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. V. L., 2012 ONCA 890
DATE: 20121219
DOCKET: C55439

Cronk, Armstrong and Epstein JJ.A.

BETWEEN

Children’s Aid Society of Toronto

Applicant (Respondent on Appeal)

and

V.L. and P.L.

Respondents (Appellants on Appeal)

V.L. and P.L., acting in person

Sherri Smolkin and Linda Hofbauer, for the respondent Children’s Aid Society of Toronto

Elizabeth McCarty and Michal Harel, Office of the Children’s Lawyer, for the child A.L.

Heard: December 3, 2012

On appeal from the order of Justice Darla A. Wilson of the Superior Court of Justice, dated June 6, 2012, with reasons reported at 2012 ONSC 2477, [2012] O.J. No. 2765.

Epstein J.A.:

I INTRODUCTION

[1] On December 17, 2007, when the appellants’ daughter, A.L., was five years of age, she was declared a child in need of protection pursuant to the *Child and*

Family Services Act, R.S.O. 1990, c. C.11 (the "*CFSA*"). Subsequent child protection proceedings resulted in A.L. being placed under Crown wardship, without access, for adoption.

[2] A.L. was brought to the attention of the Children's Aid Society (the "CAS") on March 7, 2007, when her doctor referred her to the Suspected Child Abuse and Neglect Unit at the Hospital for Sick Children due to concern that she might be suffering from rickets. In response to this concern, and upon attending the parents' home, where A.L. lived with her parents, a marijuana grow-op was discovered. A.L. was admitted into the hospital and tests demonstrated that, in addition to having rickets, she had other medical problems, including testing positive for cannabinoids, due to exposure to marijuana in the home.

[3] Charges were laid against the appellants arising out of the drug operation and their failure to provide their daughter with the necessaries of life.

[4] Following her apprehension, A.L. remained in the temporary care and custody of the CAS. Subsequently, in July 2007, on consent of the parties, she was placed in the temporary care of her maternal aunt, J.C., and J.C.'s husband, D.D.

[5] On November 29, 2007, during a supervised access visit, the appellants, aware that the CAS had brought a motion for summary judgment and that it was

scheduled to be heard on December 17, 2007, abducted A.L. The family was “on the run” until April 14, 2008, when the police finally located them in Montreal.

[6] The appellants were arrested and incarcerated. Since then, they have had no access to A.L. Her father, P.L, pleaded guilty to possession of marijuana for the purpose of trafficking, and both of her parents pleaded guilty to abduction and endangering the health of A.L. They were sentenced in April 2009.

[7] In the meantime, the motion for summary judgment took place as scheduled. A.L. was found to be a child in need of protection pursuant to s. 37(2) of the *CFSA*, meaning that it was held that she suffered or was at risk of suffering physical harm inflicted or caused by the appellants, including through neglect, and that she required medical treatment that the appellants did not provide. The motion judge found that there was evidence of “severe neglect” in the appellants’ treatment of their daughter, and she placed A.L. in the care of J.C. and D.D. for six months, subject to the supervision of the CAS.

II STATUS REVIEW AND APPEAL

[8] A status review application was brought seeking an order making A.L. a ward of the Crown, without access, for adoption. She was placed back in the care of her aunt and uncle. In April 2009, after an eight-day trial, A.L. was made a Crown ward with no access to the appellants and available for adoption. This

decision was overturned on appeal on the basis of reasonable apprehension of bias on the part of the trial judge and a new trial was ordered.

[9] The second trial, which took 14 days, ended in the decision of Spence J. of the Ontario Court of Justice, dated November 22, 2010, in which he came to the same conclusion as that reached in the first status review hearing. Spence J. made the same order and A.L. again became a ward of the Crown, without access, subject to adoption.

[10] The appellants appealed from this order to Wilson J. of the Superior Court of Justice, raising a number of issues. The primary issues were that the trial judge:

1. erred in concluding that the appellants failed to seek medical attention for A.L.;
2. demonstrated bias or a reasonable apprehension of bias;
3. erred in his consideration of the best interests test under s. 37(3) of the *CFSA*; and
4. erred in his finding that the appellants had continually demonstrated intransigence, a lack of co-operation, bad judgment and were ungovernable.

[11] Wilson J. reviewed the entire history of events preceding and following the protection order. She noted the evidence relating to A.L.'s condition and circumstances upon being apprehended, including extensive medical evidence that A.L.'s health was at risk. V.L. herself testified that she had not taken A.L. to a doctor for several years despite the fact that she noticed her daughter's

developing physical abnormalities associated with rickets. Wilson J. reviewed the evidence pertaining to the five months A.L. and the appellants were on the run and their conduct subsequent to apprehension. She went through the evidence of the appellants' conduct leading up to the Crown wardship order, evidence that demonstrated their lack of respect for authority and their apparent determination to maintain an acrimonious relationship with J.C. and D.D. The appeal judge also reviewed updated information concerning A.L.'s experience living with her aunt and uncle.

[12] After careful consideration of the evidence relevant to the trial judge's findings and his analysis as set out in his lengthy reasons, Wilson J. concluded that the trial judge's findings of fact were supported by the record, and that there was no error in his application of the law pertaining to the court's role on a status review. She dismissed the appeal.

III ISSUES

[13] The many issues the appellants raise in this appeal can be grouped as follows:

> 1. Did the appeal judge err in failing to overturn the finding that A.L. was in need of protection and in failing to overturn the determination of the disposition found to be in her best interests?
>
> 2. Did the appeal judge err in failing to find that the trial judge exhibited a reasonable apprehension of bias?

3. Did the appeal judge err in failing to find misconduct on the part of the CAS?

4. Did the appeal judge err in failing to find grounds for a mistrial?

5. Did the appeal judge err in failing to admit all the fresh evidence the appellants proposed to have admitted?

6. Did the appeal judge err in her obligation to raise the *Charter* rights of A.L. and her parents?

IV ANALYSIS

The overarching principles

[14] Two principles dominate the analysis – the paramount consideration of the best interests of the child and the standard of review.

[15] First, the court owes a special duty to ensure that the safety and well-being of children are protected. As a result of this special duty, the best interests of the child are always the paramount consideration in child protection proceedings.

[16] Second, the degree of deference owed to the trial judge is particularly high in child protection proceedings. In *C.(G.C.) v. N.B. (Min. of Health & Community Services)*, [1988] 1 S.C.R. 1073, at para. 5, the Supreme Court described the standard of review applicable in such cases as "…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."

[17] This court should only intervene, therefore, if the Superior Court appeal judge erred in principle by failing to identify a material error in the decision below.

Fresh evidence motion

[18] The appellants and the respondents have applied to have fresh evidence admitted on this appeal.

[19] Section 69(6) of the *CFSA* provides that the court may receive further evidence related to events that took place after the previous hearing. The test for admitting fresh evidence in child protection proceedings is set out in *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)*, [1994] 2 S.C.R. 165, at para. 23, as follows. The proposed evidence should be admitted if: a) it could not have been adduced before; b) it is highly relevant; c) it is potentially decisive to a best interests determination; d) it is credible, and; e) it is uncontroverted and bridges the gap between the evidence submitted before the prior court and the appeal court.

[20] The appellants seek to introduce on this appeal V.L.'s affidavit containing information about the appellants' circumstances, including their residence and employment, their contact with the CAS, the disclosure the CAS had provided, and statements about their extended family.

[21] The respondents do not oppose the admission of some of the proposed evidence. However, they oppose the inclusion of: 1) certain evidence about the criminal proceedings; 2) evidence the appeal judge refused to admit that the appellants contend discloses A.L.'s views and preferences; 3) argument about the role of the Children's Lawyer; and 4) statements about the extended family.

[22] In my view, the paragraphs to which the respondents take objection either fail to meet any of the criteria set out in *M.(C.)* or contain argument or inadmissible hearsay. I would therefore admit the affidavit into evidence with the exception of paragraphs 9, 18, 29, 31 to 42, and 44 to 48.

[23] The CAS moves to have an affidavit admitted sworn by a CAS services worker containing up-to-date information of A.L.'s current circumstances. It is precisely the type of evidence that s. 69(6) of the *CFSA* contemplates. This evidence is consistent with the intent of the legislation by assisting the court in making decisions pertaining to the welfare of particularly vulnerable children by allowing current information relevant to the determination of the child's best interests to be available. In my view, the fresh evidence proposed by the CAS should be admitted.

Issues on Appeal

1. **Did the appeal judge err in failing to overturn the finding that A.L. was in need of protection and in failing to overturn the determination of the disposition found to be in her best interests?**

[24] The appellants submit that the courts below failed to examine the entirety of the situation, taking into consideration the factors surrounding A.L.'s initial apprehension through to the dismissal of the appeal by Wilson J.

[25] I start with a critical point – the appellants did not appeal the protection order made in December 2007. At the time of the hearing of the status review application and of the appeal before the Superior Court judge, the protection order was final. Neither the trial judge nor the appeal judge had jurisdiction to go behind it.

[26] The appellants submit that this is unfair, and that they have been deprived of their rights to challenge the protection order. I do not agree. The appellants, aware of the date of the pending CAS motion for summary judgment, chose to abduct A.L. rather than attend court and present their case opposing the order sought. While the time to appeal the order had expired, counsel for both respondents submit that in circumstances such as these, the appellants, apprised of the protection order shortly after they were arrested, could have obtained an extension of time to appeal. No extension was sought.

[27] Notwithstanding the finality of the original order, the trial judge considered the entire history of the matter over the course of a 14-day hearing in which the appellants fully participated.

[28] In lengthy reasons, Spence J. devoted twelve pages to a summary of the evidence relating to A.L.'s apprehension, the original protection order, and ongoing concerns about whether she would be at risk if she were returned to her parents. He made findings of fact that were open to him on the record, and from those findings determined that A.L. remained in need of protection. He summarized his assessment of A.L.'s circumstances in relation to her parents as follows:

> I have no doubt that the parents love A.L....If this were enough to return a child to her parents, I would not hesitate to make an order sending A.L. back to her parents. However, that is not what this case is about. As the evidence unfolded during the trial, the over-arching theme became the parents' unremitting bad judgment. And here I am not referring to judgment in respect of minor issues but, rather, the kind of judgment that goes to the very core of A.L.'s safety, as well as her emotional and physical wellbeing. Regrettably, this bad judgment is not something which is merely historical in nature, but, instead, something which the parents have never demonstrated either a willingness or ability to address, right up to and during the course of trial.

[29] As previously indicated, the trial judge concluded that A.L.'s best interests would be served by making her a Crown ward, with no access, and available for

adoption by her aunt and uncle with whom she had been living for several years and in whose care she was thriving.

[30] Wilson J. applied the appropriate standard of review and upheld Spence J.'s order making A.L. a Crown ward, with no access, for the purpose of adoption. The evidence of the appellants' "unremitting bad judgment", in the words of Spence J., and its effect on A.L. and the evidence of her happiness, good health and the overall improvement in her welfare after having lived for several years with her extended family overwhelmingly supported this disposition.

[31] I see no basis for this court to interfere and would therefore not give effect to this ground of appeal.

2. Did the appeal judge err in failing to find that the trial judge exhibited a reasonable apprehension of bias?

[32] The appellants argue that by making a veiled direction to counsel to prepare A.L. to consent to adoption, the trial judge demonstrated bias, or that a reasonable person would apprehend bias.

[33] The test for bias is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would think it more likely than not that the decision maker would not decide fairly: see *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 31. In my view, Wilson J. correctly concluded that the appellants had not met this high threshold.

[34] I agree with the appeal judge that the record does not give rise to any concern about bias or reasonable apprehension of it. A fair reading of the impugned part of the transcript shows that Spence J., in an attempt to obtain information about A.L.'s views, inquired whether anyone had asked her about the possibility of her consenting to being adopted. While this question may not have been relevant given the child's age, nothing about the question or any comments he may have made in the course of asking the question disclose bias or are suggestive of bias in the sense that he may have pre-determined the matter.

[35] I would not give effect to this ground of appeal.

3. Did the appeal judge err in failing to find misconduct on the part of the CAS?

[36] The appellants contend that one of the CAS workers was determined to remove A.L. from her parents, and to this end purposely misled the court and provided false evidence.

[37] The trial judge, having heard all the evidence, including V.L.'s cross-examination of the CAS worker, concluded that she was a credible witness. He found, as he was entitled, that the appellants' allegations against the CAS worker were not borne out or were irrelevant.

[38] The appeal judge gave these findings the appropriate degree of deference and dismissed this ground of appeal. I see no error in her rejection of this argument, and would therefore not give effect to this ground of appeal.

4. Did the appeal judge err in failing to find grounds for a mistrial?

[39] The appellants argue, for the first time in this court, that the trial judge, in an effort to bolster J.C.'s credibility, improperly interfered in her cross-examination. I have been unable to find anything in the transcript that supports this submission, and I would reject this ground of appeal.

5. Did the appeal judge err in failing to admit all the fresh evidence the appellants proposed to have admitted?

[40] In my view, the appeal judge correctly applied the principles relevant to the admission of fresh evidence as set out in the *CFSA* and the applicable case law. Applying the test in *M.C.*, she determined that some of the fresh evidence should be admitted and some should not. I see no error in the exercise of her discretion in this respect and would not give effect to this ground of appeal.

6. Did the appeal judge err in her obligation to raise the *Charter* rights of A.L. and her parents?

[41] The appellants, again for the first time in this court, submit that they have been deprived of their security of person and have been treated contrary to the principles of fundamental justice.

[42] The appellants' arguments with respect to this issue, indeed with respect to the entire appeal, centre on their ongoing disagreement with the trial judge's interpretation of the evidence and their distrust of and animosity toward J.C., D.D. and the CAS. While they are understandably distraught over the outcome

of this case, the fact that the appellants disagree with that outcome does not give rise to a *Charter* breach.

V CONCLUSION

[43] The appeal judge's reasons reveal a thoughtful consideration of the entire history of this matter and of the trial decision. In my view, there is no reason to interfere with her conclusion that the appeal ought to be dismissed.

[44] A.L. deserves to be both loved and protected from harm. The record contains many comments that make it abundantly clear that the appellants love A.L. However, the record also discloses that, given their unrelenting bad judgment in matters pertaining to their daughter's welfare, under their care, she is at risk of harm. In contrast, she has, for over four years now, been in a home where she is loved, is safe and is flourishing.

VII DISPOSITION

[45] For these reasons, I would dismiss this appeal without costs as no costs are sought by the respondents.

Released: "DEC 19 2012"
"EAC"

"Gloria Epstein J.A."
"I agree E.A. Cronk J.A."
"I agree Robert P. Armstrong J.A."