W A R N I N G

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.

Toronto (North York) Registry No. C23600/03
CITATION: *Children's Aid Society of Toronto v. H.(D.)*, 2005 ONCJ 479

ONTARIO COURT OF JUSTICE

B E T W E E N :

CHILDREN'S AID SOCIETY OF TORONTO,
Applicant,

— AND —

D.H., G.B., and M.E.,
Respondents.

Before Justice Marvin A. Zuker
Heard on 26-30 September2005; 18 and 21 October 2005;
23, 25 and 28 November 2005; and 2 and 16 December 2005
Reasons for Judgment released on 16 December 2005

CHILD PROTECTION — Best interests of child — Cultural background — Court conceded that there was no universal standard for raising children — Different cultures raise children differently and one culture might not be any better or any worse than another — Nevertheless, on some issues, there was cross-cultural consensus and parental lack of supervision was one such issue that transcended culture.

CHILD PROTECTION — Form of order — Crown wardship — Least restrictive option to protect child — Central issue in case was mother's mental health and lack of counselling — She had been diagnosed with bipolar disorder at age 12 and in recent years suffered post-partum depression — Regrettably, she failed to follow up on her medical and psychiatric examinations, to submit to assessment and to keep appointments for counselling — She also refused to take medication for her mood swings, her depression and her anger — Recently, her life did start to stabilize but, in absence of assessment, court knew nothing of severity of her illness — Concept of "judicial notice", although made more flexible by recent precedents, could not take court vary far with respect to bipolar disorder and post-partum depression other than concluding that, if left unchecked, these conditions could have harmful results — Likewise, court had no evidence that, within x months of birth, mother would have overcome problem of post-partum depression — Mother also had continuing problems of refusing to co-operate with children's aid society, providing inadequate supervision for children and lacking social support network — Mother's second youngest child was made Crown ward without access for purposes of adoption.

CHILD PROTECTION — Form of order — Society wardship — Least restrictive option

to protect child — Court could not justify youngest child's return to mother with bipolar disorder and post-partum depression who failed to follow up on her medical and psychiatric examinations, to submit to assessment and to keep appointments for counselling and who also refused to take medication for her mood swings, her depression and her anger — Court was, however, impressed with plan of care submitted by child's paternal grandfather — Court was satisfied with his sister and adult daughter who would form part of his support network and was not concerned about his ability to supervise mother on occasional visits with child — Court imposed society wardship order pending implementation of grandfather's plan (including purchase of appropriate housing) after which child would be placed with him under supervision order.

EVIDENCE — Judicial notice — Mental health — Although recent precedents made "judicial notice" more flexible, it was speculative just how much judicial notice court could take with respect to bipolar disorder and post-partum depression — Court could point to generally recognized symptoms and could conclude that, if left unchecked, these conditions could have harmful results — In child protection case, mother with these conditions failed to follow up on her medical and psychiatric examinations, to submit to assessment and to keep appointments for counselling and she also refused to take medication for her mood swings, her depression and her anger — In absence of hard evidence, court declined to embark upon medical diagnoses that might have favoured mother's difficult position.

STATUTES AND REGULATIONS CITED

Child and Family Services Act, R.S.O. 1990, c. C-11 [as amended], subsection 1(1), subsection 1(2), clause 37(2)(*b*), subsection 37(3), section 50, subsection 57(1), subsection 57(2), subsection 57(3), subsection 57(4), section 59, subsection 59(2), section 64 and section 70.

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Van de Perre v. Edwards, [2001] 2 S.C.R. 1014, 2001 SCC 60, 275 N.R. 52, 156 B.C.A.C. 161, 94 B.C.L.R. (3d) 199, [2001] 11 W.W.R. 1, 255 W.A.C. 161, 204 D.L.R. (4th) 257, 19 R.F.L. (5th) 396, [2001] S.C.J. No. 60, 2001 CarswellBC 1999.

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Sands, Roberta G.: "The Parenting Experience of Low Income Single Women with Serious Mental Disorders: Families in Society" (1995), 76(2) Journal of Contemporary Human Services 86.

Elina C. Di Luca and Mira R. Pilch ..... for the applicant society
Vishna N. Sukdeo ..... for the respondent mother
David P. Miller ..... for the respondent father M.E.

[1] JUSTICE M.A. ZUKER (*orally*):— I intend to provide oral reasons and to review the evidence with respect to these proceedings.

[2] Ms. D.H. is now 25 years of age — I believe she was 25 on […] 2005. She has four children, all in care with the Children's Aid Society of Toronto — R.B., As.H., An.H. and S.E. For the purpose of these proceedings, of course, we are dealing with An.H. and S.E.

[3] Each of the children have different fathers. I mention this for no particular reason other than the fact that it is S.E.'s father, Mr. M.E., who has participated in these proceedings, as well as the paternal grandfather, Mr. E.E., with respect to S.E.

[4] R.B. and As.H. have been in care now almost nine months and, with respect to them, the matter is on status review. An.H. has been in care since a few months after her birth, now more than two years. And with respect to herm the matter is on status review. S.E. has been in care since being brought into care at the hospital shortly after her birth, now approximating eight months. The matter with respect to her is on protection application and there was a consent finding on 26 September 2005.

[5] The mother signed a statement of agreed facts on 26 September 2005 that S.E. be found in need of protection under clause 37(2)(*b*) [risk of physical harm] of the *Child and Family Services Act*, R.S.O. 1990, c. C-11, as amended.

[6] Ms. D.H. has been involved with the society dating back originally to September 1999, but more laterally and more continuously since 2001. Court proceedings began with respect to the "other" children in May of 2003. R.B. and As.H. were apprehended and I believe returned to Ms. D.H. on 6 May 2003. They were returned to her under a supervision order and a protection application was ultimately withdrawn on 18 June 2003 when mother entered a voluntary working agreement.

[7] On 21 August 2003, the society filed a fresh protection application with respect to R.B., As.H. and An.H., seeking a supervision order. The children remained in mother's care under a temporary supervision order until An.H. was apprehended on 4 September 2003. Since that date, An.H. has remained in care; R.B. and As.H. remained under a temporary supervision order with their mother, Ms. D.H., until 29 January 2004.

[8] The temporary order with respect to An.H. following a temporary care motion was made on 29 January 2004. The court found on consent that all three children were in need of protection under clause 37(2)(*b*) of the *Child and Family Services Act*. Orders for four months society wardship with respect to An.H. and four-month supervision order with respect to R.B. and As.H. were made. These orders were extended on 7 July 2004.

[9] The oldest two children were placed by their mother in care of the society from approximately 9 to 26 July 2004. R.B. and As.H. were placed in care again on 31 December 2004. There was a temporary care order dated 5 January 2005. The children returned home on an extended access visit on 11 January 2005 and the temporary order was varied to reflect their return home under a supervision order on 8 February 2005.

[10] S.E. was born on […] 2005. On 8 March 2005, An.H.'s society wardship was extended a further two months. On 17 March 2005, the society brought a motion to bring R.B. and As.H. back into care for what it indicated was a breach of the terms of the temporary supervision order and they were placed in the society's temporary care. On 30 March 2005, the society brought a motion to bring S.E. into care and she was placed in the society's temporary care.

[11] A temporary care hearing was held regarding R.B. and As.H. and S.E. on 2 June 2005 and all three children were to remain in the society's temporary care. The society's current recommendation with respect to all four children is Crown wardship, no access for the purposes of adoption.

[12] The trial in these proceedings began on 26 September 2005 — today is the 12th day of the proceeding. There were trial dates of 26-30 September 2005; 18 and 21 October 2005; 23, 25 and 28 November 2005; 2 December and today, 16 December 2005.

[13] The mother seeks the return of An.H. and S.E., subject to a supervision order. Service on Mr. G.B., the father of An.H., was dispensed with on the first day of trial. The father of S.E., Mr. M.E., has proposed a plan for S.E. by the paternal grandfather. Mr. M.E. took no position regarding the mother's plan.

[14] The paternal grandfather's plan is an alternative in the event that mother's plan regarding S.E. does not succeed. The mother is supportive of the paternal grandfather's plan only if her plan does not succeed.

[15] In terms of history, we heard from Ms. Sandra Fontenelle regarding the issues that led to An.H.'s apprehension. These were acknowledged in a statement of agreed facts signed by mother in January 2004 — the mother acknowledged being unco-operative, dismissive, diagnosed with post-partum depression and overwhelmed with responsibility of caring for a premature baby. The children were found in need of protection in January 2004.

[16] Filed with the court as exhibit 9 is Dr. McGee's letter dated 17 October 2005. Dr. McGee referred to mother's being on paxil from approximately July 2003 to January 2004. This was confirmed by Ms. D.H. Issues of transience, working with support services provided by the agency, her emotional state and how Ms. D.H. dealt with her children were provided by Ms. Fontenelle, Robertson House Family Residence, Ms. Lois McLaren and Dr. Gill with respect to the issues of mother's failure to follow up on her medical examinations, psychiatric examinations, *et cetera*. We heard from Pat Sowa with respect to mother's depression and mother's involvement with her children. From Ms. Munez, we had evidence of the mother's failure to co-operate and what the society felt was a lack of proper supervision by mother, not only in 2003 and 2004 but incidents in March of 2005 and again the initial apprehension in May of 2003. According to the statement of agreed facts at tab 6, exhibit 3, the mother was struggling with depression, being overwhelmed, as many people would in those circumstances. The issue of being able to provide or not being able to provide an alternative care provider when mother went into the hospital has been of concern. There is no question that, since December 2004, the mother's housing has been stabilized and financially she is on much better footing than she was prior to December 2004.

[17] The society's position is that the children continue to be at risk and that the court must look at the "best interests" test under subsection 37(3) of the *Child and Family Services Act*. Ms. Rab, Ms. Frieson and Houselink all gave evidence as to the events that occurred in March of 2005. Ms. D.H. responded to the issues of lack of supervision on one of the occasions by claiming that her boyfriend, Mr. A.B., was in the shower on the particular date when (according to the testimony of Ms. Sheila Learning) As.H. answered the door of his mother's apartment and was alone in the premises.

[18] There were historical issues that became non-issues once the children came into care — such as not going to school, missing school and being late. Other issues that have been somewhat addressed by mother included her lifestyle, moving and transience.

[19] If we move from the issue of lack of supervision to that of domestic violence, the evidence of mother with respect to Mr. G.B., the father of An.H., was that he beat her up in May 2005 to the extent that she ended up in the hospital. In terms of the evidence, Mr. A.B., the mother's current boyfriend, said that Ms. D.H. was fearful of An.H.'s father. The mother's evidence was, "I'm not afraid of [Mr. G.B.]." We also heard evidence with respect to R.B.'s father allegedly assaulting Ms. D.H.

[20] Certainly an issue that is significant is mother's mental health. I will come back to that.

[21] One issue that is disputed is: How mother has acted during access visits? To what extent she has bonded with her children? Evidence was provided by the society with respect to mother's spending too much time braiding An.H.'s hair as opposed to more "meaningful" time with An.H. I will come back to this.

[22] We heard that, on various occasions, Ms. D.H. has, rightly or wrongly, exhibited considerable anger — anger at the society, anger at its workers, anger at those who removed her children and anger at her own children. And this, from the society's perspective, was reflected in discipline that the society has felt to be inappropriate.

[23] Mr. Chafe gave evidence that, as far as he was concerned, the mother quite often did not provide proper structured activity during access visits and that "she would need a full-time care provider if the children were returned to her".

[24] Front and centre in these proceedings is the issue of mother's mental health and lack of counselling. Regrettably, we do not have any current assessment with respect to that. The society's position is that it has sought an assessment for more than two years. The mother's evidence has been that she was diagnosed with bipolar disorder at age 12. She gave evidence of being depressed in elementary school, in grade VIII, and that she had issues of an overdose and insomnia.

[25] We heard from Dr. McGee and of the referrals made — the failure to attend with respect to the assessment that Dr. Gill was going to conduct, appointments that never occurred and differences of opinion from Ms. D.H. as to what appointments she attended and what ones she did not attend, according to Dr. McGee's letter of 28 April 2005. The mother's testimony was in conflict with that of the society. There is no third-party information, again, with respect to any mental health assessment or of any counselling in any meaningful way that the mother has undergone. Ms. D.H. indicated that she would not take medication even if she were diagnosed. She felt that she could deal with her mood swings and her depression and she said that anger had always been in her life.

[26] With respect to her anger and the perception of lack of co-operation, we heard from Ruth Bockner about the incident with respect to terminating her work with Houselink. We heard evidence with respect to the lack of supports from Ms. D.H.'s family, with respect to her mother and her siblings, her grandparents and family members, none of whom appeared as witnesses in these proceedings. We heard from Janet Marshall and from Mr. A.B. and from Ms. D.H.'s neighbour.

[27] The mother's position is that her housing has stabilized, which it has. She has a two-bedroom townhouse, one that she has had for virtually a year now. She believes that she has been appropriate with An.H. and S.E. Ms. D.H. believes that, to some extent, she has taken advantage of the supports that she has been given — Ms. Trish Robinson and Ms. McLaren at Robertson House — and again that she states that she has a good relationship

with her children as reflected by the evidence of Pat Sowa. Her finances are in order.

[28] Mr. Ciaravella's information, as provided to him by Ms. D.H., is reflective of her self-diagnosis as to her depression. Everyone involved with her has accepted what she said about seeing doctors and medical visits that in reality never took place. Ms. D.H. responded to her lack of supervision that the society has suggested occurred in March of 2005. We heard from Paulette Johnson and Ms. Learning with respect to the supervision issues.

[29] Ms. Kimel gave evidence with respect to the issue of domestic violence, particularly with respect to Mr. G.B. and Mr. Ba., R.B.'s father, with respect to domestic violence. Ms. D.H.'s evidence is that she is not in any relationship with Mr. G.B. or Mr. Ba.

[30] We heard from Mr. A.B. who has been a very positive influence in Ms. D.H.'s life. I think that this has been reflected in part when they both attend access visits. Mr. A.B. is certainly very supportive of Ms. D.H. I find that Mr. A.B.'s priorities are different than her own perception him. Mr. A.B. has eight children of his own, seven with the mother with whom he is living at the present. His own children are his first priority. But he has been a stabilizing force in Ms. D.H.'s life.

[31] With respect to Mr. E.E., we heard evidence from him with respect to his first plan. It was served approximately on 7 July 2005, virtually within a week of the serving of the amended protection application by the society. His involvement or lack of involvement with Ms. Carole Simpson of the society with respect to his first plan was simply not viable, particularly with respect to Ms. S.D., the mother of three of his children.

[32] His amended plan was put forward on 21 September 2005. Ms. Carole Simpson gave evidence with respect to her meetings with Mr. E.E., although admittedly quite brief, and, at the end of the day, Ms. Simpson was not supportive of his plan. It was Ms. Simpson's position that Mr. E.E. was not much of a parent himself to his own children and it would be speculative at best, given his age (59) and given his being single, that Ms. Carole Simpson could support any plan placing S.E. with him.

[33] Mr. E.E. presented differing evidence in terms of his relationship with his own children, two of whom are diagnosed with schizophrenia. His amended plan is to move out of his one-bedroom apartment at XXX XXXXXXX Avenue [address suppressed], to purchase a house, hire a full-time nanny and to raise S.E., his grandchild. He indicated that he has no problem with Ms. D.H. and that supervising her would not be a problem.

[34] We heard from Ms. C.E. She talked about her relationship with Mr. E.E., her brother, about her present role as a foster mother and that she would be prepared to look after S.E. in the short term while Mr. E.E. completed his plan to buy a home. Ms. C.E. never suggested (as was indicated by Ms. Simpson) that she would not look after S.E. because S.E. was a girl and "I don't like girls; I like to deal with boys".

[35] The mother wants the two children before the court returned to her under a supervision order, primarily on the basis of having stable housing since December 2004 and

having consistent visits since June of 2005. The court heard that, prior to S.E.'s coming into care, for a variety of reasons, some of which related to mother's physical or mental health, many access visits were missed.

[36] Submissions on behalf of the mother were that the children should not be separated, four siblings in total, and there are no adoptive parents readily available, and the children should not be moved from one place to another, if such order being sought was made.

[37] Through her counsel and otherwise, the mother raised the issue of cultural background. She is strongly opposed to any idea that these children would be adopted by someone who did not reflect her own background and cultural heritage.

[38] Mr. Miller seeks an order under paragraph 4 of subsection 57(1) of the *Child and Family Services Act* that, with respect to S.E., there be a short society wardship order followed by a period of supervision to Mr. E.E. During the period of wardship, S.E. would be in care but there would be extended access visits to Mr. E.E.

[39] The society's position in part is that, historically, Ms. D.H. has not followed through on voluntary agreements, supervision orders and wardship orders and has not addressed the issues that she has faced. The society submits that An.H. and S.E. require long-term planning, stability and safety. The society is concerned that Ms. D.H. does not recognize her own needs and thus has placed her children at risk of harm. Therefore, the society is seeking an order of Crown wardship without access for the purposes of adoption for both children.

[40] With respect to S.E., the reasons proferred by the society is that Mr. E.E. is 59 and single, that he has never been the primary caregiver of his own children, that he feels guilty about the way that he had raised them, that his judgment is not good and that there are doubts whether he is really committed to changing his lifestyle. After seeing him testify, I am satisfied that he would turn his life upside down to raise S.E.

[41] Ms. Carole Simpson gave evidence that she has worked for the society for some 26 years. She said that she has done 300 home studies and that she liked Mr. E.E. Ms. Simpson had never had any concern about his access. But to her, his commitment was not reflected in filling out the necessary forms, doing the criminal check, *et cetera*, and on that basis he was supposedly not really committed to his plan. She said that Mr. E.E. had somewhat limited knowledge of schizophrenia. By contrast, Ms. C.E. was very positive about her brother. The court heard positive things from Mr. E.E.'s daughter, Ms. S.F. Ms. S.F., who is 19, has indicated that perhaps sooner than later she intends to live with her father.

[42] For the society, there are no options other than an order of Crown wardship and further it has urged that section 70 would be inappropriate in terms of extending the time periods, particularly with respect to An.H. With respect to subsection 59(2), the evidence of the society is that there is a presumption against access with respect to An.H., who has been in care since September 2003 and S.E., who has been in care for almost all of her short life.

[43] What are some of the other issues before the court? I think the one issue that cannot and will not, regrettably, go away, is the mother's mental illness.

[44] We do not know the severity of her illness. I would agree that, in most cases, if not in this case, mental illness alone is not sufficient to establish parental unfitness or lack of fitness. I would refer to a paper by Roberta G. Sands, "The Parenting Experience of Low Income Single Women with Serious Mental Disorders: Families in Society", at (1995), 76(2) Journal of Contemporary Human Services 86-89. Certainly, a person is competent unless legally proven otherwise. Ms. D.H. has acknowledged issues of bipolar and post-partum depression. Ms. D.H. gave extensive evidence to suggest that she can undergo therapy to manage her anger.

[45] There is no evidence that this is going to go away or to be contained. The court must look at the issue of mental illness together with the lack of supervision, her lack of supports and also her lack of acknowledgements.

[46] Courts are not required to exhaust every speculative possibility of parental improvement. The welfare of children is more likely to be threatened the younger they are. With respect to An.H. and S.E., both under the age of three years, they are more susceptible to illness and there may be more need for consistent close interaction with fully committed adults.

[47] The mother's plan is premised to a great extent on assumptions and hypotheses, uncertainties and continually changing circumstances.

[48] I do not wish to spend too much time with respect to the abuse that has been perpetrated on Ms. D.H. The focus, of course, is on the best interests of the children. We have no evidence that any of the children were affected by domestic violence perpetrated on Ms. D.H.

[49] Ms. D.H. did respond relatively quickly with respect to the incident involving Mr. G.B. in May 2005. She was in denial with respect to an incident in February 2005 when, according to the evidence, Ms. D.H. was in the company of a man and came upon Mr. G.B. The suggestion that "I am not afraid of [Mr. G.B.]" might well be a minimization of his impact on her.

[50] Judicial notice is something that the courts must take with care and attention. More recent decisions of our courts have dealt extensively with the issue of judicial notice and how much is a court really supposed to speculate in terms of judicial notice. See *The Queen v. Spence*, 2005 SCC 71, [2005] S.C.J. No. 74, 2005 CarswellOnt 6824, which dealt with the issue of race. In that appeal, a black man had been charged with robbing an East Indian man and the court considered whether it could take judicial notice that the jurors have a natural sympathy for victims of the same race. The Supreme Court of Canada found (emphasis in original):

> **[60]** . . . ***the permissible scope of judicial notice should vary according to the nature of the issue under consideration.*** . . .

. . .

> **[65]** . . . I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute ***for the particular purpose for which it is to be used***, . . .

[51] And as Justice W. Ian Binnie said speaking for the Supreme Court of Canada:

> **[1]** The administration of justice has faced up to the fact that racial prejudice and discrimination are intractable features of our society and must be squarely addressed in the selection of jurors.

He went on to say:

> **[52]** While courts have accepted the widespread existence of racism, and the likelihood that anti-black racism is aggravated when the alleged victim is white, there is no similar consensus that "everybody knows" a juror of a particular race is likely to favour a complainant or witness of the same race, despite the trial safeguards and the trial judge's instruction to the contrary.

[52] How much judicial notice this court can take with respect to bipolar disorder and post-partum depression is speculative. We know that those who suffer from bipolar disorder talk about experiencing highs and lows. The highs are periods of mania; the lows, periods of depression. And we know that, if left unchecked, this behaviour can have harmful results.

[53] Mania often involves impaired judgment and reckless behaviour and this may vary from person to person. We do not know in this case what type of bipolar disorder Ms. D.H. may have because again we do not have the benefit of any evaluation.

[54] One article stated that:

> Bipolar disorder is more likely to affect the children of parents who had the disorder. When one parent has bipolar disorder, the risk to each child is estimated to be 15 to 30 percent. When both parents have bipolar disorder, the risk increases to 50 to 75 percent.

See the article "Bipolar Disorder" by the Depression and Bipolar Support Alliance at:

http://www.dbsalliance.org/Media/BipolarFacts.html

[55] In terms of judicial notice, one cannot presume to be giving medical diagnoses with respect to post-partum depression. There is no evidence that post-partum depression in this case does not remain. I would maintain, with respect, that there is no magical formula that would suggest that, after four months, six months or twelve months after birth, post-partum depression would have been addressed by the mother.

[56] What are some of the risks of post-partum depression, a history of depression or bipolar disorder at any time? And what can people do about, for example, post-partum depression? Stress reduction; psychotherapy; counselling; medication?

[57] The purpose of an assessment sought by the society for more than two years, is to some extent, I would find, an issue of risk management — assessing a risk and dealing with

the risk and developing a protocol with respect to that risk.

[58] Another concern raised — and the court heard evidence of this — was that of culture. And this is a very difficult thing. Culture as a defence to "How I deal with my children", whoever the parent may be and, in this case, of course, Ms. D.H.

[59] There have been many studies, many articles on the issue of cultural defence, certainly from a criminal perspective in:

- Anonymous: "The Cultural Defense in Criminal Law" (1986), 99 Harv. L. Rev. 1293-1311;
- Doriane Lambelet Coleman: "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma" (1996), 96 Col. L. Rev. 1093-1167;
- Inga Feldman: *Cultural Sensitivity with Immigrant Families and Their Children* (New York City: National Resource Center for Foster Care and Permanency Planning, Hunter College School of Social Work, 2003), at:

  http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/cultual-sensitivity-with-immigrants2.pdf; and
- Alison Dundes Renteln: *The Cultural Defence* (London: Oxford University Press, 2004).

[60] There are two sides of the coin. A parent can take the perspective that we live in a multi-cultural society and that an individual in such a society has the right to follow the traditions of his or her own culture. That ethnic minority groups should have the right to keep their own ways of life including their child-rearing styles.

[61] The opposite view is (in this case) the issue of assimilation into the law of Ontario or Canada, rather than cultural tradition.

[62] So we have the issue of cultural purism and individual rights. The reality is that there is no universal standard for raising children. Different cultures raise children differently. One culture may not be any better or any worse than another. Spanking children is a good example. What we may regard as physical abuse in our culture is not the same, for example, in Asia or South America. If we are dealing with lack of supervision of children, then, I find that it is, to use an important word, cross-cultural.

[63] As a generalization, our society to date has a cross-cultural perspective in the cultural context in which we are dealing. It is indeed complicated.

[64] In terms of findings of fact and in my review of the evidence, the exhibits, the affidavits and having heard and seen Ms. D.H. (who was diagnosed with post-partum depression; was on Paxil; diagnosed with bipolar disorder at age 12; and suffered from depression), the court concludes that she has not followed up with respect to the expectations of mental health professionals. In terms of the evidence, the court prefers and accepts the perspective of Dr. Gill and Dr. McGee as to the events that have occurred.

[65] As to the issue of lack of supervision, the court prefers the evidence of Ms. Rab, the evidence as to Houselink and the evidence of Ms. Sheila Learning. The court does not believe that Mr. A.B. was taking a shower during a major incident of no supervision.

[66] The mother feels that, when appropriate, she should be free to discipline her children physically. The evidence, in any event, has been that she loves her children.

[67] The mother lived a transient lifestyle for a variety of reasons — financial and otherwise, depression and otherwise, lack of supports and otherwise — during most of 2003 and 2004. The frequent changing of schools — seven or eight times, if I recall correctly — did affect the children's schooling. But again, since December 2004, the mother's housing has stabilized.

[68] As a fact, the court finds that mother was assaulted by Mr. G.B. in May of 2005. The court does not accept Ms. D.H.'s evidence that this was the first time that Mr. G.B. assaulted her. The court further accepts the evidence with respect to her being assaulted by R.B.'s father.

[69] I find that the mother's access until May or June of 2005, for a variety of reasons, was not consistent with her children. Since June of 2005, however, consistency was not an issue.

[70] The court heard considerable evidence with respect to the mother's anger, her lack of co-operation from the society's perspective and, to some extent, to use a society word, her being "dismissive" of the society. In response to a question that the court asked, Ms. D.H. indicated that, as far as she was concerned, she did not need the society in her life.

[71] In terms of the law, at the top of any list are the protection and the best interests and welfare of the children.

[72] We must always promote the integrity of the family, but only if the circumstances are adequate to protect the children of that family. Services are provided or are intended to be provided to allow families to remain intact while affecting acceptable change within the statutory time limits. There is no responsibility for any society to shore up a family indefinitely. And of course, the court must consider the reasonableness of Ms. D.H.'s plan and Mr. E.E.'s plan.

[73] Section 57 of the *Child and Family Services Act* provides a fundamental recognition of the best interests of the children as the primary consideration in making any order under section 57. The court has a duty to assess the evidence and to conclude what order is appropriate — Crown wardship or supervision. What is the necessary evidentiary basis for making these orders?

[74] In the of-quoted decision of *Catholic Children's Aid Society of Metropolitan Toronto v. Cidalia M.*, [1994] 2 S.C.R. 165, 165 N.R. 161, 71 O.A.C. 81, 113 D.L.R. (4th) 321, 2 R.F.L. (4th) 313, [1994] S.C.J. No. 37, 1994 CarswellOnt 376, Justice Claire L'Heureux-Dubé stated at paragraph [48]

> **[48]** The law that the courts must apply in the present case in the Ontario *Child and Family Services Act* which, properly interpreted, mandates a careful balancing of its paramount objective of the best interests of the child with a value of maintaining the family unit

At paragraph [39], she quoted from the earlier case of *Racine and Racine v. Woods*, [1983] 2 S.C.R. 173, 48 N.R. 362, 24 Man. R. (2d) 314, [1984] 1 W.W.R. 1, 1 D.L.R. (4th) 193, 36 R.F.L. (2d) 1, 1983 CanLII 27, [1984] 1 C.N.L.R. 161, 1983 CarswellMan 147:

> While the court can feel great compassion for the respondent, and respect for her determined efforts to overcome her adversities, it has an obligation to ensure that any order it makes will promote the best interests of her child. This and this alone is our task.

[75] In another frequently cited decision — *King v. Low and Low*, [1985] 1 S.C.R. 87, 57 N.R. 17, [1985] N.W.T.R. 101, 58 A.R. 275, [1985] 3 W.W.R. 1, 16 D.L.R. (4th) 576, 44 R.F.L. (2d) 113, [1985] S.C.J. No. 7, 1985 CarswellAlta 395 — Justice William R. McIntyre stated at page 101 [S.C.R.]:

> The welfare of the child must be decided on the consideration of these and all other relevant factors including the general psychological, spiritual and emotional welfare of the child.

[76] Subsection 1(1)of the *Child and Family Services Act* states that:

> **1. Paramount purpose.—**(1) The paramount purpose of this Act is to promote the best interests, protection and well being of children.

[77] And subsection 1(2) sets out additional purposes, one of which is to recognize the least disruptive course of action that is available and appropriate in a particular case. The court must consider all of the circumstances and the evidence having regard to subsection 37(3) of the *Child and Family Services Act* to make a final order in terms of the best interests of the children.

[78] A child protection proceeding, as we know, is a civil hearing. The balancing of probabilities evidentiary test is applied. Perhaps with the kind of order that is being sought from the society, there should be a higher standard than a balance of probabilities? But this is a civil proceeding. Arguably, as some (but not all) have suggested, a higher burden is upon the state having regard to the order being sought. Then there are subsection 57(1), subsection 57(2), subsection 57(3), subsection 57(4) and subsection 59(2).

[79] An.H. has been in care, as indicated, since September 2003 and, with respect to S.E., March of 2005. In every case such as this, the court has to look at the issue of bonding, bonding certainly with mother. Is the bonding any greater than it would be in terms of an access parent exercising access in a supervised access setting?

[80] Would the disruption of care to the children be greater should they be returned to their mother's care and then removed again given the evidence that we have heard? What is the degree of risk of returning the children to the mother? Are the circumstances likely to change in the near future? If a supervision order were made, as is sought by the mother, are

there adults available to supervise the children?

[81] The courts have looked at section 50 of the *Child and Family Services Act* in terms of the past as being a useful predictor of the future. In *Children's Aid Society of Simcoe County v Cecile S. and Scot S.* (2001), 104 A.C.W.S. (3d) 699, [2001] O.J. No. 1380, 2001 CarswellOnt 1302 (Ont. Fam. Ct.), Justice Lydia M. Olah addressed this point thus:

> **[9]** The real relevance of "past parenting" evidence is the extent to which it provides a reliable backdrop against which to measure the extent to which the parents' abilities and circumstances have changed.

[82] And in *Children's Aid Society of Peel Region v. Dianna K. and Stephen K.* (1991), 25 A.C.W.S. (3d) 301, [1991] W.D.F.L. 264, 4 O.F.L.R. 121, [1991] O.J. No. 159, 1991 CarswellOnt 1468 (Ont. Prov. Div.), Provincial Judge A. Peter Nasmith (as he then was) observed:

> In the uncertain and unscientific world of making predictions about harm to children, there is probably no more compelling evidence of risk than harm that has befallen other children in the same parents' care.

[83] The principal determination is the best interests of the children, the issue of bonding, credibility, parenting ability and the weight to be given to all of the relevant factors with respect to the evidence.

[84] In the case of *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60, 275 N.R. 52, 156 B.C.A.C. 161, 94 B.C.L.R. (3d) 199, [2001] 11 W.W.R. 1, 255 W.A.C. 161, 204 D.L.R. (4th) 257, 19 R.F.L. (5th) 396, [2001] S.C.J. No. 60, 2001 CarswellBC 1999, the Supreme Court of Canada decision found, as in this case, that there was no evidence to support any suggestion that race was or had been a consideration in those proceedings. That case dealt with issues raised by the interveners who submitted that black parents are more likely to be aware of the need to prepare their children to cope with racism because the case involved the mother who was white and the father who was black.

> **[38]** . . . the main issue is which parent will facilitate contact and the development of racial identity in a manner that avoids conflict, discord and disharmony. . . . It is not always possible to address these sensitive issues by judicial notice, even though some notice of racial facts can be taken; . . .

It is the best interests of the children at which the court must look, which should include cultural identity.

[85] With respect to An.H. and with respect to the findings of fact and evidence that was proffered in these proceedings, Crown wardship without access is the only order that responds to the facts as I have found them in this case under paragraph 4 of subsection 57(1).

[86] Subsection 59(2) operates as a presumption against access to Crown wards. The burden of proving that a court shall award access to a Crown ward is upon those who seek such access. The words "beneficial" and "meaningful" under clause 59(2)(*a*) require something more than establishing that someone is a biological parent.

[87] Making such an order with respect to An.H. would be disruptive to the possibility of adoption. An.H. has enjoyed consistent supervised access laterally with her mother and her siblings and evidence has been that, most often, the mother is appropriate with An.H., and she has a positive relationship with An.H. But this is only one prong of the test. Access visits must also not impair the future opportunities for a permanent and stable placement. Therefore, in these circumstances, there will be an order of no access with respect to An.H.

[88] With respect to S.E., the court supports Mr. Miller's submissions. The court supports Mr. Miller's proposal that there be a wardship order with the intent that that would be followed by a supervision order.

[89] This court was very impressed with Mr. E.E., with his sister, Ms. C.E., and with his daughter, Ms. S.F.

[90] The court was also very impressed with Mr. A.B. Unfortunately, because there are not the supports available to mother and because Mr. A.B.'s role is uncertain, the court cannot make speculative orders on what may happen or may not happen. We heard from Mr. A.B. with respect to his priorities. He is certainly supportive and a good parent.

[91] The court is of the view that there should be a three-month society wardship with respect to S.E. and we could return again on 22 February 2006.

[92] The intention of the court is to order that the society work towards increasing access to Mr. E.E. He has indicated that he is in the process, if not already, of purchasing a three-bedroom home. If this has been done, then we can deal with the issue of extended access to Mr. E.E., issues of supervision where appropriate, initially with Ms. C.E. who indicated she would supervise, as would his daughter, Ms. S.F.

[93] Unfortunately, Ms. D.H. has now left the courtroom. The court is mindful that placing one of the two children for adoption may be a real challenge. However, what I would have said to the mother is that, under section 64 and section 59 of the *Child and Family Services Act*, she can seek an access order or status review if An.H. has not been placed within the next six months.

[94] Justice Craig Perkins stated in a decision of *Family, Youth and Child Services of Muskoka v. R.S.*, where, on appeal, the Divisional Court at (2004), 11 R.F.L. (6th) 39, [2004] O.J. No. 3146, 2004 CarswellOnt 3125, quoted at paragraph [16] with approval from his judgment:

> **[51]** While the children are in foster care and even while they are placed for an adoption that has not been made final, the CAS as the custodial parent of the children retains the right to control who has access to the children and who does not, and on what terms. I leave it to the CAS to determine whether that power should be used in favour of any of the other children or any of the adult parties to this case.

[95] So, in spite of the order that I have made with respect to An.H. and S.E., nothing precludes Ms. D.H. from exercising access until or if or when An.H. is placed for adoption.

[96] Nothing, hypothetically, would preclude Mr. E.E. from coming forth with a plan with respect to both children.

[97] I will take 10 minutes if there are any questions. Thank you very much.

[98] Ms. PILCH: I do have one question.

[99] THE COURT: Yes, certainly.

[100] Ms. PILCH: With respect to An.H., just to clarify. Obviously, the order being made is Crown wardship without access, and your comments about ongoing access, as I understood it, given the situation and the law, is that, until the child is placed on adoption, the society has the right as the parent of the child to offer contact with the mother or other persons, but the right of the parent to access does terminate with the order that that you have made today?

[101] THE COURT: That's right.

[102] Ms. PILCH: It is difficult to understand, I think, even for lawyers, that difference between the right of the child to be contacted and the right of the parent to access.

[103] THE COURT: Yes.

[104] Ms. PILCH: So perhaps you could.

[105] THE COURT: Yes, it is in the society's determination, certainly.

[106] Ms. PILCH: Thank you.

[107] THE COURT: And keeping in mind the best interests of the child.

[108] Ms. PILCH: Yes, of course.

[109] THE COURT: Thank you very much. The next return date is 22 February 2006. If there is any reason to come back earlier, certainly we may. Thank you.