# WARNING

## THIS IS AN APPEAL UNDER THE

## *CHILD AND FAMILY SERVICES ACT*

## AND IS SUBJECT TO S. 45 OF THE ACT WHICH PROVIDES:

**45. (7)** The court may make an order,

(a) excluding a particular media representative from all or part of a hearing;

(b) excluding all media representatives from all or a part of a hearing; or

(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 the presence of the media representative or representatives or the publication of the report, as the case may be, would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding.

**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.

**45. (9)** 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.

# COURT OF APPEAL FOR ONTARIO

CITATION: Children's Aid Society of Toronto v. G.S., 2012 ONCA 783
DATE: 20121119
DOCKET: C55658

Simmons, Armstrong and Watt JJ.A.

BETWEEN

Children’s Aid Society of Toronto

Applicant (Respondent in Appeal)

and

G.S.

Respondent (Appellant in Appeal)

Robin E. Leighton, for the appellant

Caroline Handleman, for the respondent

Heard: October 30, 2012

On appeal from the order of Justice Emile R. Kruzick of the Superior Court of Justice, dated May 22, 2012, dismissing the appeal from the order of Justice Debra A.W. Paulseth of the Ontario Court of Justice, dated October 19, 2011.

**By the Court:**

[1] The appellant appeals the order of a Superior Court judge dismissing his appeal from an order of an Ontario Court judge making M.S. a Crown ward. The formal order for Crown wardship is silent on the issue of access. In her reasons, the trial judge noted that it was clear from the evidence that if M.S. were made a

Crown ward, he would be adopted by his foster family and his biological father would be able to continue contact with his son.

[2] The appellant raises one issue on appeal. He argues that the Superior Court appeal judge and the trial judge erred in their application of subsection 37(3) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("*CFSA*") regarding the best interests of the child.

[3] For the reasons that follow, we allow the appeal.

## A. BACKGROUND

[4] The appellant is the biological father of the child, M.S., who was born in June 2008.

[5] M.S. was initially apprehended two days after his birth because of the Society's concerns about his biological mother, R.O. R.O. suffered from untreated mental health issues (the result of a closed head injury when she was 15) and had a criminal record for assaults. Both parents had a history of substance abuse. An older child, R.S., was made a Crown ward soon after M.S. was initially apprehended. On May 1, 2009, summary judgment was granted finding M.S. a child in need of protection.

[6] Although R.O. took no steps to cooperate with the Society and address her issues following M.S.'s initial apprehension, in the words of the trial judge, the appellant "turned his life around". As described by the trial judge, the appellant

attended his visits regularly, began a therapeutic access program, attended the Canterbury Clinic for substance screens and counselling, and participated in a relapse prevention program three times. He also completed an anger management program and the “Caring Dads” program.

[7] As a result of the appellant’s efforts, on December 10, 2009, the court ordered that M.S. become a ward of the Society for two months and then be placed in the care and custody of the appellant for 12 months, subject to Society supervision. One of the conditions of the supervision order was that the appellant not have any contact with R.O., if M.S. was with him, and that he not allow R.O. to have access to M.S. without preapproved consent by the Society.

[8] On February 9, 2011, an order was made terminating the Society’s supervision of M.S. and placing him in the appellant’s custody with a restraining order against R.O. under subsection 57.1(3) of the *CFSA*.[1]

[9] On March 17, 2011, a Society worker made an unannounced visit to the appellant’s home and found R.O. alone in the apartment with M.S. As a result, M.S. was again apprehended that day and returned to the foster family he lived with before being placed in his father's care.

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[1] Subsection 57.1(3) of the *CFSA* provides that, “When making an order under subsection (1), the court may, without a separate application, make a restraining order in accordance with section 35 of the *Children’s Law Reform Act, 2009*, s. 11, s.3.” Section 35 of the *Children’s Law Reform Act, 2009*, permits a court to make a restraining order “if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody.”

[10] As a result of M.S.'s apprehension, the Society launched a further protection application seeking a final order for Crown wardship, with no access, for the purpose of adoption.

[11] At trial, it emerged that the appellant had reconnected with R.O. in the late fall of 2010 and allowed her to store some of her belongings at his apartment. As stated by the appellant, "inevitably [M.S.'s] path and [his] mother's path crossed." The trial judge found that "[t]his contact increased such that, on three or four occasions before March 17, 2011, [M.S.] was present when [the appellant] saw [R.O.]."

[12] According to the appellant, on the morning of March 17, 2011, he received an early morning telephone call to go to work – and R.O. called immediately thereafter. She sounded okay to him and he needed a babysitter. She seemed all right when she arrived. The appellant prepared M.S.'s lunch and believed M.S. would have a nap. The appellant hoped to be back within about six hours – by 3 p.m.

[13] The appellant's evidence at trial made it clear that he had lied to his Society worker about not having contact with R.O. and that he had also lied in the Statement of Agreed Facts filed in support of the February 2011 order, which terminated the Society's supervision.

[14] That said, the appellant also gave evidence at trial concerning the steps he had taken to ensure he has no ongoing contact with R.O. For example, he took back the key he had given her to his apartment, changed his locks and telephone number, continued counselling at the Canterbury Clinic and wrote a letter to R.O. in an effort to gain closure of that relationship.

## B. THE TRIAL JUDGE'S REASONS

[15] The trial judge began the analysis section of her reasons by noting the efforts the appellant had made to turn his life around and establish a good relationship with his son. She described him as “a very pleasant, sincere, and likeable person … who dearly loves his son.”

[16] Nonetheless, the trial judge noted that the appellant had made serious mistakes in the past – in relation to substance abuse, errors in judgment and in his relationship with R.O. In essence, the trial judge concluded that, in the light of the serious risk R.O. posed to M.S., and in the light of the appellant’s conduct in exposing his son to that risk as well as lying about it, M.S.’s best interests required that he be made a Crown ward. She said:

> In the three months from December, 2010 until the apprehension in March, 2011, [the appellant] had increasing contact with [R.O.]. They talked on the phone. He saw her when [M.S.] wasn't there. He then saw her three or four times when [M.S.] was there and then left [M.S.] with her to go to the store and finally for the better part of a day…

> [R.O.] is a serious risk to [M.S.]. Someone who lets [M.S.] get to know [R.O.] is placing him at risk. Someone who leaves [M.S.] with [R.O.] is placing him at risk.
>
> Someone who makes these mistakes after this much involvement with courts and doctors and treatment centers, a young child made a Crown ward and a second child apprehended twice – this is someone who cannot really commit to meeting [M.S.]'s best interests. No amount of prohibitive conditions would be likely to make this situation adequate – they didn't work before on more than one occasion. I cannot place a child back in that same situation. If it was a question of giving [the appellant] another chance at just about anything else – I would but not a helpless child – the court has to focus on [M.S.] and not [the appellant]'s best interests.

## C. THE SUPERIOR COURT APPEAL JUDGE'S REASONS

[17] On appeal, the Superior Court appeal judge decided the matter on the basis of deference to the trial judge. The appeal judge acknowledged that the trial judge did not articulate all the elements of the best interests test, but concluded that the consideration of the best interests test was implicit in her reasons. Finding no errors of fact or law, he therefore dismissed the appeal.

## D. RELEVANT STATUTORY PROVISIONS

[18] Subsection 37(3) of the *CFSA* sets out the factors to be considered, where relevant, in making an order in the best interests of the child:

> 37. (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:

1. *The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.*

2. The child's physical, mental and emotional level of development.

3. The child's cultural background.

4. The religious faith, if any, in which the child is being raised.

5. *The importance for the child's development of a positive relationship with a parent and a secure place as a member of the family.*

6. *The child's relationship and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community.*

7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.

8. The merits of the plan for the child's care proposed by society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with returning to apparent.

9. The child's views and wishes, if they can be reasonably ascertained.

10. The effects on the child of delay in the disposition of the case.

11. *The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.*

12. *The degree of risk, if any, that justify the finding that the child is in need of protection.*

13. Any other relevant circumstance (emphasis added).

## E. DISCUSSION

### (1) Standard of Review

[19] In *C.(G.C.) v. New Brunswick (Minister of Health and Community Services)*, [1988] 1 S.C.R. 1073, at para. 5, the Supreme Court of Canada said the following about the deferential standard of review applicable in family law cases in the context of a child welfare proceeding:

> …trial judges' decisions, particularly in matters of family law, should not be interfered with lightly by appellate courts absent an error in principle, a failure to consider all relevant factors, a consideration of an irrelevant factor or a lack of factual support for the judgment.

[20] The order under appeal in this case is the order dismissing the appeal of the trial judge's decision. At this stage, this court should only intervene if the Superior Court appeal judge erred in principle by failing to identify a material error in the decision below.

[21] In our view, the Superior Court appeal judge did err in principle by failing to identify a material error in the decision below – namely, that the trial judge considered only the risk of harm to the child if the appellant exposed him to R.O. and failed to weigh that harm against the risk of disruption to the child's relationship with his father if an order for Crown wardship were made.

[22] On that basis, it is our view that the Superior Court appeal judge erred in failing to identify the error in principle below and in dismissing the appeal.

**(2) The "Best Interests" Determination**

[23] On appeal to this court, the appellant argues that the Superior Court appeal judge erred in failing to hold that the trial judge erred in law by failing to consider the bond between M.S. and his father, the risk that the bond would be diminished or terminated as a result of the Crown wardship order, and the harm to M.S. that could follow.

[24] We agree with this submission.

[25] In our view, the trial judge made the following error in principle in analyzing M.S.'s best interests: she failed to identify the risk of disruption to the valuable relationship with his father that a Crown wardship order would introduce as a relevant factor in the "best interests" analysis and she failed to balance this risk against the risk of harm to M.S. through exposure to R.O.

[26] On appeal, the Superior Court appeal judge repeated this error by deciding the case based on deference without reference to this omission in the trial judge's "best interests" analysis.

[27] Subsection 37(3) of the *CFSA* requires a person in determining a child's "best interests" to take into account all relevant circumstances, including those specifically listed.

[28] In this case, the child's emotional needs in connection with his relationship with the appellant (s. 37(3)1), the importance of the child's development of a

positive relationship with the appellant (s. 37(3)5), the child's relationships and emotional ties to the appellant (s. 37(3)6) and the risk of harm to the child if he were kept away from his father (s. 37(3)11) were all highly relevant. While the risk that the child may suffer harm through being allowed to remain in the appellant's care was also relevant, it was an error for the trial judge to consider that risk alone.

[29] That the relationship between the appellant and M.S. was positive is clear from the trial judge's reasons. At para. 19, the trial judge accepted that the supervised visits between M.S. and the appellant have "always been very positive", that the two have "a close and loving relationship", that the appellant is "attentive to [M.S.'s] needs and very affectionate with him", and that M.S. is "always excited to see his father".

[30] Given this clearly positive relationship, it was necessary for the trial judge to assess the degree of risk to M.S. through the possibility of exposure to R.O. – an exposure that the appellant had taken steps to reduce by retrieving his apartment key from R.O., changing his locks and phone number, and writing a letter to R.O. asking her not to contact him – and balance it against the disruption to the father/son relationship.

[31] Rather than engaging in this balancing exercise, the trial judge appears to have been satisfied with the future adoptive mother's statement that she would

allow the appellant to visit with his son, and with making the Crown wardship order silent about access. In our view, this was an error. The court should not have rested upon the assurances of this foster parent alone as a basis for disregarding the potential for risk to M.S. arising from the disruption of his relationship with his father. This is so for at least two reasons. In the absence of an order entitling the appellant to have contact with M.S., the adoptive parents could at any point and for any reason choose to sever that contact.[2] Moreover, even if some contact were to continue, this contact would necessarily be significantly reduced in a way that could be contrary to M.S.'s best interests.

[32] Turning to the degree of risk posed to M.S. from the risk of exposure to R.O., ss. 37(3)12) requires consideration of "the degree of risk, if any, that justified the finding that the child is in need of protection". Throughout her reasons, the trial judge treated the risk of harm to M.S. through exposure to R.O. as significant.

[33] However, beyond referring to the fact that the risk posed by R.O. stems from mental health issues and R.O.'s decision to self-medicate those issues with marijuana, and to the further fact that the risk of harm manifests itself in domestic

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[2] A continuing relationship can be preserved where the society applies for an openness order under s. 145.9(1) of the *CFSA*. Subsection 145.1(3) of the *CFSA* provides that the court may make an openness order in respect of a child if the court is satisfied of the following: that it is in the best interests of the child; that the openness order will permit the continuation of a relationship with a person that is beneficial and meaningful to the child; and that the society, the person who will be permitted to communicate with or have a relationship with the child if the order is made, and the person with whom the society has placed or plans to place the child for adoption, have all consented.

violence, aggression and inability to interact appropriately with her children, the trial judge never identified the precise degree of risk posed to M.S. by R.O. if M.S. were allowed to remain in the appellant's care.[3]

[34] The documents filed in the appeal record identify incidents of domestic violence between R.O. and previous partners, between R.O. and the appellant, and, on one occasion, between R.O. and an access supervisor. During the latter incident, R.O. apparently threw a bowl, a spoon, and a banana at the access supervisor. While the record supports a finding that exposure to R.O. poses a risk to M.S., none of the other documents in the appeal record addressed this risk in the context of the appellant having "turned his life around", overcome his substance abuse problems, and ceased living with R.O. as a domestic partner. In these circumstances, the extent of that risk if M.S. were placed in the appellant's care subject to a restraining order was not in our view sufficiently quantified to permit a proper balancing against the risk of disruption to the positive relationship with the appellant.

[35] For these reasons, it was in our view, an error for the trial judge not to weigh the risk of harm through exposure to R.O. against the risk of disruption to M.S.'s relationship with the appellant. In light of this error, it was equally an error

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[3] At para. 12 of her reasons, the trial judge states "all the documents referred to above discuss in great detail the inability of [R.O.] to interact appropriately with her children and the high degree of risk she poses to [the child, M.S.]". At para. 41, it is stated that "[R.O.] is a serious risk to [M.S.]". The trial judge refers to R.O.'s mental health issues, her decision to self-medicate, and to the documented incidents of domestic violence, aggression and an inability to interact appropriately with her children.

for the Superior Court appeal judge to defer to the trial judge in the absence of the required balancing of best interest factors.

[36] In the light of the nature of the issues to be determined, we see no alternative but to order a new trial.

[37] In the result, the appeal is allowed, the orders of the Superior Court appeal judge and of the trial judge are set aside, and a new trial is ordered.

Released: “JS” November 19, 2012

“Janet Simmons J.A.”

“Robert P. Armstrong J.A.”

“David Watt J.A.”