D. was in daycare. There was no way that L. D. could get the child to and from daycare. They said Mr. Dannsah- Appiah knew that C.D. was going to take the child to daycare. Mr. Sharpe put to him his case note that stated that the child can be taken out of the home by C.D. with the supervision and/or permission of L. D. or another person designated by her.

[137] D. was apprehended on August 31 when C.D. was seen unsupervised with her when on the way to daycare. Ms. Simamba said that the Society apprehended D. because L. D. had been entrusted with the care of D. and she could not meet the Society's expectations.

D.'s apprehension

[138] Much was made, on behalf of C.D., with the Society's inconsistent position. The Society had just learned that C.D. had been caring for the child for at least a year against the terms of a court order and they left the child effectively with her because they felt the child was safe and well cared for. Two weeks later they apprehended the child. Mr. Sharpe argued that it was only when the Society realized in preparing for trial that leaving the child in the effective care of C.D. was totally inconsistent with their trial position that the Society decided to apprehend. At a trial scheduled to begin within two months the Society would seek to have D. placed in temporary Society care due to the risk that she would come to physical harm either at the hands of, or due to the neglect of, her mother C.D.

[139] I find that the Society did make errors. It should have been discovered much earlier that the child was actually living with her mother. If the child was to be left in the kin care of L. D. the matter should have been immediately returned to court with a new plan and clear written terms as to how the supervision of the mother's time with D. could work. It appears that the Society was wilfully blind when the child was left with L. D. The Society knew the mother was quite willing to breach a court order yet they did no due diligence on L. D., knew she worked full time, knew she would not present a plan as a kin caregiver, and knew that somehow the child was to get back and forth from daycare without any other caregivers being identified. It is difficult to believe that the workers actually expected compliance with the verbal arrangement that they made.

[140] However, the Society errors in no way excuse the mother's actions. She knew she had been very fortunate that D. was not apprehended. She should have known that she must be extremely careful not only to properly care for her daughter but also to make sure that she had Society approval for everything she did with her child. She must have known that the Society could not condone her having unrestricted time with D. yet she not only took her to daycare, which she might possibly have thought was authorized by the Society, she also took her out in the community. The child was observed at the counselling appointment by Ms. Mohanty. C.D. used the failure of the Society to apprehend her child as a license to keep ignoring court orders and Society directions.

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Kin care for D.

[141] The court must look at each child's best interests separately. In this matter the Society sought three different dispositions. The disposition sought for D. was placement in the care of the Society for a period of four months.

[142] Sub-section 101 (4) requires a court to;

> …consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family under paragraph 1 of subsection (1) with the consent of the relative or other person.

[143] The mother's alternative position was to have D. placed with her first cousin C.S. As noted above C.D. had not contacted C.S. for ten years (though they saw each other at a school five years ago). C.S. was contacted only at the instigation of C.D.'s mother who knew that C.S. had a great deal of professional experience with child protection matters.

[144] C.S. testified that she became involved in this matter when C.D.'s mother contacted her and told her that C.D.'s child was about to be apprehended and asked her if she could mediate. C.S. has an MSW and is working on her Ph.D in social work and education. C.S. used to work for the Children's Aid Society of Toronto ("CAST") and the PCAS in various roles including as a child protection worker. Her current position is that of a social worker with the Peel District School Board ("PDSB") and she does custody/access assessments for the OCL. At the present time she has taken a leave from the PDSB to work full time on her Ph.D. C.S. is married to a social worker. They live in Mississauga with their two children who are 15 and 11 years of age. C.S. has a 22 year old child who no longer resides at home.

[145] C.S. said that she met M. when she was about four but had never met the twins. She knew K. Q. and had just met D. on August 17 at L. D.'s home. C.S. said that the police and the on call worker were at the home when she and C.D. arrived. She was not asked to be very involved in the discussions but she left the home when it was decided that D. could stay at L. D.'s home with C.D.

[146] C.S. said she returned to L. D.'s home on August 31 when the case worker Ms. Simamba and her colleague attended for the purpose of apprehending D. She told Ms. Simamba that she wanted to get a better understanding of the situation to see if she could be a support C.D. and D. C.S was given some context to the effect that the Society's issue with C.D. related to anger management but she was not given a fulsome account. She said she told Ms. Simamba that she was prepared to care for D. to prevent an apprehension. C.S. said that she offered herself and her mother H. S., who resides in her home, as potential caregivers for D. She was told there would need to be a full kin assessment.

[147] The child D. was then apprehended on August 31. The Society did not contact C.S. to see if she could take the child in. C.S. did contact the Society and Ms. Horvath a kin worker with the PCAS was assigned to do the assessment. Due to her occupation C.S. already had a vulnerable sector check and she was willing to take D. immediately, notwithstanding that an immediate placement was not ideal as extensive renovations were being done at her home.

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[148] A kin assessment was started but at the time of trial had not been completed. C.S. and her husband had submitted, but not yet picked up, their vulnerable sector checks but as practicing social workers they had already had such checks done so this was not a hurdle. Ms. Horvath had interviewed C.S. and her husband and had a home meeting scheduled for November 23.

[149] C.S. was quite flexible about the support she could provide. She said that D. could live with her for as long as needed. Her intention was to support C.D. to a place where she can care for her children. C.S. said she was aware that C.D.'s access to her children was currently supervised at the Society and she stated that she would support C.D. with access as permitted by the Society or court order.

[150] C.S. had her two younger kids with her when she went to L. D.'s on August 17 so her children met D. She said that her children were excited about the prospect of D. living with them. C.S. said that she was on leave to work on her Ph.D but she would return to full time work at the PDSB in January 2019. Her husband currently worked part time as a social worker at the Toronto District School Board ("TDSB") from 8:30 to 12:00 p.m. and he also worked at a shelter on the weekends. He picked up some shifts counselling at an addictions centre during the week but he was quite flexible. All of this evidence meant that two experienced social workers and parents, who also happened to be members of D.'s extended family were quite able to care for D.

[151] C.S. also stated that she had the assistance of her mother H. S. who worked on a full time basis as an administrative assistant on weekdays. C.S. was prepared to supervise any access that C.D. might have with her other children.

[152] I find that there is overwhelming evidence that C.S. and her husband would be suitable kin caregivers to D. I accept that the kin assessment has not been fully completed, but, in my view, the only real outstanding issue is the receipt of an informed consent by both C.S. and her husband. C.D. should authorize the Society to release any relevant information about her file to C.S. especially since she may be asked to supervise the access that C.D. has both with D. However, even if no consent is forthcoming from C.D. that should not be a barrier to kin placement of D. as C.S. and her husband have a significant amount of experience in front line social work and are well equipped to handle any challenges that might be faced.

Extended Society Care for M.

[153] The only competing plans for M.'s care are return to C.D. under supervision or extended Society care.

[154] The decision of the Honourable Justice C. Curtis in the *Children's Aid Society of Toronto v. B.S., J.P. and S.P.,* sets out the significance of this type of Order.

> 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.) (1996), 23 R.F.L. (4th) 79 (Ont. Div. Ct.).

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> 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. M. (C.), [1994] 2 S.C.R. 165 (S.C.C.).
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> 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 & Grenville v. C., 2001 CarswellOnt 1504 (Ont. S.C.J.).
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> 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.

[155] I completely agree with Justice Curtis. I have carefully weighed all of the evidence of the only possible alternative which is a supervision order with the mother. I find that of all of C.D.'s children M. is the most at risk in her mother's care, given that she will never be able to speak for herself and requires constant supervision. C.D. has denied any physical discipline and any failure to supervise M. She has alleged that more harm has come to M. while she has been in care than every occurred when she lived at home. I will address C.D.'s expressed concerns about the quality of care that M. has received since she was apprehended.

[156] M.'s time in care since April 30, 2016 has not always been positive. There were challenges in finding an appropriate placement. The first family placement broke down within a day when the foster parents advised that they were not aware that M. had global developmental delays and they were not prepared for that. M. was then briefly placed in another foster home and then was transferred to a group home known as Lenester operated by the PCAS. While Lenester was able to meet her instrumental needs there were some problems with other children in the home being aggressive with M. M was bit on two separate occasions by another child.

Lenester group home

[157] Jessica Williams gave evidence. She is a child and youth worker who worked for the PCAS from 2001 - 2006 and since her return to work in 2008 she has worked at the Lenester group home. She said that M. is wonderfully funny and sweet. She did look for attention but she followed directions pretty well and she was easy to work with if the caregiver can get her attention.

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[158] Ms. J. Williams addressed C.D.'s repeated concerns about her daughter M. being assaulted while in Society care. She noted that one peer struck M. in May 2016. Another bit M. twice with the second bite leaving a mark. On November 12, 2016 C.D. had asked the Society to investigate a burn like mark in the area of M.'s collarbone. She was taken to a doctor to be examined. It was suspected that it was a friction burn caused by M. rocking back and forth on her school bus while restrained by a harness. No treatment was required. There were a number of other concerns raised by the mother about injuries or illnesses with M. that were all investigated. C.D. chose not to meet with anyone at Lenester. Her practice was to use the access visits that she had at the Society to check each child for injuries. While she insisted that all marks on her children that occurred when they were living with her were accidental or occurred at school she was equally insistent that all marks found on her children when they were cared for by others must have been intentionally inflicted.

Foster home placement

[159] J.O., M.'s foster mother testified that she was an R.N. who works part time in her community. She planned to retire in four years and thought she might like to foster children. She completed her home study and began fostering with Bayfield Homes on March 7, 2018. M. is her first and only foster child. She has a 24 year old nephew living with her and a granddaughter who comes on alternate weekends. J.O. is of African descent so there is somewhat of a cultural match with M. who is of African-Caribbean descent. She is a practicing Christian, not Muslim like M., but J.O. stated that her foster child was not really a practicing Muslim and she continues to attend a Catholic school.

[160] J.O. has arranged her life such that her work schedule is synced with M.'s school schedule. She is then able to be with M. at all times that she is at home with the exception of every second weekend when she works and Bayfield provides the same staff person each time to provide coverage. J.O. described the transition from Lenester to her home. It was clear that great care was taken to ensure that the foster mother knew all about M.'s challenges. She helps M. with bathing and hygiene. J.O. said that M.'s fine motor skills were not very good so she could not manage zippers or buttons and she now uses pants with an elastic waist band. She said that M. requires a harness strap to ensure she does not rock too much in the bus.

[161] J.O. described how she communicates with M. The youth tapped her stomach when she was hungry. She is able to feed herself. She taps her pubic area for toileting. M. needs some help with that. J.O. said that M. knows her routines. J.O. said that M. is now finished with her program at ErinOaks. They are obtaining a communication device for M. in which she will be able to point out what she wants on her iPad. They are currently using a loaner device to see how it works.

[162] M. has attended a Catholic high school in Brampton since September 2018. Her age places her in Grade 10 but she is in a specialized classroom with other young persons with developmental delay. There are about five kids in the class with three or four teachers. The school day runs from 8:00 a.m. to 2:10 p.m. The students learn practical things including cooking. J.O. said that she had no problem getting M. to school. She noted that M. will attend the same school until she is eighteen years old.

[163] The foster mother described the activities that M. is involved in when she is not in school. She noted that M. enjoyed using her tablet with its sensory activities. M. really

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enjoys listening to music. She said that M. was not a clumsy child. Since March she has slipped on the stairs once and fell on her behind. The foster mother said that once you understand M. she is easy to manage and she follows directions. She said that Bayfield staff take M. swimming and there is always one to one supervision when she is in the community.

[164] J.O. confirmed that M. sees her mother once a week. After she comes home from school a volunteer driver picks he up. J.O. said she had been told that the mother was concerned about M.'s hygiene so she always ensured M. showered before her visit. This made C.D.'s insistence that M. "shower" in the visit room washroom appear not only demeaning but also completely unnecessary. J.O., said the visits do not upset M. - she had tears in her eyes only once after a visit.

[165] J.O. did have a meeting with Ms. Simamba and she did agree to meet with the mother. C.D. declined the opportunity. In terms of her commitment to care for M. the foster mother said that she really enjoys having M. live with her and she will keep her until a permanent home is found even if that means keeping her until she finishes school and is ready to move to a home for developmentally delayed adults.

[166] J.O. presented as a very kind and caring person who had decided to foster children for all of the right reasons. She spoke so lovingly and positively about the life she shared with M.

Permanency planning

[167] The relevant part of section 112 of the *CYFSA* states;

> Society's obligation to pursue family relationship for child in extended Society care
>
> 112 Where a child is in extended Society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c), the Society shall make all reasonable efforts to assist the child to develop a positive, secure and enduring relationship within a family through one of the following:
>
> 1. An adoption.
>
> 2. A custody order under subsection 116 (1).

[168] This means that the Society has an obligation under the *CYFSA* to try and find a permanent home for M. who will be 15 next month. M. has already had other placements that did not work out nearly as well as her current one. The Society must try to meet their obligations under the legislation but given that M. will be ready to move to an adult home in three years and given that her home and school are working out well there need be no urgency on the part of the Society to change the *status quo*. It is recognized though that J.O. agreed to be a is a foster parent, not an adoptive parent, and she cannot be required to continue fostering a particular child if for any reason she is unable or unwilling to do so. It is very good to hear that she does not anticipate that happening in the foreseeable future.

[169] I find that the evidence is very clear that it is in the best interests of M. to be placed into extended Society care.

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Custody of the twins

[170] The Society seeks an order that Aa. and As. be placed in the custody of their father G.B. pursuant to s. 102 of the *CYFSA*. C.D. seeks an order that the twins be returned to her care under supervision. C.D. was adamantly opposed to G.B. being in a caregiving role to her daughters.

History of care and contact with the twins.

[171] The twins lived with their mother from their birth on […], 2011 to their apprehension in June 2012. They were in care from June 2012 until February 2014 when they were returned to C.D.'s care under supervision. They were apprehended again on April 30, 2016 and lived in foster care until they were placed with their father G.B. on January 17, 2017. The twins have been residing with their father G.B. his common law spouse Sh. J. and their two children K.B. (11) and Ka. B. (3) ever since.

[172] G.B. lived with C.D. at the time of the twin's birth until he was removed from the home on January 30, 2012. Once the twins were apprehended in 2012 G.B. had no contact with them until they were re-apprehended in June 2016.

G.B.'s background with C.D.

[173] G.B. testified that he met C.D. in 2004 when she came to Jamaica from Canada where she had been married to M.'s father. After she returned to Canada they continued a long distance relationship and she said she would help him immigrate to Canada. Before that happened G.B. became involved in a relationship with Sh. J. and they had a child K. B who was born in 2006. G.B. told C.D. about K.B. in November 2007. Although C.D. was quite upset about this G.B. and C.D. married in 2008. C.D. sponsored G.B. and he arrived in Canada in 2010.

[174] G.B. then sponsored K.B. to come to Canada. The twins were born on […], 2011 and they were in hospital until December 23. K.B. arrived just after that. The household was then made up of K.Q., M. K.B. and the infant twins. I have set out above, in the history of past proceedings, the series of events that occurred between December 2011 and June 2012 that led to the apprehension of all five children. Since G.B. began living with Sh. J there has been a very acrimonious relationship between G.B. and C.D.

[175] C.D.'s eldest daughter K.Q. was returned to her in August 2012. G.B. had been charged with sexually interfering with then 15 year old K. Q. by touching her breast and her pubic area over her clothes. G.B. entered a guilty plea to that charge. G.B. stated that he was told by his lawyer that he should enter a guilty plea. He did so and he was sentenced to 40 days custody (which he served on weekends to keep his job) and put on probation for one year. He was required to take an anger management course but given no sexual abuse counselling at that time.

[176] G.B.'s denial of the abuse even after the conviction is very troubling. G.B. testified that he did not do anything wrong. He said that there was considerable tension in the household and that C.D. had become very angry with him for bringing K.B. into their busy home. He insisted that C.D. convinced K. Q. to make up the sexual touching allegation so

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that he and K.B. would be removed from the home. He was removed but unfortunately for K.B. she remained with C.D. who continued to be resentful of her.

[177] G.B. lived with his surety for a period of time and that is why he said he could not have K.B. with him. It is concerning that G.B. testified that even after he was forced to leave the home he and C.D. carried on a relationship and the children were brought to the home where he resided. Given the release conditions this evidence, if true, reflects poorly on both C.D. and G.B.

[178] G. B, then said that he moved into the top floor of a house. In February 2014, M. and the twins were returned to C.D. under supervision. G.B. said he occasionally saw them in a mall and he gave C.D. money for their support. G.B. did not have any access through the Society from June 2012 to June 2016.

G.B. re-unites with Sh. J.

[179] G.B. worked hard at his job and was able to save money for a home. He was able to purchase a three bedroom apartment condominium in August 2014 which he totally renovated. In this time period G.B. reconnected with Sh. J. the mother of his daughter K.B. Sh. J. had family in Canada but her immigration to Canada was prioritized when the Society provided her with a letter in June 2012 confirming that her daughter K.B. was in foster care. K.B. was placed with her mother Sh. J. under supervision in October 2012.

[180] Sh. J. began spending time at G.B.'s home. G.B. and Sh.J. had an argument and G.B. was arrested for assault in or about February 2013. He entered a guilty plea and was sentenced to time served - about fourteen days. The couple's relationship continued and ultimately Sh. J. became pregnant. She moved into G.B.'s condominium in April 2015. On August 5, 2015, Ka. was born. Sh. J. said that she had two older sisters and a younger sister and therefore the children had cousins sleep overs on some weekends and holidays.

G.B. seeks access

[181] Now that G.B. had been reunited with his daughter K.B. and he and Sh. J. had another child together Sh. J. encouraged him to reconnect with his children with C.D. - Aa. and As. He contacted the Society sometime in the fall of 2015 and sought access. The Society insisted that he completed an assessment which was done by Dr. Monik Kalia. I qualified Dr. Khalia as an expert in the area of psychosexual risk assessment. In his report of March 4, 2016 Dr. Kalia noted at page 7, that he administered the Personality Assessment Inventory ("PAI") to Mr. Brown and that his clinical profile;

> revealed no significant clinical elevations and there is no indication that he is currently experiencing any clinical psychopathology, including personality disorder."

[182] Further, at page 11 of the report Dr. Kalia noted;

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> There is no other history of sexual offence other than the charges for which he has been convicted. Being an incest offender makes one much more likely to be assessed as low risk to recidivate on existing actuarial measures.

[183] After the report the Society said that G.B. did twelve sessions of sexual abuse counselling. In his evidence G.B. could not recall doing this counselling. I noted that he had done anger management counselling after one of his two convictions but it is unclear as to whether he did specific sexual abuse counselling and it is equally unclear whether if he did it would have been effective given that he continues to deny any sexual interference with K.Q.

Access post 2016 apprehension

[184] In May 2016, G.B. received a call from the Society telling him that the twins had been apprehended from C.D. G.B. filed an Answer seeking a placement with him. By June 2016, G.B. obtained supervised visits with the twins. The visits became unsupervised by July. On August 24, 2016, G.B.'s older daughter K.B., was finally placed in the care of Sh. J. by way of a custody order made under s. 57.1 of the *CFSA.* By October 2016, G.B. had overnight visits with the twins and by January 17, 2017 they were placed in his care under temporary supervision. From this time forward G.B. and Sh. J. have been parenting all four girls.

C.D.'s concerns with G. B as a parent

[185] In her evidence C.D. was clear that she could not understand why the Society would consider G.B. capable of being the custodial parent of the twins. She had the following concerns;

1. He had never independently parented children and the real custodial parent would be Sh. J.

2. He had been sexually abusive to K. Q. and physically abusive to her and the twins.

3. He would never let her see the twins.

[186] I will address C.D.'s concerns but in so doing I note that G.B. cannot be compared against a perfect parent or even a very good parent. The context in which his ability to parent must be considered is this; if the children cannot be protected by living with their mother is it in their best interest to continue to reside with their father and his common law spouse or should they be placed in extended Society care with a view to adoption.

Parenting history

[187] It is true that G .B. did not assume the primary parenting role when he lived with C.D. He worked on a full time basis as a forklift driver working night shifts at Staples. It was not clear when he began that work but he testified that he worked full time for an energy company before coming to Canada in 2010 and it appears that he has maintained full time employment since. When he came to Canada K. Q. and M. were living with C.D. He was only with M. for about a month after the twins came home before he was arrested on

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January 30, 2012. G.B. did not directly parent again until Sh. J. and K.B. moved into his home in April 2015.

[188] G.B. had access to the twins beginning in June 2016. The Society did not have any concern with his ability to manage his daughters and they were placed with him in January 2017. It is true that G.B. resided with Sh. J. when the twins were returned to him and he is not primarily parenting them now. However Sh. J. works on a full time basis so that G.B. is sharing in the parenting of his four daughters.

Parenting since twins placed with G.B.

[189] G.B. said that he worked overnight and that his shift finished at either 6:00 or 7:00 a.m. However, he is permitted to leave the warehouse as early as 5:00 a.m. if his work is completed. Sh. J. worked at a company that makes and ships parts. She either worked from 6:00 to 2:00 p.m. or from 7:00 to 3:00 p.m. She leaves for work at 5:08 a.m. for her 6:00 a.m. shifts and she said that G.B. always made sure he was home before she left. If she worked until 2:00 p.m., then he would pick her up at 2:15 p.m. and she would meet the kids when they came off the school bus. If she worked until 3:00 p.m. she took the bus home and G.B. met the kids. Sh. J. said she got the children's lunch and clothes ready but when he got home in the morning G.B. was responsible for getting the three eldest to school.

[190] According to the evidence of both G.B. and Sh. J. the shared parenting continued in the evening and on weekends. They both helped with homework. As G.B. left for work at 7:30 p.m. Sh. J. would get the children ready for their 8:15 bedtime on weeknights.

[191] G.B. admitted that if she was available Sh. J. would take the children to the doctor, dentist or optometrist. However, he has taken care of all three types of appointment in the last two years and at times when the children are ill he is the one that has to look after them when they miss school. G.B. said that he takes the twins swimming and intends to sign them up for lessons. G.B. said he had been to the school for interviews and activities. He ensured that the twins were home and ready for their Friday at 4:00 p.m. visits with their mother. G.B. was the contact person for that access as Sh. J. had never had any contact with C.D.

C.D.'s access visits

[192] G.B. expressed some frustration with C.D.'s actions at the visits. He said the children always wore good clothes to the visits and the mother always takes them into the washroom and often changes their clothes and sometimes keeps the ones he sent them in. He recalled an incident in August 2018 in which the mother removed face paint that the children had on for a post visit activity. He said that she often took away the toys that they had brought for a visit. He said his daughters told him that when their mother took them to the washroom at visits she told them not to listen to G.B. or Sh. J. G.B. denied telling the children to say negative things about their mother. He said the children did tell him that C.D. often slapped them and he reassured them that he would never do that.

[193] G.B. said that the twins are very well settled in their home and are doing well both at home and school. They are very close to both their big and little sister.

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Physical violence

[194] C.D. was adamant that G.B. should not have custody of the twins because he had a history of violence and she believed he was hurting the twins. G.B. admitted that the police were called to his home with C .D. before K.B. arrived. They investigated an allegation but there were no charges. There was no other evidence that G.B. physically assaulted C.D. or assaulted the children in their joint care with the notable exception of the sexual interference conviction regarding C.D.'s teenage daughter K. Q. discussed above. G.B. admitted a physical confrontation with Sh. J. in or about February 2013 for which he was convicted prior to them living together.

[195] C.D. said that As. had marks and bumps on her when she attended for visits from G.B.'s home and she insisted that they be investigated. A Society worker met with G.B. and he produced a letter that he had received from the child's school informing him of an injury that occurred at school so the investigation did not proceed further. C.D. did notice scratches on both girls during visits but they were attributed to playing with the young child Ka. who is now only three years old.

[196] The strongest allegation of G.B. harming the twins was when As. had a mark on her neck. She said that her father had grabbed her by the neck in the condo building's lobby when the superintendent was there. G.B. admitted reaching out to restrain his daughter when she was running in the common area. The mark was observed by Society workers but it did not require medical attention

Open to access

[197] G.B. said that he wanted the twins to have access to their mother. He said that he thought that there would be more tension and potential conflict between C.D. and Sh. J. than there would be between himself and C .D. G.B. had been trying to manage his parenting relationship with both of the mothers of his children for about 15 years with mixed success. C.D. and Sh. J. never met and G.B. conceded that it would be hard for them to work out access. He said that he would likely need help with arranging access.

[198] G.B. said he was happy for the twins to interact with their sisters M. and D. as well. He has not had any contact with M. since he left the house in January 2012. He has had no contact with D.

Summary

[199] There is no doubt that as a potential custodial parent G.B. had many hurdles to overcome. The fact is though that he is the father of the twins and he and Sh. J. had done a good job parenting them for nearly two years. The twins are doing well socially and academically. They are living with their two sisters K.B. and Ka. B. If they remain with G.B. they will have the opportunity for continued contact with Sh.J's extended family.

[200] I find that the Society did act appropriately when faced with a plan made by a father with a sexual interference conviction on a teenage child with whom he lived. They proceeded cautiously and obtained an assessment. They graduated access before a return of the child. There is no doubt that the presence of Sh. J. in the home is critical for G.B.'s plan. I do not though accept the submission on C.D.'s behalf that it is Sh. J. who would

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effectively be granted custody. Almost all families where both parents work outside the home need to have some form of shared parenting. I accept the evidence of G.B. and Sh.J. that G.B. assists with child care responsibilities. Even if I found that Sh. J. did more of the instrumental parenting tasks than G.B. that would not be a reason not to award him custody. G.B. is the father of the twins. He is in a long term common law relationship with the mother of his other two children. They are a family unit. They have successfully parented all four children while at the same time ensuring that the twins attended all visits with their mother.

[201] I find that it is in the best interests of Aa. and As. to remain in the care of the father. I will make a custody order in his favour under s. 102 of the *CYFSA*.

Access

[202] I will begin be setting out the relevant legislative authority for access orders under the *CYFSA* that are applicable to all four children which are found in sub-sections (1) (2) and (7).

> Access order
>
> 104 (1) The court may, in the child's best interests,
>
> (a) when making an order under this Part; or
>
> (b) upon an application under subsection (2),
>
> make, vary or terminate an order respecting a person's access to the child or the child's access to a person, and may impose such terms and conditions on the order as the court considers appropriate.
>
> Who may apply
>
> (2) Where a child is in a Society's care and custody or supervision, the following may apply to the court at any time for an order under subsection (1):
>
> 1. The child.
>
> 2. Any other person, including a sibling of the child….
>
> Court to specify access holders and access recipients
>
> (7) Where a court makes or varies an access order under section 104 with respect to a child who is in extended Society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c), the court shall specify,
>
> (a) every person who has been granted a right of access; and
>
> (b) every person with respect to whom access has been granted.

[203] I will address access to each child separately as different considerations apply to their specific circumstances.

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M's access

[204] I have found that M. should be placed into extended Society care. The relevant provisions with respect to access are set out in s. 104 (5)

> When court may order access to child in extended Society care
>
> (5) A court shall not make or vary an access order under section 104 with respect to a child who is in extended Society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c) unless the court is satisfied that the order or variation would be in the child's best interests.
>
> Additional considerations for best interests test
>
> (6) The court shall consider, as part of its determination of whether an order or variation would be in the child's best interests under subsection (5),
>
> (a) whether the relationship between the person and the child is beneficial and meaningful to the child; and
>
> (b) if the court considers it relevant, whether the ordered access will impair the child's future opportunities for adoption.

[205] It should be noted that the phrase "best interests" is defined in s. 74(3) of the *CYFSA* and there are 14 factors that the court "shall consider".

[206] Ms. Pilch submitted that the *CYFSA* has different wording that the old *CFSA* when it comes to access to children who used to be referred to as wards of the Crown. The introduction of the best interests test in the *CYFSA* brings a less rigid and more flexible approach to deciding whether to order access to a child placed in the extended care of the Society. Previously the court was limited to determining if the access was "beneficial and meaningful" and whether it will "impair the child's future opportunities for adoption" .Those factors are now set out as "additional considerations for the best interest test".

[207] In *Family and Children's Services of Guelph & Wellington County v. T.S*., 2018 ONCJ 411, the Honourable Justice M. O'Dea stated at paragraph 49-54

> [49] As addressed in *Family & Children's Services of Guelph & Wellington County v. D.D.D.H.* (May 14, 2018), an assessment of access following an extended care order is considered differently than under s. 59(2.1) of the *Child and Family Services Act.*
>
> [50] The *CYFSA* has retained the terminology supporting the former s. 59(2) *CFSA* presumption against access once an extended Society care order is made: see, s. 105(4). The wording of s. 105(4) also appears to support the continued applicability of prior court decisions that the onus shifts to the person seeking access: see *Children's Aid Society of the Niagara Region v. C.(J.)*, 2007 CanLII 8919 (ON SCDC), [2007] O.J. No. 1058 Ont. Div. Ct; *Children's Aid Society of Toronto v. P.(D.),* 2005 CanLII 34560 (ON CA), [2005] O.J. No. 4075, ONCA.
>
> [51] However, the onus is now based on a best interest assessment on the considerations defined in s. 74(3) together with beneficialness and meaningfulness

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> which were adopted from subsection 59(2.1) of the *CFSA* and added as a new best interest criterion for an access assessment: see s. 105(6) CYFSA.
>
> [52] In the result, beneficialness and meaningfulness is no longer the sole criterion (apart from the adoption question) defining the access onus. Reading subsections 105(5) and (6) together, the beneficialness and meaningfulness criterion should be given no greater weight than the balance of the subsection 74(3) criteria.
>
> [53] The question addressed in *D.D.D.H.* is whether beneficialness and meaningfulness should be interpreted as it was under the *CFSA*: see *Children's Aid Society of Niagara Region v. J.(M.)*, 2004 CanLII 2667 (ON SC), [2004] O.J. No. 2872, S.C.J. Nothing in the wording of the *CYFSA* appears to bar applying the prior interpretation; however, given that this new criterion is merely one of fourteen considerations, will the prior interpretation risk giving it greater weight than it merits under the new regime?
>
> [54] I found the *J.(M.)* interpretation of "significantly advantageous" (#45, 2004 CanLII 2667 (ON SC), [2004] O.J. No. 2872) stands a risk of overpowering the other 13 criteria in subsection 74(3) and found this interpretation should be amended to mean that the access relationship at the time of trial was both "positive" and "important" to the child since, in my mind, these words appear contextually compatible with the balance of the subsection 74(3) considerations whereas significantly advantageous reads as an overriding consideration.

[208] I agree with Justice O'Dea. The change in language in the new legislation must mean that there is to be a change in the approach to determining whether access should be ordered to a child in the extended care of the Society.

[209] There was a great deal of evidence about the supervised access visits that M. had with her mother and siblings. I have noted above some of the concerning issues such as the extended washroom breaks where M. was showered and examined. However, most of the evidence about the visits stressed the warm, loving and playful interaction between M. and her mother and siblings. J.O. stated that M. appeared to enjoy the visits and with one possible exception when she was tearful she had not become emotionally upset about them. There was evidence from Dr. Murphy and the teacher and other caregivers about how M. needed routine and consistency. M. has either lived with her mother and sisters throughout her life or had access to them on a consistent basis. I find that this access is positive and important to M.

[210] Pursuant to s. 104 (7) I am required to designate who has the right of access, often referred to as the access holder, and who has been granted a right of access, often referred to as the access recipient. M. shall have right of access and C.D., Aa. As. and D. are the persons to whom access has been granted. The access shall be designated as being at the discretion of the Society as there are many schedules to coordinate.

Aa. and As.'s access

[211] I have found that the twins should remain in the care and custody of their father G.B. and that a custody order should be made under s. 102 of the *Act.* The relevant sub-sections governing access are s. 105 (2) and s. 106 and they read as follows;

> Access after custody order under s. 102

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> (2) If a custody order is made under section 102 removing a child from the person who had charge of the child immediately before intervention under this Part, the court shall make an order for access by the person unless the court is satisfied that continued contact will not be in the child's best interests.
>
> Review of access order made concurrently with custody order
>
> 106 No order for access under section 104 is subject to review under this Act if it is made at the same time as a custody order under section 102, but it may be the subject of an application under section 21 of the Children's Law Reform Act and the provisions of that Act apply as if the order had been made under that Act.

[212] Ms. Pilch stated that the Society acknowledged that both Aa. and As. have a positive relationship with their mother. Nevertheless the Society submission was that any of this access order between the twins and their mother should be fully supervised. The submission was that it was very clear on the totality of evidence before the court that C.D. would disparage both G.B. and Sh. J. and provide them with inaccurate and troubling information about their own safety in their care.

[213] Mr. Sharpe emphasized the warm and loving relationship that was apparent at all of the supervised visits. C.D. demonstrated an ability to manage the twin's behaviour as well as engage in playful interaction with them.

[214] The only concerns that I noted with the weekly visits were that many were cancelled by the mother and even in a totally supervised context C.D. did try to make negative statements about their father going so far on one occasion to tell them G.B. was not their father. Even more troubling was that C.D. admitted that she made that statement and was totally unconcerned about how the twins might react to it. C.D. was very clear in her evidence that she was the only one that loved her daughters. She felt that G.B. only wanted the girls with him for the government benefits he would get and that Sh. J. had effectively stolen her children. There are reasons why the access remained supervised for well over two years prior to trial.

[215] On the other hand there is also no doubt that C.D. has the parenting ability to provide for the twins instrumental needs. The issue with her parenting was her anger and frustration that led to her physically assaulting her children. Though there is some evidence from the girls themselves that they were physically disciplined they did not suffer any serious injuries and they are not apprehensive around their mother and certainly have never shown any fear of her. Furthermore, the worst examples of the mother's physical outbursts were with respect to the child K.B. in 2012 and M. in 2016. In both situations C .D. was caring for multiple children with no assistance.

[216] A custody order will be made which means that the Society will no longer be involved in the lives of Aa. and As. It is anticipated that the twins will be seen by Society workers if family visits continue with M. at the Society's offices. There is no specific plan as to how emotionally safe visits could be organized directly between G.B. and C.D. G.B. said that he would facilitate access. C.D. believes that he will not do so.

[217] I find that the relationship between the twins and their mother is positive and important and the twins should have a right of access to their mother. However, in the

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absence of a viable plan from either party I am unable to make a specific access order. If both parties were represented by counsel I would have expected a plan to have been developed prior to trial even though C.D. felt very strongly that the twins should not live with their father.

[218] The twins are only seven years old but I am making a final order so I do not want to include wording that would limit the ability to expand, or contract, access if circumstances change. Although access pursuant to a custody order made under s. 102 can be changed by an application to court under the *Children's Law Reform Act* I do not want to encourage a new proceeding.

[219] The main reason put forward by the Society for supervised visits was the likelihood that C .D. would undermine G.B. and Sh. J's parenting. The twins have now lived in that household for nearly two years with their two siblings. It may well be that the twins are now so secure in their living arrangement that any attempts at undermining it will be counter-productive. In any event, the older the twins get the more capable they will be of determining which parent is acting in their best interests.

[220] The Society's request for supervised access only if ordered will likely mean that no access will occur. The Society will not host additional access for the mother and the twins and the mother has no interest in going to the Society's offices. The evidence was that at one point she had two visits a week; one to D. and the other to the other three children. It was C.D. who asked the Society to merge the visits. I appreciate that C.D. is now employed and merging the visits may have felt practically necessary but the point is that even with the Society mandated to arrange supervised visits only one visit for one and half hours a week resulted. I cannot see G.B. and C.D. cooperating in arranging a time for access and finding and paying for a supervisor.

[221] As it is I have no choice but to give the twins a right of access to their mother and their sisters and to put the details of such a plan in the discretion of their father. Given that the father does not have counsel I should set out some factors he should consider in exercising that discretion. It may be that G.B. will exercise his discretion in favour of semi-supervised visits by him at a public place. He could include phone calls or electronic access if available. Until the twins are older he might feel the need to monitor the access to ensure that his parenting is not undermined by C.D. If that access goes well he may choose to move to supervised, third party or public place exchanges of the twins with the mother. It is clear to me from the evidence that I heard that G.B. and Sh. J. should not exchange the twins for access. Notwithstanding the complex and conflicted relationship between G.B. and C.D. they may be able to manage semi-supervised access or access exchanges.

[222] Aa. and As. shall have the right of access to their siblings M. and D. It is anticipated that their access to M. will be facilitated by the Society in family visits as it is now. I expect that G.B. should be able to arrange visits between the twins and D. directly with C.S. As the order for D. will only be a temporary order the particulars of access to her can be re-visited when a final order is made.

D's temporary access

[223] I shall make an order placing D. in the care of kin caregiver C.S. for six months. Access by D. is governed by s. 105 (1) of the Act. which reads as follows;

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Access: where child removed from person in charge

> 105 (1) Where an order is made under paragraph 1 or 2 of subsection 101 (1) removing a child from the person who had charge of the child immediately before intervention under this Part, the court shall make an order for access by the person unless the court is satisfied that continued contact with the person would not be in the child's best interests.

[224] I find that there is a positive and important relationship between D, and her mother and siblings M., Aa. and As., and it is in D's best interests that an access order be made.

[225] D. will be able to see M. during family visits at the Society. Access to the twins shall be in the discretion of the Society. While it may be that at least initially the access between D. and her twin sisters will occur during family visits involving the mother and her four daughters at the Society it does not always have to be this way. If C.S. consents, the Society may choose to allow the twins to visit their little sister at C.S.'s home.

[226] It will be important for C.D. to have regular visits with D. if she wishes to pursue her plan to have D. ultimately returned to her care. C.S. was clear in her evidence that she wanted to help her cousin and that she was prepared to care for D. for an indefinite time with the goal being the return of D. to C.D.'s care. C.S. is clearly a very competent parent who also has experience as a child protection worker and is currently a school social worker. Although C.D. and C.S. are first cousins and grew up together they have had very little contact over their adult years. At the time of trial the Society did not have C.D.'s consent to disclose her file to C.S.

[227] C.S., her husband and her children are prepared to welcome D. into their home. There may need a period of time to allow them to get used to this new extended family dynamic. It would be unfair to C.S. to make her responsible for the supervision of D.'s access to her mother at this initial stage. I shall make an order that D.'s access to C.D. shall be supervised by the Society or their delegate. In this way D. can be placed in C.S.'s home and the Society can provide whatever information they are authorized to provide to her about C .D. and their concerns. C.S. and her husband can then make an informed decision as to whether they are prepared to just care for D. or whether they are also prepared to supervise D's access with C.D. If they are the Society can then delegate the supervision to them.

FINAL ORDER

1) The child M., is found to be in need of protection pursuant to s. 74 (2) (a) (i) (ii) (b) (i) (ii) of the *CYFSA* and shall be placed into extended Society care with access to her mother C.D. and her siblings As. As. and D. in the discretion of the Society. M. is the person with a right of access and C.D. Aa. As. and D. are the recipients of that access.

2) The child Aa. is found to be in need of protection pursuant to s. 74 (2) (b) (i) and (ii).

3) The child As. is found to be in need of protection pursuant to s. 74 (2) (b) (i) and (ii).

4) a) The Respondent G.B. shall have custody of Aa. and As.

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b) The Respondent C.D. shall have access to the said children in the discretion of G.B. as to time, duration, location and supervision.

5) The child D. is found to be in need of protection pursuant to s. 74 (2) (b) (i) and (ii).

6) a) The child D. be placed with C.S. as a kin caregiver subject to the supervision of the Society for a period of six months with access to her mother C.D. and her siblings M., Aa. and As.at the discretion of the Society. D. has the right of access and C.D., M., Aa. and As. are the recipients of that access. Provided that the Society has the right to delegate the arrangement and supervision of D.'s access to the said kin caregiver C.S.

b) The Status Review date for D. is May 29, 2019, at 9:30 a.m., in courtroom 208.

Released: December 4, 2018
Justice Philip J. Clay

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