WARNING

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

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

> **45.**—(7) *Order excluding media representatives or prohibiting publication.*— The court may make an order,
>
> . . .
>
> (*c*) prohibiting the publication of a report of the hearing or a specified part of the hearing,
>
> where the court is of the opinion that . . . publication of the report, . . ., would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding.
>
> (8) *Prohibition: identifying child.*— No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.
>
> (9) *Idem: order re adult.*— The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.
>
> . . .
>
> **85.**—(3) *Idem.*— A person who contravenes subsection 45(8) or 76(11) (publication of identifying information) or an order prohibiting publication made under clause 45(7)(*c*) or subsection 45(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both.

COURT FILE No.: FO-11-00053176-0001
47 Sheppard Ave. E., Toronto, ON. M2N 5X5
DATE: 2012-12-20
Citation: *Children's Aid Society of Toronto v. V.M.*, 2012 ONCJ 816

ONTARIO COURT OF JUSTICE

B E T W E E N :

Children's Aid Society of Toronto,
Applicant,

— AND —

V. M.,
Respondent.

Before Justice C.J. Jones
Heard on November 12, 2012
Reasons for Decision released on December 20, 2012

Ms. Mira R. Pilch ..... for the applicant society
Mr. B. Keyshawn Hyacinth ..... for the respondent mother, V. M.
Ms. Barbara J. Thurston ..... for the Office of the Children's Lawyer, legal representative for the child, A. M.
Service of the application upon the respondent father, D.T, has been dispensed with.

C.J. JONES, J.:

Part One – Introduction:

[1] This is a motion for summary judgment, brought by the Children's Aid Society of Toronto (referred to as the "society") in the context of a status review application relating to the child, A.M., born […], 2002, who is now ten years of age. The society's motion is made pursuant to Rule 16 of the *Family Law Rules (the FLR*). The society is requesting an order that the child be placed in the care and custody of the society as a crown ward. The society has also claimed alternate relief in its notice of motion.

[2] In its Plan of Care filed in the proceeding, the Society is proposing that, if a crown ward-

ship order is granted, the child would be placed for adoption.

[3] The respondent mother, V.M. (referred to as "the mother") asks that the summary judgment motion be dismissed and that the proceeding be set down for trial. She takes the position that there are genuine issues that must be tried in this case.

[4] The mother has filed an Answer and Plan of Care, proposing various alternative plans for the child. She requests that the child be returned to her care. In the event that this order is not granted, she suggests a family plan for the child. In this case, as a first option, the mother is seeking a custody order under s. 57.1 of the *Child and Family Services Act (*referred to as *the CFSA),* placing her son, A.M., in the care and custody of her brother and sister-in-law, who had previously been approved as a kinship placement for the child. This order would be a deemed custody order under the *Children's Law Reform Act (*referred to as *the CLRA).* As an alternate option, the mother suggests that an order be made placing the child in the care of her brother and sister-in-law, subject to the supervision of the society.

[5] The mother also maintains that there is a genuine issue for trial as to whether she should have any access to the child.

Part Two – The Law:

[6] Rule 16 of *the FLR* governs a motion for summary judgment. For the purposes of this case, the relevant provisions are as follows:

> **RULE 16: SUMMARY JUDGMENT**
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> **WHEN AVAILABLE**
>
> **16.** (1) After the respondent has served an answer or after the time for serving an answer has expired, a party may make a motion for summary judgment for a final order without a trial on all or part of any claim made or any defence presented in the case.
>
> **AVAILABLE IN ANY CASE EXCEPT DIVORCE**
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> (2) A motion for summary judgment under subrule (1) may be made in any case (including a child protection case) that does not include a divorce claim.
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> **EVIDENCE REQUIRED**
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> (4) The party making the motion shall serve an affidavit or other evidence that sets out specific facts showing that there is no genuine issue requiring a trial.
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> **EVIDENCE OF RESPONDING PARTY**
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> (4.1) In response to the affidavit or other evidence served by the party making the motion, the party responding to the motion may not rest on mere allegations or denials but shall set out, in an affidavit or other evidence, specific facts showing that there is a genuine issue for trial.

EVIDENCE NOT FROM PERSONAL KNOWLEDGE

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

NO ISSUE FOR TRIAL

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

ORDER GIVING DIRECTIONS

(9) If the court does not make a final order, or makes an order for a trial of an issue, the court may also,

(a) specify what facts are not in dispute, state the issues and give directions about how and when the case will go to trial (in which case the order governs how the trial proceeds, unless the trial judge orders otherwise to prevent injustice);

(b) give directions; and

(c) impose conditions (for example, require a party to pay money into court as security, or limit a party's pretrial disclosure).

[7] On a summary judgment motion, the onus is upon the society to demonstrate that there is no genuine issue for trial.[1] In responding, the parent must put her best case forward. It is insufficient to simply deny the facts alleged by the society. [2] Summary judgment should proceed with caution, particularly in child protection cases where crown wardship without access is being sought. It is not, however, limited to or granted only in the clearest of cases. The court must ensure that the best interests of the child are adequately addressed on the available evidence.[3]

[8] Crown wardship requires compelling evidence within the civil standard of proof that there is no other available and appropriate alternative for the child.[4]

Part Three – Material Facts:

[9] A.M is part of a sibling group of eight children born to the mother. He has five older siblings, as well as two younger siblings.

[10] The child had previously been in the care of the society in 2004, following the apprehension of the child and his older five siblings, due to disclosures that the mother had hit his now 14-year old brother, then age 6 years, on the head, causing a large lump. The mother pleaded guilty to a charge of assault in relation to this incident, receiving a conditional discharge and two years probation.

[11] Following her finding of guilt, the society continued to work with the mother, re-

sulting in the eventual return of the children to the mother's care. The society's file, arising from this earlier activation, was closed in 2007.

[12] The current activation began in January 2011, after the child made a disclosure to his school personnel, advising that he had been hit with a belt by his mother and that he was afraid of going home. According to the narrative in the Statement of Agreed Facts signed by the society and the mother and filed on the initial protection application, the mother attended at the child's school and admitted to the police that she had beaten the child with a belt. Criminal charges were laid against the mother as a result.

[13] The child was apprehended by the society directly from his school. At his admission medical check up, the doctor noted scars and marks on the child's body that were at various stages of healing.

[14] On January 31, 2011 an order was granted placing the child in the temporary care of the society. At that time, a without prejudice, temporary order was made for access between the child and the mother, supervised by the society, with the frequency and duration of access to be determined by the society. At the time of the order, the child was articulating that he did not want access with his mother, and therefore no access schedule was arranged.

[15] Shortly after the apprehension, the mother proposed her brother and his wife as a potential kinship placement for the child, and the society began the process of conducting a kinship assessment. The mother advised that the child had spent considerable time with his aunt and uncle, visiting their home often for weekends and holidays.

[16] A temporary care and custody motion was filed by the mother, however her motion was adjourned on May 3, 2011, on consent of all parties. At that time, the society was in the process of undertaking a kinship assessment of the maternal uncle and aunt, who were being considered as a placement for the child. Accordingly, the court made the following endorsement:

> "Society says kinship plan with [the maternal uncle] is looking optimistic. Society says [the child] is fearful of his mother. Society wishes to transition [the child] carefully. OCL [reports] [the child] is very "guarded", consistently advising he wishes no contact with family members.... Society will be looking at therapeutic intervention for addressing [the child's] fears."

[17] It was on this basis that the proceeding was adjourned.

[18] Initially, the mother's bail conditions prohibited any contact with the child. On June 21, 2011, the mother pleaded guilty to a charge of Threatening Bodily Harm towards the child. As a term of her probation, she was to have no contact with the child, except with the approval of the society, or pursuant to the terms of a Family Court order. No access was arranged between the child and the mother, as the society understood that the child was continuing to express a fear at the prospect of seeing his mother.

[19] In May or June, 2011, the society approved the proposed kinship plan being put

forward by the maternal uncle and aunt. A visit was arranged between them and the child, which reportedly went well. However, the child was not placed with the proposed kin caregivers, because subsequent to this visit, he stated that he did not wish to reside with his aunt and uncle and he was reluctant to arrange another visit. The child's articulated views were perplexing to the society's worker, Mr. Link, who had observed the positive interactions of the first visit. In an email forwarded on May 12, 2011 by Mr. Link to the society's children's service worker and the kinship assessment worker, Mr. Link stated the following:

> "Clinically we may need, and the judge encouraged us to consider, some therapeutic intervention to assist with re-introducing access and / or [the child's] placement with the aunt and uncle.

[20] Mr. Link went on to express that he was unsure of the source of the child's concerns or anxieties that were underlying his fears.

[21] In a follow-up email, on May 24, 2011 Mr. Link indicated the following:

> "I think the kinship placement is the place to focus on right now. Having said this, perhaps [the three society workers] can discuss the steps toward having [the child] consider another visit with his aunt and uncle.....I'd like to propose a visit during the week of May 30th. I think the sooner we reintroduce a visit and assess its progress, the better we'll be able to decide if any therapeutic intervention needs occur concurrently with visits or prior to future visits...."

[22] Around the time of these email exchanges, the child communicated to the worker that he would like to visit with his maternal uncle and aunt, for a period of one hour, with the worker present. The child was clear in expressing the parameters that would provide him with a feeling of security for the visit. Notwithstanding the child's expressed wishes, the visit did not ever occur. By this stage, the information had been communicated to the uncle and aunt that the child did not want to live with them. This resulted in a withdrawal, by them, from further involvement with the child. The kinship worker expressed in an email that she believed they were feeling hurt that their offer to plan for the child had been rebuffed. It is not known whether any attempt was made to explain the child's fears and anxieties to these maternal relatives in a sensitive manner, or to outline to them the plan for therapy for the child. The uncle and aunt were not parties to the action, and could not be presumed to have had this level of knowledge about the child's difficulties.

[23] The evidence filed on the motion does not outline the explanation that was provided to the child for the fact that no visit with the uncle and aunt was arranged.

[24] From March to June 2011 the mother engaged a Parenting Program in a group counselling format over a ten week period, as well as four individual counselling sessions. The mother obtained a letter describing her involvement in the counselling program as positive.

[25] The child remained in the care of the society under a temporary supervision order

through-out the balance of 2011, until December 15, 2011, when a consent hearing was held based on a Statement of Agreed Facts signed by the society and the mother. At that time, the child was found to be in need of protection pursuant to s. 37 (2) (a) of the Act, namely that the child had suffered physical harm. The child was made a ward of the society for a period of six months, with access to his family at the discretion of the society and in accordance with his wishes.

[26] Up to the date the consent Order was granted, there had been no access between the child and his mother, since his initial apprehension in January 2011. Further, other than one visit with the maternal aunt and uncle preceding the May 3, 2011 court attendance, it would appear that there was no contact or visitation between the child and any of his family members for almost the entire year leading up to this Order, during which he was in the society's care.

[27] The child's two younger siblings, age six and four years, and three of his older siblings, age 17, 16 and 14 years, continued to reside in the mother's care under the terms of a supervision order, pursuant to which the society supervised the other children in the mother's care. This supervision order has been in place, in one form or another, since January 31, 2011, continuing up to the date this motion was argued.

[28] The child's worker indicates that throughout the fall of 2011 and early winter of 2012, she obtained information from the foster parent and the foster parent support worker that suggested the child was curious about his siblings. The child's counsel advises that the child has consistently maintained a wish to have contact and visits with his two oldest siblings, and more recently, with all of his family. Notwithstanding the child's views, no sibling visits were arranged other than one visit between the child and his oldest sister in July 2012, initiated by the sister and referred to below.

[29] The evidence filed on the motion indicates that the family services worker met with the mother at the home in late March 2012, and that during the visit the worker asked the mother if she was looking to have access to A.M. and if she intended to present a plan to the court for his return to her care, and that in response to both questions, the mother answered in the negative.

[30] The family worker indicates that she contacted the mother by telephone in early May 2012 and that during the call, she advised the mother of the date and time of an upcoming society branch conference to discuss planning for A.M. According to the case note, the mother expressed a sense of futility in relation to attending the meeting, expressing her view that the society had already made a decision "to take her son". The mother did not attend the meeting.

[31] The current status review application was commenced on May 25, 2012.

[32] In late May 2012 the child indicated to his worker that he wanted visits with his "whole family". Presumably this was a reference to his mother, his siblings and his maternal relatives, who had together comprised the child's "family" prior to his apprehension and who

had all but vanished from his life by May 2012. In response to this, he was apparently advised by his worker that his mother was not ready for visits with him. This was based upon the family worker's conversation with the mother, which had occurred two months earlier. The worker states that she advised the child she was unsure whether his mother would be in agreement with his request for sibling visits.

[33] There is no indication in the evidence that the child's wishes were subsequently conveyed to his mother or his family and similarly, there is no evidence that any concerted efforts were made to facilitate the sibling and family contact that the child was wishing.

[34] In the end, it would appear that, other than one visit with his oldest sister, referred to below, no family or sibling visits were ever arranged, due to the combined inertia on the part of the society, the mother and the maternal relatives.

[35] In June, 2012 the society was contacted by the child's oldest sister, requesting an opportunity to visit with the child. The society cooperated to arrange a visit in July 2012, although the sister found herself behind schedule, such that she was late, with the result that she was only able to visit for the last half hour of the scheduled time. The child and his sister looked through family pictures during the visit.

[36] In the meantime, and not surprisingly, the child's behaviour while in care has been deteriorating. At school, the child has had at least five suspensions between January 2011, when he was first taken into CAS care, and June 2012. As well, during this timeframe, he had been disciplined with detentions and by being sent home from school on a number of occasions due to unacceptable behaviour. Up to June 2012, the child had had no therapeutic support, nor any emotional support or ongoing contact with any of his family members.

[37] The child's acting out behaviour appeared to increase over the summer 2012. There were significant difficulties with the child's behaviour at summer daycamp, including aggressive behaviour towards other children and lashing out physically towards the camp counsellors. The child's behaviour at his foster home also began to plummet in a downward spiral, resulting in the police being called to the foster home due to the child's loss of self-control and aggression.

[38] Ultimately, in September 2012 the child's placement in his foster home broke down, and he was placed in a treatment group home, where he is now attending a Day Treatment program for his schooling.

[39] The child's counsel indicates that, following A.M.'s arrival in the group home, he advised her that he wanted to have visits and contact with his mother, his brothers and sisters and his former foster mother. It is unclear as to whether the society and the mother were made aware of the change in the child's expressed wishes, prior to the time the motion was argued. In any case, no efforts appear to have been made to arrange any such visits.

[40] In summary, although a thoughtful plan had been formulated for this child in May 2011, proposing therapy to attempt to get to the root of his fears and anxieties concerning contact with his family, no therapy was actually implemented, even up to the time this mo-

tion was argued. The court was informed that a referral had been made of the child for play therapy, although there was no indication that it had yet been commenced.

[41] The society points to other services that have been provided to the child during the time he has been in care, including a psycho-educational and psychosocial assessment and a trauma assessment. While these assessments are helpful to assess the child's functioning and to identify the services and supports that would be helpful to the child, they do not equate to therapy for the child. They may provide a pathway to identify the form of therapy that would be most helpful to the child, but they are not a substitute for the actual therapy.

[42] A psychiatric referral has also been made for the child. Following an outburst at school in May 2012 that resulted in the police being called to the school, the child was taken to hospital and seen in the emergency department by a psychiatrist. At that time, a referral was made for the child to be seen by a psychiatrist at the Shoniker Clinic, however at the time the motion was argued there was no indication that a psychiatric appointment at that Clinic had yet occurred.

[43] At his new placement the child will be attending a Day Treatment program for school. While there may be a treatment component to this program, the society did not elaborate to indicate whether the child's anxieties concerning family contact, or the rebuilding of his relationships with family members, would be addressed therapeutically in this program. The child was not transferred to the new placement until September 2012. In any case, even without therapy, the child has been requesting family contact since at least May 2012.

Part Four – Analysis:

[44] At ten years of age, A.M. has paid a very high price for his disclosure. The child's experience, up to the date of his apprehension from his mother's care, was that of a member of a large sibling group. A.M. would have identified himself as one of a family of eight children. However, in the almost two years that he has been in care, his family has all but disappeared. He has been left isolated and alone. It is difficult to imagine what effect this has had on his own sense of identity and self-worth. It would be almost impossible for this child to feel that he was ever a valued member of his family, given their absence and lack of involvement in his life over the two years that he has been in care.

[45] The court agrees that it is not possible to place the child in the care of the mother at this time. She has treated him harshly and no steps have been taken to attempt to repair the damage to their relationship or to rebuild A.M.'s trust in the mother as a caregiver. While it was a positive first step for the mother to have engaged in some counselling up to June 2011, there is no indication that the focus of the counselling was directed towards gaining an understanding of the impact of her behaviour on her son, and how she should guide any future interaction with him. As well, there was no evidence that she has continued any therapeutic involvement since that time. Sadly, the mother has not taken responsibility for her actions, denying any physical discipline, notwithstanding her earlier admission, in the Statement of

Agreed Facts, that she told police she had hit the child with a belt. The burden of the fall-out over her excessive use of physical force against her son has been borne entirely by the child, in the sense of his loss of family relationships.

[46] The mother has had no contact with A.M. since January 2011 when he came into the care of the society. She has not been diligent in requesting access or contact with her son. This is likely to have been translated, by the child, into a lack of care or concern for his welfare. Through her counsel, the mother maintains this is not the case. The mother contends that she understood that the child did not want contact, and thus she did not press her request for access. The mother states that she was expecting the child to be in therapy as a first step to mend the relationship, however she did not follow up with the society to determine the status of the therapeutic intervention as time passed on, nor to insist that a timeline be established for this to occur, as weeks stretched into months with the child in care. Much greater effort is required of a parent in these circumstances.

[47] The mother's counsel advises that she objects to the request by the society that her son be made a crown ward, and that she wants the return of her son to his family. Up to the date of commencement of the society's motion, the mother has not been stridently vocal in expressing this request, with the result that the child is likely to be feeling a sense of abandonment by his family.

[48] The mother did not participate in the branch conference meeting for the child, held in the spring 2012, and she did not engage in any continuing dialogue with the society to seek access to A.M. She reportedly advised the society in late March 2012 that she was not seeking access at that time. For the most part, as the differences in view between the mother and the society expanded, the mother secluded herself from the society.

[49] Faced with the society moving in a direction with which she did not agree, the mother's response was to avoid communication with the society and to retract from any level of cooperation with the agency. The result is that, at this stage, her request for the return of the child to her care has no prospect of success.

[50] The mother maintains that the kinship plan remains an open option for the child. She contends that her brother and sister-in-law remain prepared to offer a family placement in their home for A.M. The mother informed the society again of her brother's plan in the summer of 2012. It does not appear that the society made any further efforts to contact the maternal relatives to determine whether or not that is the case. Given that the society was following the pathway towards crown wardship for A.M., with the understanding that this was the only available plan for the child, the society was obliged to reach out to the maternal aunt and uncle to attempt to clarify their position when the agency was once again informed of this option.

[51] It is likely that the society's lack of action arose from its doubts about the level of commitment of the maternal relatives, notwithstanding the mother's advice in August 2012 that they remained interested in putting forward their plan for the child. The lack of contact between the maternal relatives and A.M. for a protracted period of time would legitimately

give rise to reservations. The uncle and aunt had been absent from the child's life for over one year. Their willingness to follow through with this plan would fairly be called into question. Nevertheless, there ought to have been some further attempt to pose this question to them and to clarify their willingness to plan for the child.

[52] The withdrawal, by the maternal aunt and uncle, from contact with the child occurred after they were advised by the society that the child was not interested in their plan. By August 2012 there was information from both the society's workers and the child's counsel that the tide had turned in relation to the child's wishes, and that he was now requesting contact with his family, even without having had any therapeutic services. The society ought to have made an inquiry of the maternal relatives as to whether they continued to be interested in planning for the child, so that all options open to the child would be given consideration.

[53] Somewhere along the way, the carefully considered plan that had been formulated by the society was abandoned. The plan had been to implement therapy for the child in an attempt to illuminate the cause of the child's underlying fears and anxieties which, in May 2011, were standing in the way of either the reintegration of the child with his family through the kinship plan, or further contact between the child and his family through access. It is unclear how or why the plan changed course.

[54] The submissions of the parties focused primarily on the merits of three possible options for the child raised in the motion materials. The first option is the order sought by the society of crown wardship in relation to A.M. This plan can only prevail, at the summary judgment motion stage, if there is no genuine issue for trial. The second option is the return of the child to the mother's care. As noted above, this plan is not realistic given the circumstances. There is no genuine issue for trial in relation to the mother's plan for the return of the child to her care. The third option is the placement of the child with the maternal uncle and aunt, either pursuant to a custody order or in the context of a supervision order. There is a question as to whether this plan could be viable for the child, particularly with therapeutic intervention and support for the child. The evidence did not satisfactorily address this matter.

[55] In the result, the court is of the view that there is a genuine issue for trial in this case on this discrete issue. The issue is whether a family plan could prevail for A.M., with therapeutic intervention for the child. If the family plan goes forward, there is also the further issue as to whether it would be in the child's best interests for him to have access with his mother and siblings, and if so, what form the access should take.

[56] The child deserves the opportunity to see whether the family plan can succeed. The society must take some steps to attempt to clarify whether the family plan of his aunt and uncle continues to exist, given that the child's views and wishes appear to have shifted. If the plan remains open for the child, the society should make a timely decision as to whether any further up-date of the kinship assessment is required, and if so, to undertake this update promptly. If the plan is re-approved, the society should also consider the supports that the child and the kin family will require to ensure the success of the plan, and take steps to

put these resources in place or make referrals for same.

[57] As well, since at least as early as May 2012, A.M. has been expressing a wish to have contact with his family members, and this merits a concentrated and intensive effort on all sides to attempt to facilitate such contact. This should move forward in an expedited manner. Most recently, according to his counsel, he has also requested contact with his mother. If the child will require supports in order to advance with such access, these supports should be put in place without further delay. If there is a possibility of the family plan proceeding, the Society will require an opportunity to assess whether the child's access with his other family members is positive, and if so, to consider the form such access should take in the future.

[58] It is unlikely that the above steps can be taken prior to the next Assignment Court which is currently scheduled for January 7, 2013. There may also be case management issues to be addressed before the case management judge. The proceeding is therefore adjourned to a date to be set by the court or the trial coordinator before the case management judge.

Part Five – Order:

[59] The court therefore makes the following order:

1. The proceeding is adjourned to a date before the case management judge, to be set by the court or the trial coordinator.

2. The only issues for trial are:

   a) whether there is a viable plan for the child through a kin placement with the maternal uncle and aunt;

   b) as between the Society's plan for crown wardship for the child and the kin placement, if available, what disposition is in the child's best interests;

   c) the issue of the child's access, if any, to the mother, his siblings and his maternal family members.

Released: December 20, 2012

Signed: "Justice C.J. Jones"

CITATIONS:

1. *Children's Aid Society of Hamilton* v. *M.N.*, [2007] O.J. No 1526 (Ont.S.C.)
2. *Children's Aid Society of Toronto* v. *K.T.*, [2000] O.J. No. 4736 (Ont. C.J.)
3. *Jewish Family and Child Services of Toronto* v. *A. (R.)*, [2001] O.J. No. 47 (Ont. S.C.)
4. *Catholic Children's Aid Society of Toronto* v. *N.B.*, 2009 ONCJ 648, affirmed at 2010 ONSC 615.