

WARNING

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

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

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

. . .

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

ONTARIO COURT OF JUSTICE

B E T W E E N :

CATHOLIC CHILDREN'S AID SOCIETY OF TORONTO,
Applicant,

— AND —

M.B. and J.P.L.,
Respondents,

Before Justice Heather L. Katarynych
Heard on 29 June 2004 and 25 August 2004
Reasons for Judgment released on 1 September 2004

CHILD PROTECTION — Child in need of protection — Risk (General) — Evaluation of level of risk — Child's age and stage of development — Situation creating risk of harm for very young child may not present risk of harm, or at least not same degree of risk, for older child — Conversely, level of "adequate" protective intervention for older child may differ markedly from what is "adequate" protection for younger child — In her social interaction, mother of two children (10 and 15 years old) tended to retreat into her own "headspace" and either to babble incoherently or to remain vacantly silent, which frustrated her efforts at getting school to take her concerns about younger child seriously — Worry of children's aid society was that children could adopt mother's distorted perceptions and thus cripple their own ability to cope with day-to-day demands of life — In this case, court found that children were at age and stage where they could manage essentials of their personal care and nutrition and of visibility within their schools — Children were otherwise healthy and performing well at school — Older child simply accepted mother's behaviour as way that she had always been and was neither frightened nor particularly perturbed about it — Such accommodating attitude did not eliminate risk of harm but it did make risk easier to manage by creation of support system without need to invoke foster care — Younger child was at higher risk, but not at level that required his removal from home if proper supports were in place — Court dismissed society's motion for interim care and custody of children and ordered their return to mother subject to terms of supervision.

CHILD PROTECTION — Interim care and custody — Grounds — Reasonable grounds to believe in risk of likely harm to child — Evaluation of level of risk — Child's age

and stage of development — Situation creating risk of harm for very young child may not present risk of harm, or at least not same degree of risk, for older child — Conversely, level of “adequate” protective intervention for older child may differ markedly from what is “adequate” protection for younger child — In her social interaction, mother of two children (10 and 15 years old) tended to retreat into her own “headspace” and either to babble incoherently or to remain vacantly silent, which frustrated her efforts at getting school to take her concerns about younger child seriously — Worry of children’s aid society was that children could adopt mother’s distorted perceptions and thus cripple their own ability to cope with day-to-day demands of life — In this case, court found that children were at age and stage where they could manage essentials of their personal care and nutrition and of visibility within their schools — Children were otherwise healthy and performing well at school — Older child simply accepted mother’s behaviour as way that she had always been and was neither frightened nor particularly perturbed about it — Such accommodating attitude did not eliminate risk of harm but it did make risk easier to manage by creation of support system without need to invoke foster care — Younger child was at higher risk, but not at level that required his removal from home if proper supports were in place — Court dismissed society’s motion for interim care and custody of children and ordered their return to mother subject to terms of supervision.

CHILD PROTECTION — Interim care and custody — Grounds — Reasonable grounds to believe in risk of likely harm to child — Evaluation of level of risk — Child’s age and stage of development — Risk arising from parental intoxication — In this case, at children’s age (10 and 15 years) and stage of development, any intoxication by mother (proof of which was unclear) would be more of embarrassment to them than occasion of risk of physical harm — Real risk would lie in ongoing emotional harm to children of their age when they would repeatedly have to set aside their own needs to accommodate parent’s needs, when they would try to believe that problem was really not there, or would go away, and when they would feel that it was unsafe to ask others for help.

STATUTES AND REGULATIONS CITED

Child and Family Services Act, R.S.O. 1990, c. C-11 [as amended], [section 1](#) and [subsection 51\(3\)](#).

Karen Ksienski	for the applicant society
Reide L. Kaiser	for the respondent mother, M.B.
Henry J. Hong	for the respondent father, J.P.L.
Gary Gottlieb	for the Office of the Children’s Lawyer, legal representative for the children, M.L.C.B. and E.V.L.B.

[1] JUSTICE KATARYNYCH:— The question to be decided is whether the two children in this case are to remain in the temporary custody of the Catholic Children’s Aid Society of Toronto or be returned to the care and custody of their mother pending resolution of a protection application that has been outstanding in this court since 17 February 2004.

[2] For the reasons that follow and on the whole of the evidence in the competing interim claims presently before the court, interim custody of the children is to be entrusted to their mother, under interim society supervision, on conditions that I am satisfied will provide a responsible protection, if both the society and the mother commit themselves to carrying out the conditions set out in today's order.

1: THE LAW

[3] The legal test that must be met by the society to sustain an interim society care is twofold:

1. there are reasonable grounds to believe that the child is likely to suffer harm (if returned to the parent from whom the child has been removed); and
2. there are reasonable grounds to believe that the child cannot be protected adequately by an order returning the child to the care of the parent from whom he or she was removed, with or without the support of an interim society supervision of the child in that parent's care.

See [subsection 51\(3\)](#) of the *Child and Family Services Act*, R.S.O. 1990, c. C-11, as amended.

[4] That provision is to be read in the context of the scheme for child protection contained in Part III and the objectives set out in [section 1](#) of the Act, with due deference to the paramount objective of the Act to promote the best interests, protection and well-being of children.

[5] There is ample jurisprudential support for the proposition that both physical and emotional harm are encompassed by [subsection 51\(3\)](#) of the Act.

2: ANALYSIS

[6] On the whole of the evidence, I was satisfied that the first prong of the legal test for interim adjudication had been met, but not on all the concerns advanced by the society.

[7] The belief that the children are likely to suffer harm in their mother's care and custody is rooted in essentially two concerns brought to the society's attention by community-based professionals who have a duty to report their concerns to the child protection authorities:

1. behaviour by the mother that raises a real question whether she is experiencing deterioration in her mental and emotional health; and
2. behaviour by the mother suggesting that she may have a drinking problem.

The first concern is by far, on the whole of the evidence, the predominating question.

[8] In assessing the extent to which these concerns provide reasonable ground to believe that there is a risk of harm to either of these children in their mother's care, I considered first the age and stage of development of each child.

[9] That consideration is often left to a weighing of the level of intervention needed to respond to an identified risk. On my read of the statutory scheme, it is also appropriate to bring the child’s age and stage of development to the scales in assessing the reasonableness of the belief about physical or emotional harm in the parent’s care. What is a risk of harm for a very young child may not be a risk of harm, or at least not the same degree of risk, for an older child whose functioning is not otherwise compromised. What is “adequate” protective intervention for an older child may differ markedly from what is “adequate” protection for a younger child.

[10] The risk to these children is essentially risk of emotional harm; the worry that both children will be so enveloped by the distorted perceptions of their mother that they will make those perceptions their own. It is a reasonably grounded belief that the children will be crippled in their own ability to cope with the day-to-day tasks of life.

[11] In this case, the mother displays, both by her conduct and her words, a hyper-vigilance about her own safety and the safety of her children and a very high degree of suspicion, verging on paranoia, about the actions and intentions of others with whom she comes in contact. In addition, this mother has been observed on more than one occasion in the presence of society social work staff, including at least two access visits, to devolve into a scattered thinking, silent moving of her lips and blank stare in the presence of those around her, including the children, that invites the inference that she has lost contact with reality at those times.

[12] The mother’s anxieties, however rooted, were playing havoc with the stability of these children and the schooling continuity for the younger child, E.V.L.B., during the fall of 2003 and early winter of this year. Her need for secrecy resulted in measures taken by both police and the society to ascertain the safety of the children that would have been wholly unnecessary, had she responded to the attempts of the society and police to speak with her. Her secrecy has bred and actually exacerbated the disruption for the children in the investigation. This mother’s resistance to any questioning by the child protection authorities, even when the purposes were explained to her, was in fact so great that it triggered a forced entry of her premises by police in an attempt to ascertain the safety of the children and a warrant to seek and apprehend the boy. Had this mother been better motivated and able to participate in the investigation in a more child-centred fashion, it is unlikely that an apprehension of the children would have been necessary at all.

[13] That said, the evidence does not ground, as reasonable belief, the degree of harm believed by the society.

[14] M.L.C.B. is almost 15 years of age and, on the whole of the evidence in the motion, a reasonably resilient child. Whatever her experiences in her mother’s care, she has emerged into these early years of her adolescence with a competence that reduces substantially the risk of harm to her if she is returned to her mother’s care. She is neither frightened nor particularly perturbed about the behaviour of her mother that so concerns others. For this child, it is simply the way that her mother has always been. That accommodation to her mother does not eliminate the risk of harm. It simply makes it more

manageable through supports that can reasonably be provided for this teen without requiring her to remain in foster care.

[15] M.L.C.B. was apprehended on 12 February 2004 and has been in the continuous “without prejudice” interim care of the society since that date — a period now exceeding six months and more than the wardship timeframe sought in the protection application itself. I found no real nexus between M.L.C.B.’s circumstances at that time and the reasons given to the mother for the apprehension of M.L.C.B. (“due to her lack of co-operation and the concerns that the society has with regards to H.” (referring to E.V.L.B.) — see paragraph 51 of the affidavit of Balbino, sworn on 16 February 2004).

[16] That lack of nexus at the time of her apprehension does not disentitle M.L.C.B. to an interim protective intervention. It does, however, warrant a careful look at what this girl does and does not need in her life at this time. She has shown herself as capable in foster care in managing stresses in her life as she was showing in the care of her mother.

[17] E.V.L.B. is ten years old and, at that age, at higher risk of being swept into the distorted perceptions of his mother. Whatever the cause — and I accept Mr. Kaiser’s point that there has been no diagnosis of mental ill health — this mother has conducted herself in a manner that has caused considerable upheaval to this boy in the course of his last school year. He needs to be shielded from a repetition of it. He needs stability in his housing, in his schooling and in his mother’s ability and motivation to work co-operatively with staff of his school and others involved in his life. She also needs to be taken seriously in her concerns about her son’s safety in the school setting and, to have that happen, she needs to conduct herself in a manner that does not leave those with whom she speaks with a sense that she has lost contact with reality.

[18] Direct observations of society’s staff involved in the case, set in the context of similar first-hand experience of other community-based professionals involved with the family (for example, the principal of E.V.L.B.’s school and a shelter worker), provides credible and trustworthy evidence upon which to find reasonable grounds to believe the following:

- (a) that there are times when this mother disconnects from objective reality and retreats into a mental space that is very real to her, but not real to those around her;
- (b) that this mental space is not adequately explained by her suggestion that she is likely “deep in thought” at these times;
- (c) that her conduct in relation to others is driven by her sense that she needs to shield herself from harm that is very real to her and may to a degree be objectively verifiable, but has not been readily observable to or understood by others;
- (d) that her need to shield herself and her children from their perceived “harm” is interfering with the ability of the children to have stability in their housing and conduct of their day to day life;
- (e) that this need to keep people at bay has impeded this mother from providing the measure of co-operation needed by the society in its investigation to put to rest the concerns that had been brought to the society for investigation.

[19] The behaviour described by those who have observed and experienced interaction with this mother is not the stuff of being “deep in thought”, as the mother would have me find. On the evidence in the motion, she has made statements that give serious concern that she is in “disconnect” from the reality around her, whether she perceives it that way or not. Too many individuals, none of whom have any reason to act maliciously towards her, have observed this behaviour for this court to dismiss their observations as nonsense.

[20] It may well be that certain of this mother’s fears are well grounded from her own experience and the experience of her children in their community; for example, her complaint:

- that people target her for complaints to the child protection authorities,
- that she finds herself getting repeatedly assaulted sexually,
- that her boy is getting bullied in the school and that no one is doing anything about it.

It may also be that these are perceptions very real to her, but not grounded in any factual reality, which is why she does not get the response from others that she seeks; in short, the extent to which her fears are a reflection of distortion in her ability to process interactions and information is a question to be cast within a clinical evaluation of her health.

[21] The letter from her physician filed in evidence is too sparse in detail to shed any reliable light on the concerns that triggered this protection intervention.

[22] On the whole of the evidence, there is no reason to believe that those professionals who are concerned about her behaviour in their own interactions with her are out to make her life miserable. If her fears have an objective base, she needs support to deal with whatever is causing or contributing to the safety of herself and her children in the community. If her fears are groundless, she needs support to put those fears to rest so that she can better concentrate on the needs of the children. The society cannot withdraw its intervention until those mental health concerns are put to rest, either by medical evidence that there is nothing in the mother’s functioning that requires medical attention, or by a diagnosis of what is at play in this behaviour and a medical management of it.

[23] In the interim, the children need support to keep them from being swept any deeper into their mother’s anxieties. They need their mother to be able to interact constructively with their schools and in their community, if they are to have continuity in their schooling and their housing and they need to be freed of burdens that are the responsibility of their mother to bear.

[24] In terms of reports to the society alleging intoxication of the mother at her son’s school, whether anonymous, from unnamed school staff, or from those sources identified in the society’s evidence as having first-hand experience of her, the evidence as a whole does not rise above suspicion, albeit strong suspicion.

[25] I did consider trustworthy the information provided to the society that was based on first-hand observation of the mother. All else (the second and third-hand hearsay) I ignored.

If the society intends to rely on that information as this case goes forward, it needs to speak directly with each individual and to ascertain whether the information that the society gained from others is a full and accurate accounting of what each person said.

[26] I could draw no conclusions from the untested evidence of the children or the mother on this issue. The children emerge in the evidence as a whole as very protective of their mother and it may well be that their denials of any problems in their home are an aspect of that attempt to shield their mother from scrutiny.

[27] That said, at the age and stage of these children, any intoxication, if it were made out, would be more a matter of embarrassment to them than risk of physical harm in the mother's care. As a matter of human experience, the real risk in parental intoxication lies in the ongoing emotional harm to a child of the age of these two when they must repeatedly set aside their own needs in order to accommodate the parent's needs, when the child tries to believe that the problem is really not there, or will go away, and when the child feels it unsafe to ask for the help of others with the problem.

[28] No other allegation of risk advanced in the society's evidence was reasonably grounded. That included evidence related to E.V.L.B. and his reactions to germs and playgrounds. That evidence is simply too sparse to draw any conclusions from it at this time.

3: ON THE LEVEL OF INTERIM PROTECTION ORDERED TODAY

[29] Although I can understand the caution of the society in recommending a return of the children to their mother's care at this time, the whole of the evidence did not satisfy this court that continued society foster care was the order needed at this time to provide each child with an adequate protection pending resolution of the outstanding protection application.

[30] The age and stage of development of children is a pivotal consideration in determining the court's response to the level of risk made out by the evidence. The task is to impose an "adequate" protection.

[31] These children are not pre-schoolers. Their dependency on their mother for their care and well-being is there, to be sure. Within the statutory scheme, however, it is proper to weigh the degree of dependency. In this regard, I considered the ability of a child of this age and stage to manage the essentials of their personal care and nutrition and of their visibility within their schools — the eyes there that can be reasonably expected to focus on their well-being during their school day, the ears that are there for listening to them, if they want to reach out for assistance, and the hand at the back that is responsible school staff monitoring of both their academic and their personal experience of school life, set within a context where school staff have a legal duty to report protection concerns to the society; and the degree to which community-based services can contribute to their well-being.

[32] It is also proper to take into account the degree to which the shortcomings of a parent have already had a negative impact on the children; for example, the extent to which

continuity in their care has been disrupted by a “ping-ponging” between the care of their parent and the care of the children’s aid society or the care of others; and the extent to which there are lags in their own abilities that are reasonably attributable to the quality of parenting given to them. There is no evidence that either child, until the apprehension that triggered the now outstanding protection application, had been removed from the care of their mother.

[33] I also took into account the health of the children at the time of their apprehension. Both children at the time of their admission to society foster care were in good health, but for some cavities requiring dental work.

[34] All of that would suggest that the mother was doing a lot of things right, notwithstanding her struggles.

[35] On the society’s own evidence, M.L.C.B. was managing to get herself to and from school in the midst of the family’s housing crises in the time leading to the society’s removal of her from her mother. She managed to acclimatize herself to foster care while still paying responsible attention to her schooling and even managed to win an athletic award at the close of the last school year. She comes across in the evidence as a resilient teen, with considerable loyalty to her mother and with a sense that, at times, her mother is not sufficiently attentive to her needs.

[36] M.L.C.B. is likely to be better served at this time, not by continued foster care, but rather with a support around both her and her mother that is geared to giving mother opportunity to make more visible her attention to M.L.C.B.’s needs.

[37] That gives the mother and M.L.C.B. opportunity, with the assistance of the society social worker, to take a hard look at the impact of her conduct on M.L.C.B.’s well-being. M.L.C.B. is not oblivious to her mother’s difficulties in times of stress. In her eyes, what gives the society and others concern about her mother’s propensity to retreat into her headspace has been part and parcel of her mother’s functioning for a long time. She has acclimatized herself to it. That is a coping mechanism. Nevertheless, M.L.C.B. needs to see a healthy mother.

[38] E.V.L.B. needs to see that, too. The protection needed by E.V.L.B., to be “adequate” within the meaning of the legislation, includes a fresh start in a new school, opportunity to be known by his legal name “E.” as proactive protection for him from being a “special attraction” to his peers and opportunity for his mother to get off on a co-operative footing with school staff. In relation to the name by which this child has been known, a ten year old boy who goes by the name “H.” is, as a matter of common sense, likely to be the butt of taunting by his peers. It is not unreasonable to expect a responsible parent to recognize that and to allow this child the use of his legal name outside the intimacy of his family.

[39] E.V.L.B. needs a closer supervision of his care than does his older sister, so that the continuity of his schooling and housing is not unnecessarily disrupted by actions of his mother. He also needs exposure to community-based activities in which he can root himself to grow his own resilience and coping skills.

[40] I consider this level of protection adequate for these two children essentially because it was the position of this mother in the motion hearing that she is prepared to do what is needed to have the children returned to her parenting. It is also the desire of the children to return to their mother's care. I am mindful that the school year is about to begin.

The children are entitled to have their mother given an opportunity to work with the society and with their school and other supports, including medical assessment of their mother, to put to rest the concerns that resulted in their removal from her.

[41] Given the age of the children, the medical investigation is the sort of assessment that can be undertaken with the children in her care under the conditions of a court order, provided mother and the society work closely together to keep that level of protective intervention adequate for the children.

4: INTERIM ORDERS

[42] For all these reasons, the following orders are made today:

Interim Custody

On an interim basis, [E.V.L.B.] and [M.L.C.B.] are returned to the care and custody of their mother, [Ms. M.B.], subject to the support and supervision of the Catholic Children's Aid Society of Toronto, and the following conditions:

1. The society social worker and mother are to work closely and co-operatively with each other, through both scheduled and drop in home visits, to keep a responsible pulse on the well-being of each child. As part of this responsibility, the social worker is to meet privately with each child and privately with the mother from time to time to keep a pulse on what the mother needs and what each child needs to make life reasonably manageable, and the mother is to work within those constraints on her privacy.
2. The mother, with the assistance of the social worker, if needed, is to register [E.V.L.B.] in a new school, and work co-operatively with school staff to help [E.V.L.B.] get off to a good start. This child is not to be home-schooled at this time in his life. As part of this responsibility, the mother and social worker are to explore what can be put in place within the school setting to assist this child to manage the bullying behaviour of others. If supports within the school are insufficient, the society is to arrange for private counselling of [E.V.L.B.] to build his skills in this area.
3. The mother, with the assistance of the social worker, if needed, is to register [E.V.L.B.] in an after school activity in the community to help him build his skills in managing his interaction with others. The choice of activity is to have [E.V.L.B.'s] input and the cost of the activity is to be borne by the society.
4. The mother is to participate in an investigation and assessment of her mental and emotional health, such clinical investigation to be undertaken by a medical practitioner qualified in that area of medicine. The clinical investigator is to have full and frank disclosure from both the society and the mother in relation to the concerns set out in this endorsement.
5. The mother is to sign whatever releases are needed by the society to monitor the well-being of the children in their mother's care.

6. The mother is not to make any change in her address or telephone number without first notifying the society social worker and counsel for the children of the change.

Interim Access

Access between [M.L.C.B.] and her father is to be as arranged by [M.L.C.B.] directly, with [Mr. J.P.L.'s] taking particular care that [M.L.C.B.] is not exposed to excessive drinking or any other irresponsible behaviour of adults in his home during her access.

Access between [E.V.L.B.] and [Mr. J.P.L.] is to be arranged by the society, mother and [Mr. J.P.L.] in a manner that gives [E.V.L.B.] a responsibly supervised access.

[43] This endorsement is to be released to counsel of record by facsimile transmission today, and the original incorporated into the continuing record.