WARNING

Prohibitions under the *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched. 1, apply to this decision:

Prohibition re identifying child

87(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.

Prohibition re identifying person charged

87(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.

Transcript

87(10) No person except a party or a party's lawyer shall be given a copy of a transcript of the hearing, unless the court orders otherwise.

…

Offences re publication

142 (3) A person who contravenes subsection 87 (8) or 134 (11) (publication of identifying information) or an order prohibiting publication made under clause 87 (7) (c) or subsection 87 (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 OF APPEAL FOR ONTARIO

CITATION: Catholic Children's Aid Society of Toronto v. V.O., 2023 ONCA 355
DATE: 20230518
DOCKET: COA-22-CV-0326 & COA-22-CV-0413

Feldman, Gillese and Huscroft JJ.A.

DOCKET: COA-22-CV-0326

BETWEEN

Catholic Children’s Aid Society of Toronto

Applicant (Respondent)

and

V.O. and B.M.

Respondents (Appellant)

DOCKET: COA-22-CV-0413

AND BETWEEN

Catholic Children’s Aid Society of Toronto

Applicant (Respondent)

and

V.O. and B.M.

Respondents (Appellant)

Andrew Burgess and Jessica Gagné, for the appellants

Fatima Husain, for the respondent

Heard: April 17, 2023

On appeal from the order of Justice E. Llana Nakonechny of the Superior Court of Justice, dated October 20, 2022, dismissing an appeal from the order of Justice Roselyn Zisman of the Ontario Court of Justice, dated May 19, 2022.

Huscroft J.A.:

OVERVIEW

[1] The appellants are L's biological parents. The respondent Catholic Children's Aid Society of Toronto ("CCAS") apprehended L in March 2019 when she was one year old following her hospitalization as a result of serious concerns about her growth. Although she was an average weight at birth (3.1 kg), by the time she was one year old she was severely underweight. She weighed only 4.2 kg – a weight expected for a one-month-old. She was developmentally delayed, unable to walk, stand, or roll over, and could barely hold her head up. In November 2020, the appellants consented to an order placing L into extended society care. More than a year later, in January 2022, and after the CCAS advised it was seeking an adoption placement for L, the appellants applied to the court for a status review, asking for L to be returned to their care.

[2] The motion judge held that leave was required and denied the appellants leave to bring an application. Her decision was affirmed by the appeal judge. This is a second appeal.

[3] The appellants argue that they are entitled to bring a status review application as of right. In the alternative, they argue that they should have been granted leave to bring their application.

[4] The appeal is dismissed for the reasons that follow.

BACKGROUND

(1) Factual background

[5] The appellants are the biological parents of L, who was born in March 2018, as well as a younger daughter. The appellant mother also has four older children, and what the motion judge described as “a history of extensive involvement with child protection agencies in Newfoundland, the Peel Region … and with the [CCAS].”

[6] By the time L was one year old, she was extremely underweight for her age. She weighed only 4.2 kg – only 1.1 kg more than at birth – a weight that would have been expected for a one-month-old child. She was also developmentally delayed, unable to walk, stand, or roll over, and could barely hold her head up. A pediatrician concluded that L required immediate medical treatment. She was taken to Humber River Hospital on March 4, 2019 and shortly afterwards transferred to the Hospital for Sick Children. L was put on a calorie-enhanced diet and gained weight steadily with minimal medical intervention.

[7] L was placed into foster care by the CCAS following her discharge from the hospital on March 28, 2019. She gained weight steadily while in foster care. The appellant mother gave birth to another child on April 16, 2019, and the CCAS placed that child in the same foster home as L the next day. Both children thrived in foster care. The appellants had supervised in-person parenting time as well as virtual parenting time during the COVID-19 pandemic.

[8] In July 2020, L was diagnosed with Bainbridge-Roper's Syndrome ("BRS"), a rare genetic condition which leads to feeding difficulties, intellectual disability, and other developmental disabilities, and was diagnosed with autism in December 2020. L has continued to gain weight in foster care but requires ongoing treatment such as physiotherapy and speech and language therapy. Her younger sister has not been diagnosed with any special needs.

[9] Protection applications for both children were set for trial. However, in November 2020, the appellants and the CCAS entered into a consent order placing L in extended society care. In the sworn agreed statement of facts submitted to the court, the appellants agreed that there was a risk that L was "likely to suffer physical harm" if she remained in their care due to a "pattern of neglect in caring for, providing for, supervising or protecting the child". The consent order permitted the appellants monthly visits with L at the CCAS office, which were later extended to unsupervised visits. L's younger sister was placed in the appellants' care

pursuant to a 12-month supervision order. The supervision order was subsequently terminated on consent.

[10] In June 2021, the CCAS informed the appellants that it was seeking an adoption placement for L. The appellants objected and sought to bring a status review application for the return of L to their care. They did not file their application until January 4, 2022.

[11] The CCAS has identified a potential adoptive family for L and formed the opinion that the prospective adoptive family has a good understanding of L's medical and developmental needs, as well as eventual openness needs. Whereas L's visits with the appellants have been monthly, since December 2021, L has had weekly visits with the prospective adoptive family. Although visits have continued, the appellants' status review application has put adoption planning on hold.

(2) The motion judge's decision

[12] At the first appearance of the status review proceedings on March 2, 2022, the motion judge directed that s. 115(5) of the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 ("*CYFSA*"), required the appellants to seek leave of the court to apply for a status review. The appellants did not object to the leave requirement and proceeded to apply for leave. The motion judge's reasons do not address the leave requirement issue.

[13] At the outset of her analysis, the motion judge noted that s. 115(5) does not set out a test for leave to seek a status review but added that a test has developed through the case law. She considered the five criteria set out by Bean J. in *Children's Aid Society of Metro Toronto v. B.A.F.*, [1988] O.J. No. 2950 (Prov. Ct. (Fam. Div.)):

1. The court must be satisfied that the status review application for which leave is sought must be made in good faith and not for some ulterior motive.
2. Leave should be refused where it is possible to obtain the relief sought by some less drastic way than a review of the whole order.
3. There must be some unusual circumstance to justify the review after two years and in spite of the child's permanent status.
4. The court must be satisfied that, after two or more years, a status review application would likely promote the objectives set out in section 1 [of the *CYFSA*].
5. The applicant must establish a *prima facie* case that, if leave was granted, the applicant would probably get the relief sought.

[14] The motion judge noted that there were two lines of cases relating to these criteria. Some cases have held, following *B.A.F.*, that all five criteria must be satisfied before leave will be granted. Others have adopted a more flexible approach, in which the court's discretion is not fettered by a requirement that the five criteria be satisfied. The motion judge considered that the five criteria provide

a helpful guide for conducting a contextual analysis of whether leave should be granted. For example, in *Children's Aid Society of Haldimand and Norfolk v. J.A.M.-F.*, 2011 ONCJ 53, at paras. 22-23, Thibideau J. stated that the leave determination is a matter of substance, not formality; the analysis should be child-focused and give effect to the purposes of the *CYFSA*.

[15] The motion judge preferred and both counsel agreed to a "more flexible approach" focusing on the merits of the leave application rather than the necessity of satisfying all five criteria. She stated:

> Accordingly, the onus is on the parents to convince the court, on a balance of probabilities, that leave should be granted. In assessing the merits of the motion, the court is required to consider the legislative principles of the *CYFSA*. The first and paramount purpose is to promote the best interests, protection and well-being of the child. In reviewing these purposes the court must weigh if there is evidence that warrants a hearing on the merits. The court should weigh the circumstances flowing up to the leave application with the secure placement of the child.

[16] The motion judge found that appellants were sincere in wanting to have L returned to their care. She also found that a significant element of the appellants' motive for bringing the motion was to defeat the adoption plan for L, describing their agreement to an extended society care order for the child as "a litigation strategy". The motion judge noted that the CCAS conceded that custody of L could be determined only by a status review application, but if L were placed for adoption,

the parents' continuing contact with L could be determined through a possible openness application.

[17] As for unusual circumstances justifying the court's review, the motion judge considered all of the appellants' arguments for granting them leave: that L's condition had improved; that they had been forced to agree to extended society care for L to avoid losing both L and her younger sister; that L's younger sister has been returned to their care and is no longer under a supervision order; that there have been no concerns about their care for L during access visits; and that they have now learned about BRS.

[18] The motion judge considered each of these arguments in turn. It was anticipated that L would improve in the care of foster parents who were meeting her needs and following up with her medical care. It was also clear, however, that L would always require 24-hour care and not be able to live independently. The motion judge concluded that the appellants' choice not to go to trial and to consent to extended society care for L was not a circumstance justifying leave. Nor was the fact that they had been able to care for L's younger sister, who has no special needs. As for BRS, the diagnosis was known at the time of the extended society care order. Although the appellants now blame all of L's medical issues on the condition, they took no responsibility for the serious condition that L was in when she was admitted to hospital in March 2019, or for their failure to seek any medical advice for a period of eight months. The motion judge concluded that the

appellants were seeking to relitigate whether L should have been placed in extended society care in the first place.

[19] As for whether the status review application would promote the objectives of the *CYFSA,* the motion judge referred to the delay inherent in granting leave and her difficulty accepting the appellants' assertion that they could meet L's significant special needs when they did not admit to having failed to meet those needs earlier.

[20] Finally, the motion judge noted the parties' concession that neither the report from Dr. Russell, submitted by the appellants, nor the report from Dr. Baird, submitted by the CCAS, met the test for admitting expert evidence. She quoted from Dr. Baird's report, which stated that BRS did not appear to cause children to require above-normal caloric requirements for growth, but stated that she did not need to rely on his report to conclude that the parents had not accepted responsibility for their role in what she described as the severe neglect of L. There was no logical explanation for why L began to gain weight as soon as she was admitted to hospital and continued to do so in foster care.

[21] The motion judge found that the plan proposed by the appellants did not ensure that L's extensive needs would be met on a consistent basis. She concluded that the appellants' status review application would prolong and possibly even disrupt L's opportunity for permanent placement with prospective

adoptive parents who were ready, willing, and able to meet her needs. The motion judge dismissed the appellants' leave motion.

(3) The appeal judge's decision

[22] On their first appeal to the Superior Court of Justice, the appellants argued that the motion judge erred by (1) requiring them to obtain leave to apply for a status review; (2) applying the incorrect leave test; (3) relying on inadmissible evidence (the opinion letter from Dr. Baird); and (4) making palpable and overriding errors of fact.

[23] The appeal judge rejected the appellants' argument that they did not require leave under s. 115(5) on the basis that the appellants had not raised this argument before the motion judge, and it was not in the interests of justice to consider the new argument on appeal. The appellants had brought the leave motion and the judge handled the motion in accordance with their request, rather than making the sort of findings that would otherwise have been required. The appeal judge also concluded that the motion judge did not apply the incorrect test for leave. There was evidentiary support for the motion judge's findings and they were not clearly wrong.

[24] The appeal judge concluded that the motion judge did not rely on inadmissible evidence: the motion judge found that neither doctor's letter met the test of an expert report and she did not consider them as such. The motion judge

noted that neither doctor examined L, and although Dr. Baird reviewed her medical reports it is not clear if Dr. Russell did. The motion judge also explicitly noted the frailties of a report not tested by cross-examination and made it clear that she was not relying on Dr. Baird's report to conclude that the parents have not accepted any responsibility for L's significant health issues when she was in their care. Finally, the appeal judge rejected the argument that motion judge made palpable and overriding errors of fact. The appeal judge dismissed the appeal.

ISSUES ON APPEAL

[25] The appellants filed separate notices of appeal and factums. Their submissions are merged for purposes of this decision.

[26] The following issues arise:

1. Did the appeal judge err in refusing to decide if leave was required to bring a status review application?
2. Was leave required for the parents to bring a status review application in this case?
3. If leave was required to bring a status review application, does this court have jurisdiction to hear an appeal from a refusal of leave?
4. What is the proper framework for leave under s. 115(5) of the *CYFSA*?
5. Did the motion judge err in the exercise of her discretion?

I address each of these issues in turn.

DISCUSSION

(1) The appeal judge erred in failing to decide whether leave was required

[27] The appellants brought their status review application on January 4, 2022, without requesting leave. At the first appearance in their proceeding on March 2, 2022, they were directed to bring a motion for leave to bring their application. Accordingly, they filed their request for leave on March 31, 2022.

[28] The appellants' decision to argue the merits of the leave issue before the motion judge and to save their arguments about the leave requirement for a possible appeal was reasonable in the circumstances and was the most efficient way to deal with the matter. It does not give rise to a concern that the appellants were raising new issues on appeal.

[29] In any event, the appeal judge had the discretion to hear a new argument and should have exercised it to hear the appellants' leave argument in this case. This was the parents' final attempt to secure the return of L. It would be contrary to the interests of justice and the paramount purpose of the *CYFSA* – to promote the best interests, protection, and well-being of children – to refuse to hear their leave argument. The court's role is to "deal with cases justly" – the primary objective of the rules, as r. 2 of the *Family Law Rules*, O. Reg. 114/99, makes clear. As this court has said, the court has "great latitude to adjudicate cases fairly":

Titova v. Titov, 2012 ONCA 864, 29 R.F.L. (7th) 267, at para. 48. The appellants' failure to object to the leave requirement at the time of the motion should not have precluded them from raising the issue on appeal. The appeal judge erred in concluding otherwise.

(2) Leave was required

[30] The appeal judge's error does not assist the appellants. As I will explain, the motion judge correctly concluded that the appellants required leave to proceed with their status review application. I set out the relevant provisions of the *CYFSA* below:

> **115** (1) This section applies where a child is in extended society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c), or is subject to an order for society supervision made under clause 116 (1) (a) or for custody made under clause 116 (1) (b).
>
> …
>
> (4) An application for review of a child's status under this section may be made on notice to the society by,
>
> (a) the child, if the child is at least 12;
>
> (b) a parent of the child;
>
> (c) the person with whom the child was placed under an order for society supervision described in clause 116 (1) (a);
>
> (d) the person to whom custody of the child was granted, if the child is subject to an order for custody described in clause 116 (1) (b);

> (e) a foster parent, if the child has lived continuously with the foster parent for at least two years immediately before the application; or
>
> (f) in the case of a First Nations, Inuk or Métis child, a person described in clause (a), (b), (c), (d) or (e) or a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities.
>
> (5) Despite clause (4) (b), a parent of a child shall not make an application under subsection (4) without leave of the court if the child has, immediately before the application, received continuous care for at least two years from the same foster parent or from the same person under a custody order.

[31] On a plain reading of s. 115(5), leave was required because L, a child in extended society care, received continuous care from the same foster parent for over two years. Faced with this, the appellants argue that leave to bring a status review application was not required because L's situation is not one that was intended to be captured by s. 115(5). They contend that s. 115(5) is concerned with ensuring that the stability of a child's long-term placement is not subject to potential disruption without due cause. Where the "continuous care for at least two years from the same foster parent or from the same person under a custody order" will be ongoing, a status review necessarily disrupts an established status quo. However, in L's case, the CCAS's plan is to place L for adoption in a *new* home, so disruption of the status quo is inevitable: L will either be moved to her adoptive family or returned to the appellants. Thus, the appellants argue that the leave requirement cannot be said to be in the child's best interests where the CCAS plans to move the child. Instead, it is in L's best interests for the court to give her

biological parents a full opportunity at a status review hearing to weigh their plan of care against the CCAS's.

[32] This interpretation must be rejected.

[33] Section 115(5) is clear: a parent may not make a status review application without leave once a child has received continuous care for at least two years from the same foster parent or from the same person under a custody order. This is consistent with the broader context of time limits in s. 122 of the *CYFSA* that prohibit interim society care orders exceeding 12 months for a child under six years of age, as well as the requirement in s. 112 that, once a child is in extended care, the society "make all reasonable efforts" to establish a permanent placement. In this case, L was in the same temporary foster home from March 28, 2019 and the appellants' status review application was not filed until January 4, 2022 – a period of almost three years.

[34] The appellants proffer no authority in support of their proposed interpretation. Section 115(5) establishes discretionary authority in the court to grant leave, but the court's discretion does not go so far as to eliminate the leave requirement itself. This argument must fail.

[35] In the alternative, the appellants argue that the two-year period in s. 115(5) refers to "continuous care for at least two years" following an extended society care order. Interpreted in this way, the time begins to run only *after* an extended society

care order has been made. Applying this approach, L had only been in continuous care with her foster parents following the extended society care order for about a year when the appellants brought their application for a status review.

[36] As with the first argument, there is no textual support for this interpretation of s. 115(5), nor is there any support in the case law. On the contrary, in several cases courts have included the time a child was with the same foster family prior to the extended society care (formerly referred to as “Crown wardship”) order in applying the two-year timeframe: see e.g., *B.A.F.*; *Children's Aid Society of Hamilton v. M.W.*, 2011 ONSC 1382; *Children’s Aid Society of Waterloo Region v. L.M.*, 2015 ONCJ 103.

[37] The appellants argue that to interpret s. 115(5) as requiring them to seek leave gives rise to an unfairness: because s. 115(7) establishes a six-month “placement window” prohibition on initiating a status review following a final order, expiration of this six-month period may coincide with two years of continuous care, leaving no window in which a parent may apply for a status review without leave. There could also be situations where the leave requirement is triggered immediately upon a child being placed in extended society care, which the appellants say would be absurd.

[38] This argument is misconceived. An extended society care order is distinct from an interim society care order. Section 122(1) of the *CYFSA* prohibits the court

from making an order for interim society care that results in a child younger than six being in the care and custody of a society for a period exceeding 12 months. This provision clearly indicates the intention of the Legislature to establish a time limit on legal limbo. The limit on time spent in interim care provides parents with a limited period of time in which to address the society's safety concerns. In contrast, s. 112 of the *CYFSA* makes clear that the purpose of an extended society care order is permanence: once an extended society care order is made, the CCAS is required to "make all reasonable efforts to assist the child to develop a positive, secure and enduring relationship within a family" through an adoption or a custody order. Given, as the appellant states, that the purpose of the six-month prohibition is to create a "placement window" during which the CCAS seeks to place the child for adoption or in a non-parent's custody, it is anticipated that the child may be placed for adoption during this time, finally terminating the parent's rights. There is no opportunity to seek a status review following an adoption placement: s. 115(9). Thus, although a status review is not foreclosed, the leave requirement established in s. 115(5) is consistent with the goal of permanence associated with an extended society care order.

[39] In this case, L was in foster care for 20 months before the extended society care order was made on November 16, 2020. As a result, the appellants had longer than the 12 months contemplated by the *CYFSA* for interim care during which to demonstrate to the court that L could be safely returned to their care. Instead of

consenting to placing L in extended society care in the fall of 2020, knowing that this designation would require the CCAS to look for a new enduring family relationship, the appellants could have proceeded to trial and argued for the return of L. The CCAS advised the appellants in June 2021 that it was looking for an adoptive placement for L. It was only in January 2022, after L had been in care for almost three years and was almost four years old, that the appellants sought to have her returned to their care. The appellants were not prevented from seeking a status review at this late stage, and so put permanence planning on hold, but consistent with the overall objectives of the legislation they were required to obtain leave to make their application.

[40] The *CYFSA* does not create an impossible situation for the appellants. It creates hurdles to parental intervention once an extended society care order has been made, but those hurdles are consistent with the purpose of such orders and with the appropriate balancing of factors to promote the best interests, protection, and well-being of children.

[41] The motion judge did not err in counting time with the foster family prior to the extended society care order in the two-year period referred to in s. 115(5). Time is of the essence in child protection cases and in this case the effect of the delay is plain: but for the appellants' status review application and two appeals, L would be in her adoptive home.

[42] For these reasons, the appellants required leave to proceed with their status review application.

(3) This court has jurisdiction to hear an appeal from a refusal of leave

[43] This issue can be addressed briefly. It is well established that an order refusing leave may be interlocutory or final, depending on the effect of the refusal: *Hendrickson v. Kallio*, [1932] O.R. 675 (C.A.), at p. 680. The CCAS accepts as much, but simply asserts that this was an interlocutory order without regard to its effect. There is no merit in this submission.

[44] The effect of the denial of leave is plain: the appellants were precluded from bringing a status review application to have L returned to them. The adoption of L could proceed following the denial of leave. Once L is placed for adoption, all access orders will terminate and the parents and the CCAS will be precluded from bringing a status review application. This effect is final, and there is no doubt that this court has jurisdiction to hear the appeal.

(4) The framework for leave

[45] The motion judge did not err in articulating the burden of proof. The applicant must satisfy the court, on a balance of probabilities, that leave should be granted. The question is: how should the court's discretion be exercised?

[46] The appellants argue that the motion judge erred in applying the wrong test for leave. Specifically, they argue that *B.A.F.* is no longer good law and that the

motion judge placed undue emphasis on the five factors set out in that decision. The appellant mother argues that the correct test is set out in *J.A.M.-F.*, at paras. 53-56: “Has the moving party placed before the court … apparently credible and weighty evidence that is sufficient to warrant holding a hearing on the merits? Is the evidence sufficient to demonstrate there is a reasonable prospect of success?” The appellant father proposes the following test: “Has the moving party put forward credible evidence that establishes a reasonable prospect of success with respect to the relief sought by the moving party on the status review application?”

[47] In my view, it is misleading to speak of a “test” for leave. The *CYFSA* does not set out a test for leave; it simply establishes a discretion to grant leave and does not enumerate any relevant considerations. This is the context in which Bean J. outlined the five criteria in *B.A.F.*, set out above. Read as a whole, those criteria suggest a limited scope for granting leave, such that it should only be granted exceptionally. Had the motion judge applied these five criteria strictly, requiring that all of them be satisfied, I would agree with the appellants that there had been an error in this case: the motion judge would have fettered her discretion under s. 115(5).

[48] But the motion judge did not apply the criteria strictly. Instead, she cited the line of cases confirming that the court’s discretion should not be fettered by strict criteria and that a more flexible approach should be taken. The motion judge

referred to the approach set out in *J.A.M.-F.*, an approach she described as focusing on the merits of the leave application rather than strict adherence to the five criteria, and described those criteria as a "helpful guide" for conducting a contextual analysis. Importantly, the motion judge emphasized that the analysis must be child-focused and must give effect to the paramount purpose of the *CYFSA*.

[49] I see no error in this regard. Plainly, discretionary authority should not be reduced to a set of criteria that apply in a rule-like fashion; to do so is to undermine the nature and purpose of discretionary authority. Different considerations may be of greater or lesser significance in different cases, and the motion judge correctly applied a flexible approach to the *B.A.F.* criteria.

[50] The strength of an applicant's case is, of course, an important consideration in determining whether to grant leave, but the inability to establish a *prima facie* case in the strong sense of that term – establishing, in effect, that a status review application will or is likely to succeed – need not doom a request for leave. I agree with Thibideau J., who stated in *J.A.M.-F.*, at para. 47:

> The proper test is one that recognizes the intent of the legislation and at the same time does not require the parent to make out the case twice, once at the leave hearing and again on the status review hearing, if successful on the leave hearing. The proper test allows meaningful and meritorious applications to move forward and prevents those that unnecessarily put at risk the in-place plan from moving forward.

[51] The motion judge did not consider the *prima facie* case criterion in the strong sense of the term. She proceeded on the basis that the requirement for leave is "substantial", and "[w]hat must be established is whether there is 'sufficient evidence to support holding a hearing and having any agency plan put on hold'". This approach interprets the *prima facie* case standard as requiring only a "reasonable prospect" or a "realistic chance" of success on the status review application. See e.g., *J.A.M.-F.*, at para. 56; *The Children's Aid Society of Toronto v. S.C.*, 2017 ONCJ 240, at para. 17; *S.R. v. Catholic Children's Aid Society of Toronto*, 2011 ONCJ 11, at para. 36; *Children's Aid Society of Brant v. A.C.*, 2015 ONCJ 436, at paras. 7-10; *M.P. v. Windsor-Essex Children's Aid Society and S.G.*, 2022 ONCJ 298, at paras. 25, 44.

[52] There is no magic in the terminology here. Suffice it to say that the strength of a proposed status review application is an important consideration in determining whether, in all of the circumstances, the court should exercise its discretion to grant leave. I am satisfied that the motion judge properly understood the nature of her discretion and, as I explain below, I see no basis to interfere in her exercise of discretion in this case.

(5) The motion judge exercised her discretion reasonably

[53] The appellants contend that the motion judge erred in her exercise of discretion in several ways.

[54] The appellant father argues that the motion judge wrongly blamed the parents for choosing a “litigation strategy” that involved agreeing to place L in extended society care to ensure the return of her younger sister. The appellants argue that the apprehension of L’s sister was used by the CCAS to extract a concession regarding L. The appellants were faced with the prospect of losing both children and in these circumstances cannot be faulted for having consented to extended society care for L.

[55] The appeal judge found that the appellants had not established that the CCAS pressured or coerced them into agreeing to a settlement against their will. The appellant father knew that he could contest extended society care for L, and the parents were represented by senior counsel in the settlement negotiations. They chose to settle rather than proceed to trial.

[56] There is no doubt, as the motion judge found, that the parents “sincerely want to have [L] returned to their care”. But the parents did not seek her return until significant time had passed, and only after they were informed that adoption planning was underway. Delay is an important consideration relevant to whether leave should be granted, as it may be inimical to a child’s best interests. I see no reversible error in this regard.

[57] Additionally, the appellant mother argues that Dr. Baird’s report was not admissible and was wrongly used by the motion judge to support her conclusions,

in effect turning the leave motion into a mini-trial on contested issues and prejudicing the appellants.

[58] I do not accept that the motion judge erred in considering inadmissible evidence. Reports from Dr. Russell (concerning the nature of BRS) and Dr. Baird (opining that there was no plausible reason to attribute L's failure to grow in the first year of her life only to BRS) were attached to affidavits filed by the parties on the motion. The motion judge referred to these reports, and Dr. Baird's in particular, in the context of considering the strength of the appellants' case.

[59] The motion judge found Dr. Baird's report "[raised] issues that … to this day remain unanswered." Dr. Baird expressed the opinion that there was "no plausible reason to attribute [L's] growth failure in the first 12 months of life to [BRS]. The only way of doing so would logically require that a different, but equally severe form of neglect be verified." Reliance on Dr. Baird's opinion as expert evidence would have been inappropriate, given the way in which it came before the court. Neither his nor Dr. Russell's report met the test for filing expert reports, and neither Dr. Russell nor Dr. Baird examined L. Accordingly, the motion judge specifically declined to rely on Dr. Baird's report, stating: "I do not need to rely on Dr. Baird's report to come to the conclusion that the parents have still not accepted any responsibility for their role in such severe neglect of [L]."

[60] This statement was accepted by the appeal judge. In my view, it merely states a common-sense conclusion: if L's failure to grow were entirely attributable to a genetic condition, there would be no explanation for how she began to thrive almost immediately upon being given adequate nutrition and has continued to do so throughout her years in foster care. In these circumstances, it was reasonable for the motion judge to conclude that the parents' lack of care in the first year of L's life must have played a role, and reasonable to note the parents' failure to take any responsibility for L's condition when she was apprehended by the CCAS. As the motion judge noted earlier in her decision:

> [Neither] parent has taken any responsibility for the serious condition that [L] was in when admitted to the hospital in March 2019 … They did not follow up with [L's] pediatrician … for almost 8 months, despite the fact that [L] continued not to gain weight … The parents do not explain in their affidavits why they failed to obtain timely medical care for [L].

This is the context in which the motion judge stated her conclusion that "the parents have still not accepted any responsibility for their role in such severe neglect of [L]". I see no error in these conclusions. The motion judge simply referred to Dr. Baird's report in drawing her conclusion, which bore on the strength of the appellants' proposed status review application. She did not err in doing so.

[61] The appellant father argues that the motion judge erred by failing to sufficiently consider the need to respect and support families and the importance of maintaining sibling relationships, both objectives of the *CYFSA*. He argues,

further, that the motion judge ignored evidence of the parents' current caregiving ability and reiterates that there will be disruption for L no matter the outcome of the proceedings.

[62] I do not accept these arguments. The motion judge was required to make a discretionary decision whether to grant leave under s. 115(5) – to identify and weigh the relevant considerations and make a decision in accordance with the purposes of the *CYFSA*. I am satisfied that she did so. Her factual findings, including findings about L's needs and the appellants' caregiving ability, are not marred by any palpable and overriding error and are entitled to deference.

[63] In summary, the motion judge exercised her discretion reasonably on the record before her. There is no basis to disturb her decision on appeal.

CONCLUSION

[64] I would dismiss the appeal and make no order as to costs.

Released: May 18, 2023 "K.F."

"Grant Huscroft J.A."
"I agree. K. Feldman J.A."
"I agree. E.E. Gillese J.A."