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: Peel Children's Aid Society v. M.H., 2018 ONCA 619
DATE: 20180709
DOCKET: C65209

Feldman, Hourigan and Brown JJ.A.

BETWEEN

Children’s Aid Society of the Region of Peel

Applicant (Respondent)

and

M.H. and S.H.

Respondents (Appellant)

and

M.O.

Respondent (Respondent)

O. Benjamin Vincents, for the appellant, S.H.

Laura Shaw and Amanda Rozario, for the respondent, C.A.S.

James Cook and Chris Junior, for the respondent, M.O.

Heard: July 3, 2018

On appeal from the order of Justice Lucy K. McSweeney of the Superior Court of Justice, dated March 7, 2018, with reasons reported at 2018 ONSC 1589, affirming the order of Justice Joseph W. Bovard of the Ontario Court of Justice, dated December 31, 2015, with reasons reported at 2015 ONCJ 756.

REASONS FOR DECISION

[1] This is an appeal from the order of McSweeney J. of the Superior Court of Justice, dated March 7, 2018, in which she dismissed an appeal from the order of Bovard J. of the Ontario Court of Justice, dated December 31, 2015. The latter order made the children of M.H. and S.H., namely Am and Az, Crown wards, without access.

[2] The children's father, S.H., appeals the decision of the appellate judge on numerous grounds.[1] One of those grounds is ineffective assistance of trial counsel, M.O. For the reasons that follow, the appeal is dismissed.

Background Facts

[3] The two sisters who are the subject of this appeal, Am and Az, are now 13 and 4. On February 25, 2011, when Am was 6 and before Az's birth, a third daughter of M.H. and S.H., M, died. M was 27 months at the time, and died while in her parents' care from complications arising from Vitamin D deficiency/rickets and asthma. An autopsy revealed that the complications were likely due to malnutrition.

[4] On March 3, 2011, Am was medically assessed and it was determined that she had severely low levels of Vitamin D and B12. The doctor assessing Am

[1] The mother's appeal, which asserted overlapping grounds of appeal, was dismissed when the mother failed to meet the deadline to perfect her appeal.

advised S.H. that dietary supplementation was necessary. On April 13, 2011, after S.H. admitted that Am had not been given the recommended vitamins, the Peel Children's Aid Society (the "Society") commenced a child protection application. Am was placed in foster care.

[5] In September 2011, the appellants were arrested and criminally charged as a consequence of M's death. They were held in custody for three months.

[6] In 2012, the Society worked with M.H. and S.H.to establish a plan for Am's return to their care. The Society deemed the plan unsuccessful in January 2013, due to the unwillingness of Am's parents to cooperate with Society representatives.

[7] Am was found to be in need of protection on April 17, 2013, pursuant to the *Child and Family Services Act,* R.S.O. 1990, c. C.11 (the "*CFSA*").[2] Her parents had overnight access with her until she was made a Crown ward without access.

[8] M.H. gave birth to Az on October 20, 2013. Az was apprehended at birth and placed in foster care. Her parents had supervised access to her until she too was made a Crown ward without access.

[9] Both Am and Az have had several foster placements since they were apprehended. They have been in the care of a paternal cousin, D.H., since June

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[2] O. Reg. 157/18: Transitional Matters under the new *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1, provides at s. 11(1) that, "A proceeding commenced under Part III of the old Act but not concluded before the day this section comes into force is continued as a proceeding commended under Part V of the Act."

30, 2015. The Society's current plan is to have D.H. permanently adopt both Am and Az, with no access to the parents.

The Trial

[10] The trial in the Ontario Court of Justice took place over 12 days between May and December 2014. The Society sought Crown wardship with no access, with a view to adoption. The parents, who did not testify, sought an order for the return of the children, with or without supervision.

[11] The parents were convicted of manslaughter in October 2014. S.H. was sentenced to two years less a day and M.H. was sentenced to two years to permit her to serve her sentence in a federal facility. On May 27, 2015, the trial judge re-opened the child protection trial to introduce evidence of the convictions and sentences. He declined to admit the reasons for sentence.

[12] S.H. and M.H. have appealed their criminal convictions to this court. Those appeals remain outstanding.

[13] The trial judge found that Az was a child in need of protection under the *CFSA*. He based that decision on the parents' failure to make alternative arrangements for the care of their children while incarcerated. In addition, based on the evidence of past parenting, he found that Az was likely to suffer physical harm if placed in her parents' care.

[14] The trial judge made both children Crown wards without access. In support of that order, he undertook a detailed analysis as required by ss. 56 and 57 of the *CFSA*. As part of that analysis, he noted that the children would not be adequately protected if returned to their parents' care due to their parents' lack of cooperation with the Society. In addition, he found that there is no alternative that would be less disruptive to the children and that would be in their best interests.

First Appeal

[15] On appeal to the Superior Court of Justice, S.H. and M.H. asserted multiple grounds of appeal. They argued that the trial judge was biased, and that he erred in his admission and use of various pieces of evidence, in failing to admit the reasons for sentence from their criminal trial and a late-filed expert report, in finding that there was no appropriate kin placement for a supervision order, in failing to consider Am's preferences, and in his use of past parenting evidence. They also asserted ineffective assistance of counsel at the trial, and the protocol of the court was followed to develop a record as the basis for the appeal judge to consider and decide the ineffective assistance of counsel issue.

[16] The appellate judge considered and rejected the appellants' grounds of appeal. She found that the trial judge's analysis was not tainted by any legal or factual errors. She dismissed the ineffective assistance of counsel ground of appeal. The appellate judge also considered the fresh evidence filed by the appellants and determined that it would not have affected the result.

Issues on This Appeal

[17] Before this court, the appellant father argues that: (i) the appellate judge erred in upholding the decision that Az was in need of protection and in finding that both children should be made Crown wards; (ii) the Society obtained the Crown wardship order by abuse of process; (iii) the appeal judge erred in failing to find that the ineffective assistance of counsel did not allow for a fair trial; and (iv) the appellate judge did not properly review the fresh evidence. He also seeks to admit further fresh evidence on this appeal.

[18] We do not give effect to any of these grounds of appeal.

Analysis

(i) Need of Protection and Crown Wards

[19] In our view, given the death of M while in her parents' care, the previous finding that Am was in need of protection, and the appellants' demonstrated inability to cooperate with the Society, there was ample evidence to support the finding made by the trial judge and affirmed by the appellate judge that Az was in need of protection.

[20] With respect to the order for Crown wardship, the trial judge gave detailed reasons in support of his finding that the test for such an order had been met. The reasons included an assessment of the children's physical, mental, and emotional needs, level of development, emotional ties to their parents, the merits of the plan

put forward by the Society versus the parents' plan, as well as the degree of risk that justified the finding that the children were in need of protection. The appellate judge made no error in declining to interfere with that finding.

[21] The appellant submits that there was no evidence to support a conclusion that the parents were not prepared to work with the Society to ensure that their children received proper nutrition to keep them healthy and safe from harm. We disagree.

[22] The trial judge noted that in none of the plans put forward by the parents for their children's care was there any acknowledgment that they needed assistance in providing for the dietary needs of their children, nor was there any plan to improve their competence in this area. Instead, he found that they would take advice about nutrition only to the extent that it did not impede their criminal defence or conflict with their faith. The trial judge concluded, quite rightly in our view, that the parents were unwilling to put the children's well-being first. It was also clear on the record that they continued to believe that they fed their children sufficiently to prevent malnutrition and vitamin deficiency, despite all of the evidence to the contrary.

(ii) Abuse of Process

[23] The argument advanced on this ground of appeal is that while the Society knew that the father had presented D.H. as someone who could care for the

children, it proceeded to adduce evidence and argue before the appellate judge that the parents did not make plans for their children. Further, the appellant alleges that the Society hid from the appellate judge the fact that the father had given D.H.'s contact information to the Society and that that amounted to presenting a plan. The result, he says, is that the Society "ensured that what was to be a kin placement by either a supervision order or a custody order pursuant to s. 57.1 of the *CFSA* became a Crown wardship."

[24] This is a serious allegation of malfeasance by the Society and its counsel. We see the allegation as entirely meritless.

[25] The Society workers repeatedly asked the parents for names of family members who could potentially care for the children. D.H.'s name was mentioned in 2012 along with other family members. None of the family members presented a plan of care for Am at that time. The Society's position is that it does not, and has never, considered providing a name and phone number as equivalent to providing a plan of care. We reject the appellant's submission that by providing phone numbers for various relatives he was presenting a plan of care.

[26] It was not until after the trial, but before the release of the trial judge's decision, that D.H. contacted the Society and had concrete discussions about a potential plan for her as a caregiver. By that time the children had been in the interim care of the Society beyond the statutory time limit, so the Society's focus

was to identify a permanent placement. As the appellate judge noted, “A further kin placement under supervision of the Society, whether with D.H. or someone else, would not have advanced this goal”.

[27] At the time of the first appeal, D.H. had a strained relationship with the parents. She advised the Society that she would not supervise access visits if so ordered by the court.

[28] We note as well that all parties knew that the children had been placed under D.H.’s care by the end of June 2015. That was over a year-and-a-half before the first appeal hearing began.

(iii) Ineffective Assistance of Counsel

[29] On the first appeal, the parents alleged that their trial counsel’s representation was ineffective and rendered the trial verdict unreliable. The appellate judge first reviewed the applicable case law, including *Children’s Aid Society of the Regional Municipality of Waterloo v. C.T.*, 2017 ONCA 931, 286 A.C.W.S. (3d) 285, on the issue of whether this ground of appeal was moot. The appellate judge found that there was no error by the trial judge and thus she found that the issue of ineffective assistance of counsel was moot.

[30] On appeal to this court, S.H. submits that the appellate judge misapplied the *Waterloo* decision. He argues that in that case, this court was simply applying the well-established principle that where a client has suffered no prejudice as a

consequence of his or her counsel's performance, there is no need to examine the performance to determine whether it was ineffective. In the present case, he submits that there was potential prejudice caused by, for example, counsel dissuading the parents from testifying.

[31] We accept this submission. The fact that the trial judge did not err does not end the analysis of counsel's performance if there is potential prejudice. The appellate judge erred in equating the absence of an error by the trial judge with an absence of prejudice. However, the appellate judge went on to conduct an analysis of the allegations of ineffective assistance of counsel, in the event that she erred in her conclusion of mootness. As part of that analysis, she considered the evidence tendered by the appellants and their trial counsel. She found no merit in any of the ineffective assistance of counsel allegations.

[32] We see no basis to interfere with the appellate judge's findings on ineffective assistance of counsel. She carefully considered each allegation and the evidence applicable to each claim. The analysis was exemplary and reveals no legal or factual errors.

[33] On the appeal before us, counsel for the appellant placed particular emphasis on the allegation that trial counsel dissuaded him and his wife from testifying and failed to advise that their testimony would not impact their defence in the criminal proceeding. The appellate judge indicated that she could not find on

a balance of probabilities that the appellants wished to testify. She further noted that S.H. confirmed in cross-examination on this point that his testimony would have reflected the contents of an affidavit he swore in November 2013. Having reviewed that affidavit, she found that had S.H. testified, his evidence would not have affected the result. There is no basis for this court to interfere with those factual findings.

[34] We would not give effect to this ground of appeal.

(iv) Fresh Evidence Below

[35] On the first appeal, the parents sought leave to file fresh evidence including: affidavits from each of them and from the Society, the sentencing reasons, medical records, and supplementary appeal records.

[36] The appellate judge held that a "majority of the fresh evidence re-states or confirms the parents' views as expressed to the Society and referred [to] elsewhere in the trial evidence". She further found that the only evidence that updated the court about the children was in an affidavit sworn by D.H. That affidavit confirmed the appropriateness of the trial judge's decision.

[37] Given these findings, the appellate judge concluded, "none of the fresh evidence could reasonably, when considered with the evidence adduced at trial, have affected the result".

[38] We agree with the Society's submission that S.H.'s affidavit confirmed his inability to cooperate with the Society, and his beliefs that M was properly fed, that he is a victim of a conspiracy, and that it is the Society that should be charged with failing to provide the necessities of life. This evidence supports the trial judge's findings.

[39] The filing of fresh evidence is not an opportunity to reargue a case *de novo*, making the same arguments based on slightly different material. While courts in child protection cases are generally more liberal in granting leave to file fresh evidence, in this case, where no new material information was tendered, the appellate judge made no error in finding that it would not have affected the result and in exercising her discretion to not admit the evidence.

(v) Further Fresh Evidence

[40] The appellant seeks leave to file further fresh evidence on this appeal, contained in an affidavit sworn in May of this year. The Society has filed a responding affidavit. Similar to the conclusion reached by the appellate judge, we are not satisfied that this new evidence would have affected the result in this case and decline to admit it.

[41] The appellant's evidence is filed for two purposes. First, it is tendered to show that the parents had made arrangements for D.H. to care for the children when they were incarcerated. However, as stated above, no plan for D.H. to care

for the children was presented prior to trial and the availability of D.H. was known to all of the parties well in advance of the appeal. This is not new information and we are not satisfied that it would make any difference to the outcome of the trial, the first appeal, or this appeal.

[42] Second, the new evidence is filed to show that the parents' youngest child is in their care. Although the Society has continuing concerns about the parents' parenting ability, and is monitoring the situation closely, they have not taken steps to remove the child. The appellant submits that this establishes that there are no safety concerns relating to his and his wife's parenting and that Am and Az should be returned to their care.

[43] We commend the efforts made by the appellant and his wife to properly care for their youngest child. However, we do not see this fresh evidence as establishing the absence of any continuing safety concerns for Am and Az. Most importantly, the focus must be on what is now in the best interests of Am and Az, the children that are the subject of these proceedings. Based on the fresh evidence filed by the Society, both children are thriving in their current environment. Am is going into grade eight in September. She attends public school and is active in sports and music. She has not seen her parents in several years. Az will be attending senior kindergarten next year and is progressing well in her early education. She has never known her parents. The Society's plan is for D.H. to permanently adopt the

children. They are doing well with her now, and there is every reason to expect that they will continue to do so.

[44] In these circumstances, we are not satisfied that the fresh evidence changes anything. It is not in the best interests of Am and Az to alter their current living situation.

Disposition

[45] The appeal is dismissed. The parties agreed that there should be no order for the costs of the appeal.

"K. Feldman J.A."
"C.W. Hourigan J.A."
"David Brown J.A"