

ONTARIO

SUPERIOR COURT OF JUSTICE
FAMILY COURT

B E T W E E N:

CATHOLIC CHILDREN’S AID SOCIETY

Applicant

- and -

M.R. (mother)

M.J.T. (father)

E.E. (maternal grandmother)

D.E. (maternal grandfather)

M.T. and T.T. (paternal grandparents)

Respondent s

)
)
)
) Toni Hammond-Grant
) – counsel for the Society
)
)
)
)
)
) Melinda Graham - mother’s counsel.
) Mother not present
)
) Joanne Guarasci - father’s counsel.
)
) Lisa Delong - maternal grandmother’s
) counsel.
)
) Victoria Loh -maternal grandfather’s counsel.
)
) Michael Clarke – paternal grandparent’s
) counsel.
)

) **HEARD:** November 3, 2008

The Honourable Mr. Justice A. Pazaratz

[1] In this temporary care hearing regarding 26 month old M.R, the court received evidence of plans by the following persons:

- (a) D.E., the maternal grandfather (supported by N.F., the child’s great grandmother, and A.E. the child’s aunt).
- (b) E.E., the maternal grandmother.
- (c) M.T. and T.T., the paternal grandparents.

- [2] The child's mother is incarcerated and supports the child being placed with her father.
- [3] The child's father is in a voluntary drug rehabilitation program and supports the child being placed with his parents.
- [4] The biological parents are also involved in their own custody dispute in a pending Children's Law Reform Act application. That action has been stayed as a result of the Children's Aid Society now seeking 6 months society wardship under the Child and Family Services Act.
- [5] The relevant chronology is as follows:
- [6] M.R. was born of a brief unmarried relationship on September 10, 2006. The father says he was not made aware of the pregnancy or the existence of the child until September 2007, when M.R. was approximately one year old. After paternity was confirmed by DNA testing in December 2007, the father commenced access to the child. However, for reasons likely in dispute between the parties, thus far the child's contact with the father and (in particular) the paternal grandparents has been sporadic and somewhat infrequent.
- [7] In June 2007 the society became involved with the family as a result of concerns about drug use by the mother's then partner (who was eventually determined not to be the biological father of M.R.), and intermittent incarceration by the mother. There were also concerns about the mother's home conditions, and ongoing domestic conflict.
- [8] In July 2007 the child was apprehended as a result of allegations the mother broke into a residence to obtain drugs. She was already on probation for other criminal matters.
- [9] Pursuant to the temporary order of Justice Steinberg dated July 30, 2007, the child was placed with the maternal grandparents D.E. and E.E. – who, until recently, were living together and putting forward a united plan.
- [10] On October 22, 2007, the mother was granted access supervised at the paternal grandmother's home.
- [11] Ultimately, on December 10, 2007 Justice McLaren granted a final order returning the child to the care of the mother, subject to a six month supervision order.
- [12] On May 28, 2008, Justice Steinberg granted a temporary order extending the December 10, 2007 terms.
- [13] Finally – after the parents signed a voluntary service agreement -- on June 16, 2008 the society was granted leave to withdraw its original protection application. The child was back with the mother. Both parties were cooperating with the society.
- [14] On June 10, 2008, the mother was convicted of fraud and impersonation, and sentenced to a period of house arrest and restitution. She experienced more problems, personally and in her

dealings with the father. She sought out emergency psychiatric treatment. She considered moving back to her parents residence, with the child.

[15] Ultimately, on October 9, 2008 the child was again apprehended as a result of the mother being incarcerated for breaching the terms of her house arrest (removing her ankle bracelet). Soon after, the society learned the mother has additional criminal charges. She remains incarcerated, and although she has counsel, no information was provided to the court as to the full extent of her unresolved criminal problems, or how long she will remain in jail.

[16] Pursuant to this court's October 14, 2008 order, the child has remained in care, with access to family members in the discretion of the society.

[17] Neither the mother nor the father is currently proposing that M.R. be returned to their care.

[18] The maternal grandfather, D.E., proposes that M.R. should be placed with him immediately. He is 50 years old and steadily employed (he says he can take 12 weeks off work to be immediately available for the child). Although he and his wife E.E. separated September 23, 2008, he says they can still cooperate with one another for the sake of the child. In his plan he notes that he and E.E. have cared for M.R. extensively in the past. His home is familiar and appropriate for the child. He is familiar with the child's medical needs.

[19] However, the society says there are unresolved issues concerning D.E.

(a) Although he denies allegations of alcohol abuse, his own son K.E. made those allegations in April 2007 (although he subsequently recanted, and now supports D.E.'s position). More troubling, E.E. has recently stated to CAS officials that D.E. drinks so heavily that she would be worried about M.R.'s safety if the child were to be placed with the maternal grandfather. Although D.E. denies abusing medications (which he has been taking for many years as a result of a serious injury), E.E. has expressed concern that D.E. mixes medications with heavy consumption of alcohol. E.E. has expressed concern that if there were an emergency in the home at night, D.E. would have difficulty waking up to care for M.R.

(b) Although D.E. denies allegations of aggressive or temperamental behaviour, E.E. has told society workers that D.E. has a problem controlling his temper and uses inappropriate and aggressive language.

(c) Although D.E. states he has a long history of personally caring for M.R., E.E. advises that she was the one who assumed primary responsibility for M.R., whenever the child was in their home.

(d) It is alleged that D.E. was aware of at least some ongoing drug abuse by his daughter (M.R.'s mother) and failed to intervene, despite being aware of the mother being on probation and having responsibility for the child.

(e) It is alleged that D.E. was aware the mother was breaching the terms of her "house arrest" (by coming to his residence, for example) and that he failed to intervene.

(f) There is an unresolved issue as to a potentially serious level of conflict between D.E. and his 16 year old son K.E. In 2007 there was serious conflict within D.E.'s home which resulted in the police attending and receiving complaints from K.E. of inappropriate discipline by D.E. As stated, K.E. has retracted past allegations and now supports D.E.'s proposal for the child. However, the society still has concerns about significant parent-child conflict in D.E.'s home. There is also an unresolved issue about K.E. having made a death threat against his sister A.E.

(g) Despite D.E.'s insistence that he and E.E. can co-operate for the sake of the child, nonetheless it is clear that their recent separation involves acrimony and uncertainty, which the child should not be exposed to.

[20] D.E.'s estranged wife E.E. proposes the child be placed in her care. She stresses that any allegation by the society of a "lack of cooperation" relates to D.E., and that she has always been cooperative with the agency.

[21] However, E.E.'s proposal (as outlined in her Answer; she did not file an affidavit herein) entails many uncertainties and by her own admission requires refinement. She proposes that weekdays she take the child to the daycare where she works, and that M.R. stay with her overnight. She suggests on weekends the child could return "to the foster family she is familiar with." She admits that with her recent and unresolved separation from D.E. she has many issues in her personal life to sort out, and that her proposal is "not an ideal situation." As with D.E., she claims daughter A.E. will assist her (A.E. appears to be spending significant time with each parent, while attending university in Brantford).

[22] The paternal grandparents M.T. and T.T. offer the least controversial option in terms of their personal credentials. The husband is steadily employed, with a good income. The wife is home and available to be with M.R.

[23] However, the primary concern about the paternal grandparents is that their historical involvement and familiarity with the child has been minimal, largely as a result of their son only becoming involved as a father less than a year ago (and on a limited basis). The society lawyer

described them as “relative strangers” to the child – a characterization not seriously challenged by their lawyer.

[24] While there appear to be no known lifestyle issues within the paternal grandparents’ home, the wife is still recovering from a serious car accident in May 2007 which caused her to leave work and undergo surgeries to her face, arm, shoulder and knees. In an affidavit she states “My rehabilitation progress has been slow but steady.” She is taking physiotherapy, and will likely not return to work. Her ability to physically care for this two year old (while her husband is at work Monday to Friday) is unknown.

[25] Ms. Hammond-Grant argued that it is premature to consider or decide upon any of the proposals being advanced because more information is required – and being sought out by the society. While opposing counsel criticized the agency for taking too long to conduct necessary kinship inquiries, Ms. Hammond-Grant countered that while the society may have known of the existence of these various extended family members for quite some time, CAS would not have been in a position to specifically assess any particular plan until the plan was actually presented. She noted that the paternal grandparents Answer and Plan of Care was only filed on October 29, 2008 -- a few days prior to the November 3, 2008 hearing – and the other plans being presented are all less than two weeks old.

[26] She said each plan by extended family members needs to be investigated thoroughly, particularly since there is real uncertainty about the likelihood of the child being returned to either biological parent in the near future. While she acknowledged that each plan is potentially viable, she emphasized that each plan before the court is also fraught with uncertainties – some of them relating directly to the physical and emotional well-being of the child – and she asked the court to defer any change in M.R.’s situation until each kinship assessment has been completed.

[27] Ms. Hammond-Grant warned that otherwise, if the court opts for a short-term placement, only to discover in the coming weeks that a more satisfactory and beneficial option exists, this young child – who has already experienced a great deal of upheaval --could experience needless additional disruption and upset. This would be inconsistent with the child’s need for permanence and stability.

[28] Temporary Care Hearings are to be determined pursuant to section 51 of the *Child and Family Services Act*, the relevant portions of which state:

51(2) CUSTODY DURING ADJOURNMENT - Where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child,

- (a) remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention under this Part;

- (b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate;
- (c) be placed in the care and custody of a person other than the person referred to in clause (a), with the consent of that other person, subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate; or
- (d) remain or be placed in the care and custody of the society, but not be placed in,
 - (i) a place of secure custody as defined in Part IV (Youth Justice), or
 - (ii) a place of open temporary detention as defined in that Part that has not been designated as a place of safety.

51(3) CRITERIA - The court shall not make an order under clause (2)(c) or (d) unless the court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm and that the child cannot be protected adequately by an order under clause (2) (a) or (b).

[29] The onus is on the society to establish, based on credible and trustworthy evidence, that there are reasonable grounds to believe that there is a real possibility that if the child is returned to the parents, it is more probable than not that she will suffer harm. Further, the society must establish that the child cannot be adequately protected by terms and conditions of an interim supervision order. As stated, in this case M.R. cannot be returned to the person who had charge of the child immediately before apprehension, because that person – the mother – is in jail, and has provided no information when she might be released. The father is also not putting forward his own plan, at this time.

[31] All counsel agree the competing proposals by the respective grandparents must be considered under section 51(2) (c). Section 51(3.1) applies:

51(3.1) PLACEMENT WITH RELATIVE, ETC. - Before making a temporary order for care and custody under clause (2) (d), the court shall consider whether it is in the child's best interests to make an order under clause (2) (c) to place the child in the care and custody of a person who is a relative of the child or a member of the child's extended family or community.

[32] Section 37(3) provides guidance in relation to determining a child's best interests: **37(3) BEST INTERESTS OF THE CHILD** - Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:

1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
2. The child's physical, mental and emotional level of development.
3. The child's cultural background.
4. The religious faith, if any, in which the child is being raised.
5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
6. The child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community.
7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.
8. The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent.
9. The child's views and wishes, if they can be reasonably ascertained.
10. The effects on the child of delay in the disposition of the case.
11. The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.
12. The degree of risk, if any, that justified the finding that the child is in need of protection.
13. Any other relevant circumstance.

[33] I have considered these criteria. Sections 37(3) (1), (6), and (7) have particular applicability, and – to varying degrees – support the positions by the respective grandparents.

[34] I have also considered the affidavits, Answers and Plans of Care filed, by the society and the extended family members.

[35] The society does not dispute the common theme advanced by all relevant family members that preference and priority should be given to placing M.R. with relatives and extended family if it

is not possible or safe to place the child with one of the biological parents. But while all of the proposals before me have merit, none of these plans is without significant risk and uncertainty.

[36] This is not a situation in which the society lacks information about the grandparents, respectively. This is not a case of mere suspicion. The society relies on its own evidence. It also relies on the evidence of the respective grandparents seeking placement of M.R. Each of them has advanced a proposal. None of them endorse any other plan as an appropriate “second choice”, in priority over foster care. Each grandparent has expressed concerns about dangers inherent in the competing proposals for M.R.’s temporary care.

[37] Based on the evidence before me, which I find to be credible and trustworthy – evidence which may well change, once more information is assembled (hopefully in the near future) -- I find that:

- (a) There would be an unacceptable risk of the child suffering harm if placed with the maternal grandfather because of evidence of alcohol and/or drug abuse; an aggressive nature; and a conflictual and unsettled home environment. The risk in this household is exacerbated by the presence of the child K.E. who appears to have both caused and complained about significant aggressive behaviour within that home.
- (b) There would be an unacceptable risk of the child suffering harm if placed with the maternal grandmother as she is so preoccupied with her own transitional circumstances (relating to her recent separation) that she can’t devote sufficient attention to this child;
- (c) There would be an unacceptable risk of the child suffering harm if placed with the paternal grandparents as they appear to be virtual strangers to the child, and the grandmother (who would assume primary responsibility according to their joint plan) appears to have physical limitations impacting on her ability to care for a young child.
- (d) With respect to each proposal I find that the child could not be adequately protected by way of a supervision order.

[38] The society requests more time to complete the necessary kinship care assessments. Ms. Hammond-Grant submits the statutory regulations allow 60 days for these to be completed. In her view, this timeframe was determined as a reflection of the amount of work the society is required to do. Indeed, she notes that with multiple (and competing) plans being presented in relation to this one child by at least three family members, the demands on the agency’s limited resources are compounded.

[39] I agree with the society that based on the information – and the unanswered questions – thus far, there is a significant risk of the child suffering harm if placed with any of the grandparents under the existing proposals, and that this risk of harm cannot at this time be adequately addressed by society supervision. As much as it is in M.R.'s interest to get out of foster care, it is also in her interest that we not make a premature decision, based on insufficient information, which might result in the child being moved around several times while we sort out which options are better or worse (or unacceptable).

[40] While I agree the society requires more time, I make no determination at this stage as to the amount of additional time the society should be given with respect to its evaluation of *each* of the proposals by family members.

[41] At this time, on a temporary without prejudice basis, the child shall remain in care, with access to family members to continue, with scheduling and any supervision of access to be in the discretion of the society. The society is expected to allow expanding and liberal access, and if necessary expedite its kinship care assessments.

[42] The matter is adjourned to December 1, 2008 at 10 a.m. to be spoken to before me. By that date the society shall provide at least a preliminary report with respect to each placement being proposed.

Pazaratz, J.

Released: November 7th, 2008