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 Oxford County v. W.T.C., 2014 ONCA 540
DATE: 20140710
DOCKET: C55909

Hoy A.C.J.O., Feldman and Simmons JJ.A.

BETWEEN

Children's Aid Society of Oxford County

Applicant (Respondent)

and

W.T.C.

Respondent (Appellant)

John Schuman and Rachel Healey, for the appellant

Lorne Glass, for the respondent

Robert E. Charney and Bruce Ellis, for the Ministry of the Attorney General

Heard: December 20, 2013

On appeal from the order of Justice Johanne N. Morissette of the Superior Court of Justice, dated July 20, 2012, dismissing an appeal from the order of Justice Peter R. W. Isaacs of the Ontario Court of Justice, dated September 2, 2010.

Feldman J.A.:

Background

[1] In reasons for decision dated July 23, 2013 (2013 ONCA 491), and, after receiving fresh evidence, November 1, 2013 (2013 ONCA 637), this court

confirmed the decisions of the Ontario Court of Justice on a status review application and of the Superior Court on appeal, that the child L.H. remain a Crown ward with no access so that she could be adopted by the prospective adoptive parents with whom she had been living for over four years.

[2] In her Supplementary Appeal Book and Compendium filed in this court, the mother submitted that delays in the appeal process, caused most significantly by delays in preparation of necessary transcripts, deprived her of her s. 7 *Charter* right to security of the person, contrary to the principles of fundamental justice. In particular, she argued that the institutional delay effectively rendered the outcome of the appeal process a *fait accompli* by extending the time that the child remained in the care of the prospective adoptive family to four years, creating the exclusive opportunity for the child to bond with that family. The child was two years old when she was initially placed with the prospective adoptive family and was six years old at the time of the appeal hearing in this court.

[3] In its July 2013 reasons, the court requested written submissions from the Attorney General of Ontario in response to the *Charter* issue and ordered a further report on the child. After receiving the fresh evidence, the court issued its decision dismissing the mother's appeal from the status review application in November 2013. Having received the submissions of the Attorney General in response to the *Charter* claim, the panel reconvened to hear oral submissions

from all parties on whether there was a *Charter* breach, and if so, what remedy was available.

[4] The details of the mother's *Charter* claim are set out at paras. 53-55 of the July 2013 decision:

> [53] The basis of the mother's s. 7 claim is the institutional delay that occurred in this case. The chronology began in March 2008 when the order for Crown wardship with no access was made for L.H. The mother applied for a status review under s. 65.1 of the CFSA on February 20, 2009, returnable on April 6, 2009. Although Rule 33 of the *Family Law Rules*, O. Reg. 114/99 provides that a status review hearing must be completed within 120 days, for reasons unexplained in the record, the status review hearing in this case did not begin until November 16, 2009. In the meantime, in June 2009, L.H. was placed with the prospective adoptive family with whom she continues to reside today. The hearing was continued on January 5, 2010 with written submissions on February 26, 2010. The reasons of the status review judge were released on September 2, 2010.
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> [54] For the purposes of the appeal to the Superior Court, the mother ordered the transcript of the hearing on January 29, 2011, but it was not prepared for 13 months until March 7, 2012. The appeal record to the Superior Court was filed on April 23, 2012. The Superior Court appeal judge released her reasons on July 20, 2012. Because her reasons were given orally, the transcript of those reasons had to be ordered for the purpose of the appeal to this court. The transcript was not produced until December 17, 2012. The mother was also not able to perfect her appeal to this court without orders of the two lower courts, which could only be obtained with the Society's cooperation.

> [55] In summary, the mother submits that her rights under s. 7 of the *Charter* have been violated by delays she did not cause. Although she initiated the status review in February 2009, the decision of the court only came in September 2010. Her appeal was then delayed for 13 months because the transcript of the hearing, which was required, took that long to prepare. There was then an additional delay in bringing the further appeal to this court because the oral reasons of the appeal judge, which were very brief – just two pages (plus 17 pages of submissions) – were not prepared for several months.

[5] The appellant submits that the delay in proceeding with the status review and the appeals caused her real prejudice because it was only after she requested the status review that the child was placed with the prospective adoptive family and had the opportunity to bond with them over the four years it took to go through the process.

[6] In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, the Supreme Court of Canada held that state action under child welfare legislation that seeks to interfere with a parent's relationship with her or his child engages s. 7 of the *Charter*. The nature of the impact on the parent's security of the person is a "serious and profound effect on a person's psychological integrity": at para. 60. Lamer C.J., speaking for the court[1], made it clear how sensitive he was to the sanctity and profound importance of the parent-child relationship, stating at para. 61, that he had:

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[1] L'Heureux Dube J. wrote concurring reasons.

> [61] [L]ittle doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)*, *supra*, at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

[7] Turning to an analysis of the principles of fundamental justice, Lamer C.J. explained at paras. 70 and 72 that in the child protection context, the principles of fundamental justice are both substantive and procedural:

> [70] Thus, the principles of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination.
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> …
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> [72] A fair procedure for determining whether a custody order should be extended requires a fair hearing before a neutral and impartial arbiter. The paramount consideration at the hearing should be the child's best interests…

[8] In that case, the Court determined that in order to have a fair hearing, the mother required appropriate legal representation to present the parent's case in the most effective way possible. Lamer C.J. explained at para. 73:

> [73] For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The best interests of the child are presumed to lie within the parental home. However, when the state makes an application for custody, it does so because there are grounds to believe that is not the case. A judge must then determine whether the parent should retain custody. In order to make this determination, the judge must be presented with evidence of the child's home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a unique position to provide this information to the court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests. There is a risk that the parent will lose custody of the child when in actual fact it might have been in the child's best interests to remain in his or her care.

[9] In this case, the appellant does not assert that she did not have a fair hearing at any stage. Rather, she states that the delays in the process, most particularly the significant delay in preparing necessary transcripts and the delay in scheduling the status review hearing, made the procedure unfair to her and, in that way, did not accord with the principles of fundamental justice.

Analysis

[10] I agree that in cases involving the welfare of children, timeliness is extremely important. Whether a child ultimately returns to the parents or parent, or is made a Crown ward, the child lives in temporary care, and all interested parties live in a state of uncertainty until the proceedings have been concluded. No adoption process can begin until any appeal from the order for Crown wardship is dismissed.

[11] This court case-manages child protection appeals to ensure that time limits for perfection are adhered to or modified only as necessary, and the appeal hearing itself is expedited. Because this court is the second level of appeal for Crown wardship orders, transcript preparation is not usually an issue.

[12] Delay in the preparation of transcripts for the first level of appeal from a Crown wardship proceeding has been identified by the courts and by the Ministry as a significant issue and some administrative steps have been taken to address it, including a new system for the ordering and preparation of transcripts. Hopefully this new system, as well as recent case law (including this court's July 23, 2013, decision in the present appeal) will ensure that counsel, the Ministry and the court give these cases the priority they demand.

[13] Whether inordinate procedural delay, including the preparation of transcripts, could amount to a breach of a parent/appellant's s.7 *Charter* right and

if so, what remedies may be available, do not need to be decided in this case because of the view I take of the effect of the delay in the particular circumstances.

[14] As I stated at the outset, the mother's position is that the passage of over four years from June 2009 (when the child was placed with the prospective adoptive parents) to July 2013 (when the final appeal was heard in this court) effectively doomed her case because the child had the opportunity to bond with the new family. This, she claimed, made it inevitable that the court's "best interests" assessment would favour a Crown wardship/no access order.

[15] I agree that over that time the child was able to settle well into a new family environment, but I do not accept that she would have been returned to her mother's care but for the delay in the Crown wardship proceedings.

[16] As recounted in our July 13, 2013 decision, at para. 10, the evidence before the status review judge indicated that L.H. was born five weeks premature, that she was exposed to cocaine in the womb, and that she developed feeding problems necessitating the insertion of a "G" tube into her stomach to ensure that she received sufficient nutrition. The evidence also indicated that L.H. was developmentally delayed and required the support of a speech therapist, occupational therapist and nutritionist.

[17] By the time of the status review hearing, the mother had a job at a restaurant and an apartment, she had been drug-free for over a year and was continuing with drug rehabilitation programs. Her progress was such that the Society was prepared to return her oldest and youngest children to her care, subject to supervision orders. Despite that progress, however, in reasons released in September 2010, the status review judge found that the mother "had not yet demonstrated a real understanding of the commitment and effort that would be required to successfully parent L.H" and that "[n]othing ha[d] been produced to demonstrate that access to [L.H.] by [the mother] will be either beneficial or meaningful for the child".

[18] At the same time, L.H. showed significant improvement through the care she received from the prospective adoptive parents. It was clear to the status court judge that the new situation was in the child's best interests. That conclusion was confirmed on appeal to the Superior Court.

[19] Fresh evidence on the appeal to this court showed on the one hand that the mother had continued to improve her situation considerably: she had taken medical courses to better prepare herself to provide for L.H.'s care; she graduated from a medical lab assistant/technician course with some health-related components; she now had a part-time managerial position in a restaurant; she owned a home with her new partner which could accommodate L.H.; and the other two children were thriving with her.

[20] On the other hand, the fresh evidence confirmed that the child was thriving as a member of her new family. She no longer needed the feeding tube, which was a significant achievement.

[21] Finding no error in the decisions below, this court sought and received a further updated report on the child's status before upholding the decision of the Superior Court. That report confirmed not only that the child was thriving, but also that it would be potentially harmful if she had to undergo another move.

[22] In other words, the passage of time benefitted both the mother and the child. The mother made significant improvements in her life that gave her the ability to seek the return of her child. The child thrived in the care of the prospective adoptive family. In other circumstances, it may have been in the best interests of the child to return to the care of the mother by the time the appeal was heard in this court, had the child not been placed in a home where she was thriving and where her situation had the potential for permanence. Many children wait in foster care.

[23] Ultimately, the issue for the courts was the best interests of the child. The passage of time gave the mother the chance to improve her ability to be an effective parent for this child. However, before the mother reached that position, and a decision had to be made by the status court judge, it was in the child's best interests to remain in the care of the proposed adoptive family. That situation

continued to be the case until the final order of this court made on November 1, 2013.

[24] I conclude that the delays in this case did not cause the substantive prejudice the mother's alleges. The issue of a s. 7 *Charter* breach does not arise.

[25] I would therefore dismiss the appeal on the *Charter* application.

[26] The court left the issue of the costs of the appeal to be determined following its decision on the *Charter* application. The appellant was not successful on the appeal and therefore is not entitled to her costs of the appeal.

[27] On the *Charter* application, the issue arose because of court administration delays. The issue is one of general importance and the court asked the Ministry of the Attorney General to respond in writing and asked the parties to re-attend to make oral submissions. In those circumstances, in my view, the appellant should receive her costs of the *Charter* application on the partial indemnity scale, payable by the Attorney General for fees in the amount of $5000.00 as claimed plus HST. No claim was made for disbursements.

RELEASED: "AH" July 10, 2014

"K. Feldman J.A."
"I agree. Alexandra Hoy A.C.J.O."
"I agree. J. Simmons J.A."