

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 45 (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. C48644/09

DATE: 2012-12-31

Citation: *Children's Aid Society of Toronto v. M.T.*, 2012 ONCJ 786

ONTARIO COURT OF JUSTICE
TORONTO NORTH FAMILY COURT

IN THE MATTER OF AN AMENDED PROTECTION APPLICATION UNDER
PART III OF THE CHILD AND FAMILY SERVICES ACT, R.S.O. 1990, C. 11,
FOR THE CROWN WARDSHIP OF E.P., BORN ON [...], 2009 AND J.T-D.,
BORN ON [...], 2010

2012 ONCJ 786 (CanLII)

B E T W E E N:)	
)	
CHILDREN'S AID SOCIETY OF TORONTO)	MIRA PILCH, for the APPLICANT
)	
)	
)	
)	
)	
APPLICANT)	
)	
- and -)	
)	
M.T. AND R.D.)	
)	
)	ANDREW SUDANO, for the
)	RESPONDENT, M.T.
)	
)	THE RESPONDENT, R.D., not
)	appearing
- and -)	
)	
N.T.)	
)	
MOVING PARTY)	N.T, the moving party, acting in person

)
) **HEARD: DECEMBER 28, 2012**

JUSTICE S.B. SHERR**ENDORSEMENT****Part One – Introduction**

[1] This proceeding is about the society's request to make the children, E.P., born on [...], 2009, and J.T.-D. , born on [...], 2010 (the children), crown wards without access, for the purpose of adoption.

[2] N.T., the maternal grandfather of the children (the maternal grandfather), has brought a motion before the court. He seeks to be added as a party to the case and also seeks an order for temporary access to the children. If permitted to file an Answer/Plan of Care, he will ask that the children be placed in his care.

[3] M.T. (the mother) is the children's mother. She does not oppose her father's motion. Her primary plan is to have the children placed with her parents (the maternal grandparents). In the alternative, she has proposed that the children be placed in the care and custody of her sister. In the further alternative, she asks that the children be placed in her care.

[4] R.D., the father of J.T.-D., has not participated in this case. The biological father of E.P. is unknown.

[5] The Children's Aid Society of Toronto (the society) opposes the motion.

Part Two – Background

[6] E.P. was first apprehended by the society on August 24, 2009 due to a multiplicity of protection issues, including the mother's mental health challenges, her drug use, her transience and E.P.'s exposure to domestic violence between the mother and her partner.

[7] On August 28, 2009, on consent, Justice Carole Curtis returned E.P. to the mother's care, subject to terms of supervision. The mother breached those terms and on September 23, 2009, E.P. was re-apprehended. On September 29, 2009, Justice Curtis made a temporary order placing E.P. in the care of the society, with access to the mother to be in the discretion of the society.

[8] On November 23, 2009, E.P. was found to be a child in need of protection pursuant to clause 37 (2) (b) (risk of physical harm) of the *Child and Family Services Act* (the Act).

[9] The mother struggled to make improvements. She proposed that E.P. be placed with the maternal grandparents. A home-study was conducted on the maternal grandparents (who lived in Quebec) and the maternal grandparents were approved by the society as suitable caregivers for E.P.. On August 16, 2010, on consent, E.P. was placed in the temporary care and custody of the maternal grandparents, to reside in Quebec.

[10] On October 6, 2010, the society withdrew the protection application as the case had been taken over by the child protection agency in Montreal.

[11] The mother married R.D. in Montreal in early 2010. J.T.-D. was born prematurely with serious medical complications, including cerebral palsy and epilepsy. He remained in the hospital for three months following his birth. On December 29, 2010, the child protection court in Quebec placed him in the care of the mother, subject to the supervision of the Montreal child protection agency.

[12] On February 14, 2011, the Quebec court also placed E.P. in the care and custody of the mother, subject to the supervision of the Montreal child protection agency. The maternal grandfather advised this court that this was done over his objection.

[13] In January of 2012, the mother left Montreal with both children without the knowledge or consent of the Montreal child protection agency. J.T.-D.'s health-care providers notified the society that the mother was not meeting the child's health needs. The Montreal child protection agency advised the society about other child protection concerns, including domestic violence between the mother and R.D., R.D.'s alcoholism and the parents' loss of housing. The Montreal child protection agency had obtained a warrant to apprehend the children.

[14] The children were apprehended by the society in Toronto on January 13, 2012 and have remained in care since that date. On January 18, 2012, Justice Marvin Zuker made a temporary order placing the children in the care of the society, with access to the parents to be in the discretion of the society. This is the temporary order that is presently in place.

[15] Despite services provided to the mother, such as the society's therapeutic access program, she has struggled in advancing her case. The mother brought a motion to increase her access on September 7, 2012. I dismissed this motion and set out the following reasons in my endorsement:

- a) The mother's inconsistent exercise of access. She only attends on about one-half of her scheduled visits with the children.
- b) The mother's difficulty following society instructions and reading the cues of the children at the visits, compromising their safety.
- c) Insufficient current mental health evidence about the mother.
- d) The complex developmental needs of the children.
- e) The children's poor reaction to visits both before and after them.

[16] The society subsequently amended its protection application to seek crown wardship, with no access for the purpose of adoption. At this point, the mother amended her Answer/Plan of Care to propose the maternal grandparents as first choice as caregivers.

[17] The society is currently assessing the maternal grandfather's plan. The maternal grandparents have agreed to the society's request to participate in a psychological assessment. This is scheduled to start early in January of 2013. The society has arranged three access visits to date for the maternal grandparents.

[18] This case has been placed on the assignment court list for April 23, 2013. The case will soon meet the one-year statutory time-limit for J.T.-D., as set out in subsection 70 (1) of the Act. The case is already well over this time-limit for E.P., because her previous time in care must also be counted.

Part Three – Should the maternal grandfather be added as a party?

3.1 Legal Considerations

[19] Subrule 7(5) of the *Family Law Rules* (the rules) provides that the court may order that any person who should be added as a party shall be added as a party.

[20] The court in *Children’s Aid Society of London and Middlesex v. S.H., S.W. and D.R.*, [2002] O.J. No. 4491, (Ont. Fam. Ct.), set out the following principles for the court to consider before adding a party to a child protection proceeding:

- (i) whether the addition of the party is in the best interests of the child,
- (ii) whether the addition of the party will delay or prolong proceedings unduly,
- (iii) whether the addition of the party is necessary to determine the issues, and
- (iv) whether the additional party is capable of putting forward a plan that is in the best interests of the child.

[21] The court in *Children’s Aid Society of London and Middlesex v. J.P.*, [2000] O.J. No. 745, (Ont. Fam. Ct.), added one more principle:

- (v) whether the person seeking to be added as a party has a legal interest in the proceeding (*i.e.*, whether an order can be made in their favour or against them).

[22] In *Children’s Aid Society of Algoma v. V.C.*, 2011 ONCJ 83 Canlii, Justice John Kukurin wrote at par. 19:

The case of *Children’s Aid Society of London and Middlesex v. S.H., S.W. and D.R.*, supra, does not stand for the proposition that **all four** of the “criteria” mentioned in that case must favour the motion applicant before the court can add that person as a party under subrule 7(5). This subrule uses the words “may order”, which denotes a permissiveness that should be exercised judicially. In other words, judicial discretion.

[23] It is not necessary for the court to determine at this stage whether the maternal grandfather’s plan would be successful; the question at this stage is whether his plan merits consideration, despite the delay in bringing it. *Catholic Children’s Aid Society of Toronto v. H.(D.)*, 2009 ONCJ 2 (CanLII).

3.2 Analysis

[24] The children's best interests will be served by having a comprehensive examination of the best long-term plan for them.

[25] The addition of the maternal grandfather as a party should not unduly delay the case. The court has made it very clear that the case will be scheduled for trial at assignment court on April 23, 2013. The proposal to place the children with the maternal grandparents is the mother's primary plan and would already be the focus of any trial. While the maternal grandfather's party status might result in an extension of trial time, this is a small price to pay to have a more thorough examination of his plan. Further, given that in this court location child protection trials continue until completion, any extension of time would be measured in days, not weeks or months.

[26] The society argues that it is not necessary for the maternal grandfather to be added as a party as the mother is already advancing placement of the children with him as her primary plan. The ability of an existing party to present a plan of placement of a child with a non-party can be a significant consideration in deciding whether to add that non-party. See: *Catholic Children's Aid Society of Toronto v. H.(D.)*, 2009 ONCJ 2 (CanLII). However, this case has unique characteristics that must be assessed when evaluating whether the maternal grandfather's plan should be presented to the court without adding him as a party.

[27] This case has been marked by the mother's vacillating attitude about her parents. When this case was first before this court in 2009-2010, the mother made significant allegations about being abused and mistreated as a child by the maternal grandparents. When it became apparent to the mother that she was on the verge of losing E.P., she recanted many of these allegations. The allegations were eventually discounted by the society who supported the return of E.P. to the maternal grandparents.

[28] The mother moved in with the maternal grandparents in 2010, but the relationship quickly fell apart. The mother subsequently reiterated the historic allegations of being abused and mistreated by her parents. She obtained the return of E.P. to her care over their objections. The maternal grandfather deposed that the mother restricted his contact with the children. He deposed that when the mother moved to Toronto, she instructed the society not to provide him with any information about the case. The maternal grandfather deposed that he sent multiple emails and made many phone calls to the society to find out what was happening to the children and asking to see them.

[29] It was only after her motion for increased access was denied in September of 2012 that the mother reached out to her parents again. When doing so, the mother sent her parents a letter (Exhibit 1), admitting that her allegations against them were false and that she had only made them because she was afraid that the society would give the children to them instead of to her.

[30] The maternal grandfather, in his affidavit, described a very fractious history with the mother. He described her as a very troubled girl, who has always exercised poor judgment, gets into violent relationships with men and chronically lies.

[31] This evidence informs the court that the present commonality of position between the maternal grandfather and the mother is precarious and is subject to change very quickly. If the relationship frays on the eve of trial, and the mother decides that she wants the children to be placed with her sister, or just herself, then the maternal grandfather's plan will not be properly presented (in the event it is not approved by the society). This is not in the children's best interests. At this point his plan is the most viable alternative to the society's plan to have the children made crown wards. His involvement in the case shouldn't be at the whim of the mother.

[32] Further, due to the significantly different way that they view their family history, the plan to place the children with the maternal grandfather would likely be presented far differently by him than by the mother. It is in the best interests of the children to have this plan presented to the court in the best possible light, and in the manner that the proposed primary caregiver wishes to present it.

[33] While there may be a commonality of positions between the mother and the maternal grandfather at this point, there is not necessarily a commonality of interests. The mother understandably does not want the children to become crown wards. She clearly hopes to be able to parent the children in the future and a placement with her parents would buy her more time to accomplish this. She will want to remain highly involved with the children, perhaps envisioning a repeat of how she was able to achieve E.P.'s return to her care in 2011. Arguably, the maternal grandfather's plan would be viewed more favourably by the court (given the profound historical parenting challenges of the mother) if he distanced himself from his daughter, presenting himself as a secure long-term alternative for the children, and minimizing her involvement with the children. He needs to have the opportunity to present this as part of his plan to the court, if he so chooses. This can't be properly presented to the court through the mother.

[34] The maternal grandfather needs full disclosure to properly present his plan. He needs to review the society's file. He needs to participate in plan of care meetings to fully appreciate the needs of the children and research the appropriate services that will be required to address these needs.

[35] The court finds that the addition of the maternal grandfather as a party is necessary to determine the issues in this case.

[36] The society expressed skepticism about the viability of the maternal grandfather's plan in their material. The children have special needs. The society has real doubt as to whether the maternal grandfather will be able to adequately meet those needs. The children have reportedly acted very poorly after the access visits with the maternal grandparents. There are concerns about the maternal grandfather's aggressive presentation, the historical abuse allegations by the mother and the parenting of the mother by the maternal grandparents.

[37] It may very well be that the maternal grandfather has an uphill climb in this case. However, he does not have to establish at this stage that he will be successful, only that he is capable of putting forward a plan in the best interests of the children that merits examination at trial. He has met this threshold. In August of 2010, the society was confident enough in the

parenting abilities of the maternal grandparents to return E.P. to their care. The society conceded that there was no evidence that the maternal grandparents failed to provide E.P. with appropriate care while she lived with them for six months. There was no evidence to contradict the maternal grandfather's position that E.P. was a happy and healthy child when she left his care in February of 2011. The maternal grandparents have successfully raised other children. With respect to the historical allegations of abuse against the maternal grandparents, there is reason to believe that a trial court may have difficulty with the mother's constantly changing evidence, particularly given her mental health challenges.

[38] With respect to whether the maternal grandfather has a legal interest in this case, his interest is similar to the grandparent in *Children's Aid Society of Algoma v. V.C.*, supra, where Justice Kukurin wrote at par. 18:

It is clear that the grandmother has a legal interest in this case in the sense that an order under paragraph 57(1) could be made in her favour. So also could an order for custody under section 57.1 of the Act. This is not a situation where the grandmother wants in only to clear her name, or to set the record straight about her past. I infer that this grandmother has a *bona fide* interest that is primarily directed to obtaining care and custody of, and raising her granddaughter.

[39] The maternal grandfather shall be added as a party to this case.

Part Four – Access

[40] The maternal grandfather seeks access to the children at a minimum of four hours for each visit, on either Mondays or Fridays. He also asked to take the children to his home in Quebec for a two-week vacation over the winter holiday season.

[41] The society asks that if any access order is made to the maternal grandfather, that access remain in their discretion.

[42] The mother did not oppose her father's access request.

[43] The maternal grandfather's request for access is framed under subsection 58 (1) of the Act which reads as follows:

Access order

58. (1) The court may, in the child's best interests,

- (a) when making an order under this Part; or
- (b) upon an application under subsection (2),

make, vary or terminate an order respecting a person's access to the child or the child's access to a person, and may impose such terms and conditions on the order as the court considers appropriate.

[44] The issue of access is difficult in this case.

[45] The trial court, given the statutory timelines, will likely have to decide between making the children crown wards (with a strong statutory presumption against access at their age) or

placing them with the maternal grandfather. If, by the time of trial, the maternal grandfather is only exercising supervised access, it would be a great leap of faith for a trial judge to place the children in his care, without first having tested more extended access. It can be reasonably argued that a failure to grant more access at this stage will have the practical effect of pre-deciding the case and it is in the best interests of the children to give this plan a reasonable opportunity to succeed. The late involvement of the maternal grandfather in this case creates even more pressure on this process. We only have five months to work with until the case is tried.

[46] This consideration has to be balanced against the current needs of the children.

[47] The children are receiving services from several professionals, including services from the Erinoaks developmental team. They report that both children are delayed in their speech. The children have been referred for physiotherapy, occupational therapy and speech pathology. The foster mother receives behavioural consultation services for the children from the Halton Integration Eligibility Clinic. J.T.-D. continues to receive follow up services from the neo-natal team at McMaster Children's Hospital. The society and the foster parent are working with Dr. Chaya Kulkarni at the Hospital for Sick Children on developmental screens and developmental enhancement for the children.

[48] The foster mother advised the society worker that it takes several days to almost a week for the children to calm down after access visits with their mother and the maternal grandparents. She says that the children do not suffer these reactions with other transitions, such as going to daycare or seeing professionals. The foster mother advised the worker that the children's reactions include screaming in the car on the way home, vomiting about half the time before and after visits, increased aggression, inability to eat, inability to engage with those around them, stiffness in their bodies and fatigue. She reports that J.T.-D. will look "spaced-out" and E.P. will be hyper-observant after visits, listing items in the house and room repeatedly. She notes that both display regression in their speech and will scream for 30 minutes at a time. The foster mother reported to the worker that before E.P.'s second visit with the maternal grandparents, when she was told that she was going on the visit, she screamed, had a tantrum, started to suck her thumb and talk like a baby and screamed for forty minutes on the way home. She noted that E.P.'s toilet training has regressed.

[49] The foster mother's descriptions of the children's reactions to the visits are puzzling to the society and the maternal grandfather as the society worker reports that the children's access visits with the maternal grandparents appear on the surface to be very positive. The maternal grandparents brought toys and food for the children. The maternal grandfather prepared a photo book for the children. The maternal grandparents were attentive to the children. The children appeared to be happy with them.

[50] It would have been helpful to have had a direct affidavit from the foster mother on this motion with more precise detail about the children's specific reactions after visits with the maternal grandparents. The court was unable to discern if the intensity of the children's reactions are any different when the maternal grandparents are visiting or the mother is visiting the children, or if there is any difference in the intensity of the children's reactions from visit to visit.

The evidence about their reactions, for the most part, was given globally. The foster mother's evidence about the children's reactions to the visits is not consistent with the society worker's. It would be helpful to know about the observations of daycare providers for the children. All of this needs to be explored further.

[51] At this point, the reports of the foster mother must be treated seriously. The society and the court need to quickly assess why the children are acting in this matter and how best to address it. There are many questions that need to be answered, such as:

- a) Is the adverse reaction of the children more specific to seeing the mother as opposed to the grandparents? Or vice versa?
- b) Is the adverse reaction of the children due to going to the society office and not necessarily related to seeing their grandparents?
- c) Is there any difference between each of the children's reactions to the visits?
- d) Are the children feeding off each other's anxieties about the visits? Should their visits be separated?
- e) How are the children being prepared for the visits? Are there ways to improve this?
- f) Could therapeutic assistance assist with the visits? Would it be helpful for the maternal grandparents to participate in this process?
- g) Are there any other factors in the children's lives contributing to this distress?

[52] The society worker, in her affidavit, reported certain opinions of Dr. Kulkarni relating to the reasons for the children's behaviours around the visits, but the society did not provide a report or affidavit from her. They did not provide her curriculum vitae. Dr. Kulkarni is not a psychologist or psychiatrist. Her doctorate is in education. The society provided no evidence supporting that she has the expertise to give the opinions attributed to her in the society worker's affidavit. They may be able to establish this expertise at trial, but for the purpose of this motion I placed no weight on the opinions attributed to her in the worker's affidavit.

[53] E.P. was previously assessed by a psychologist, Dr. Daniel Fitzgerald. It may be a good idea to immediately follow up with him on several of these questions. The society has also arranged a fetal alcohol assessment for the children in January of 2013. It will be important to see the results of that assessment.

[54] Given the children's reactions to the visits, the court needs to be more cautious in implementing access with the maternal grandparents than it otherwise might be. It is premature to grant extended overnight access as requested by the maternal grandfather.

[55] Balancing all of the considerations set out above, the court finds it is appropriate and in the best interests of the children to order a graduated access schedule for the maternal grandfather. It is important that these visits take place weekly so that the children can become more familiarized with him and more comfortable with the transitions from the foster home. The court recognizes that this is logistically difficult for the maternal grandfather who has to come in from Montreal, but it is imperative that the children be his main focus for the next five months if his plan is to succeed.

[56] The maternal grandmother can and should attend the access visits. The order will provide that the visits take place on Mondays or Fridays to accommodate the travel plans of the maternal grandparents. The visits will allow for some portion of the visits to be in the society office, so the society can evaluate the interaction between the children and the maternal grandparents and how the children are responding to the visits. The society will also be entitled to have a worker, at their option, observe portions of the community visits that will be scheduled. This is for the same purpose.

[57] The mother's access should not take place on the same day that the maternal grandparents see the children. The children should receive the entire focus of the maternal grandparents. Their reactions should be assessed independently of their reactions to visits with the mother.

[58] It is important that the maternal grandparents meet as soon as possible with the society and medical professionals to fully understand the medical and developmental needs of both children. They need to understand their needs to be able to meet them and obtain the appropriate resources in Quebec to assist them. They need to understand that E.P. is not the same child they had with them in Quebec. She has been through considerable disruption in her life. There is considerable damage that has been done that needs to be repaired.

[59] The society will be free to move to change the access order, on notice, if the children continue to struggle with the visits.

Part Five - Conclusion

[60] An order will go on the following terms:

- a) The maternal grandfather is added as a party to this case.
- b) The maternal grandfather shall serve and file his Answer/Plan of Care by February 1, 2013.
- c) The maternal grandfather shall have temporary access to the children on the following terms and conditions:
 - i) The visits shall take place weekly.
 - ii) The visits shall take place on either Monday or Friday, at the option of the society.
 - iii) The first two visits shall be for two hours in the society office.
 - iv) The next two visits shall be for three hours. One-half of the time can take place in the community.
 - v) The next two visits will be for four hours. The first and last half-hours of the visits will take place in the society office. The balance of the visit can take place in the community.
 - vi) The following visits shall be for six hours. The first and last half-hours of the visits shall take place in the society office. The balance of the visit can take place in the community.
 - vii) The society and the maternal grandparents are free to agree on further and other access.

- viii) The mother shall not attend at any of these visits. The society is not to schedule her visits on the same day as the maternal grandfather's visit.
- ix) The maternal grandmother may attend at each of these visits.
- x) The society may have a worker observe portions of the community visits and the maternal grandparents shall cooperate with this.
- xi) The maternal grandparents shall not introduce the children to other family or friends, without prior approval of the society.
- xii) The maternal grandparents are not to discuss with the children that they are planning to have them live with them.

[61] The case is adjourned until February 4, 2013 at 10:00 a.m. for a case conference.

Date: December 31, 2012

Justice S.B. Sherr