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Children - Children in Need of Protection - CFSA

CROWN WARDSHIP AND PARENTAL ACCESS

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CHILDREN IN NEED OF PROTECTION - CROWN WARDSHIP AND PARENTAL ACCESS

1. Statutory Provisions

Sections 58 and 59 of the *Child and Family Services Act*, R.S.O. 1990, c.C.11, as amended (hereinafter "CFSA"), deal with the issue of access to children who are in need of protection. These sections provide, in part, as follows:

> 58. - (1) The court may, in the child's best interests,
>
> (a) when making an order under this Part [Part III - Child Protection]; or
>
> (b) upon an application under subsection (2), make, vary or terminate an order respecting a person's access to the child or the child's access to a person, and may impose such terms and conditions on the order as the court considers appropriate.
>
> (2) Where a child is in a society's care and custody or supervision,
>
> (a) the child;
>
> (b) any other person, including, where the child is an Indian or a native person, a representative chosen by the child's band or native community; or
>
> (c) the society, may apply to the court at any time for an order under subsection (1).

Subsections 58(3) and 58(4) set out the notice requirements applicable in these proceedings. Subsection 58(5) provides that no access order in respect of a person aged 16 or older shall be made without the person's consent. Further, a period of six months must elapse between determinations of the issue of access with respect to the child, with the exception that the children's aid society may re-open the issue at any time: ss.58(6).

Even if access or interim access is not within s.58 of the CFSA, the jurisdiction for such orders is founded in the court's parens patriae jurisdiction: *M.(S.B.) v. CAS of London & Middlesex* (1995), 19 R.F.L. (4th) 327 (Ont.Gen.Div.). However, resort to parens patriae jurisdiction will be infrequent and limited to cases of necessity in situations that were not foreseeable.

The power to vary access, even to a child who has been in the care of the same foster parents for over two years, can be found within s.58(2) and thus a status review application is not necessary: *H.A. v. Children's Aid Society of Ottawa*, [2003] O.J. No. 713 (Div.Ct.).

Section 59 of the CFSA sets out specific guidelines in determining the question

of access where the court makes an order removing the child from the physical custody of the person(s) with whom the child resided before the proceedings were instituted. Although no amendments were made to s.58 of the CFSA by S.O. 1999, c.2, subsections 59(2) and (3) were. Section 59 now reads as follows:

> 59(1) Where an order is made under paragraph 1 [supervision order] or 2 [society wardship] of subsection 57(1) removing a child from the person who had charge of the child immediately before intervention under this Part, the court shall make an order for access by the person unless the court is satisfied that continued contact with him or her would not be in the child's best interests.
>
> (2) The court shall not make or vary an access order with respect to a Crown ward under section 58 (access) or section 65 (status review) unless the court is satisfied that,
>
> (a) the relationship between the person and the child is beneficial and meaningful to the child; and
>
> (b) the ordered access will not impair the child's future opportunities for a permanent or stable placement. (S.O. 1999, c.2.s.16)
>
> (3) The court shall terminate an access order with respect to a Crown ward if,
>
> (a) the order is no longer in the best interests of the child; or
>
> (b) the court is no longer satisfied that clauses 2(a) and (b) apply with respect to that access. (S.O. 1999, c.2, s.16)

However, s.59 of the CFSA as it read on the day before the amendments came into force on March 31, 2000 continues to apply to any proceeding under Part III, including a status review proceeding, commenced before that date: s.37(5), S.O. 1999, c.2. On the day before proclamation, s.39 of the CFSA read as follows:

> (1) Where an order is made under paragraph 1 or 2 of subsection 57(1) removing a child from the person who had charge of the child immediately before intervention under this Part, the court shall make an order for access by the person unless the court is satisfied that continued contact with him or her would not be in the child's best interests.
>
> (2) Where a child is made a Crown ward under paragraph 3 of subsection 57(1), the court shall not make an order for access by the person who had charge of the child immediately before intervention under this Part unless the court is satisfied that,

> (a) permanent placement in a family setting has not been planned or is not possible, and the person's access will not impair the child's future opportunities for such placement;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with the person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.
>
> (3) The court shall not terminate an order for access to a Crown ward unless the court is satisfied that the circumstances that justified the making of the order under subsection (2) no longer exist.

Despite the amendments to s.59 of the CFSA being in force for over two years, many of the cases to date have dealt with the old rather than the new provisions because the proceedings were commenced prior to March 31, 2000.

2. Presumption Against Access to a Crown Ward

There is a presumption under s. 59(2) of the CFSA *against* natural parent access to Crown wards. The presumption must be rebutted by the parent seeking access. Thus, the onus is on the parent to prove entitlement to continued access because certain defined conditions are found to exist: *Children's Aid Society of Sarnia (City) & Lambton (County) v. L.(K.),* [1999] CarswellOnt 400 (Gen.Div.); *Children's Aid Society of London and Middlesex v. G.(Lisa),* [1996] O.J. No 3698 (Ont.Fam.Ct.); *Children's Aid Society of Ottawa-Carleton v. K.(L.),* [1995] W.D.F.L. 1422 (Ont.Prov.Div., June 16, 1995).

This presumption has not been displaced by the 1999 amendments since the opening words of s.59(2) still stipulate that the court shall not make or vary an access order with respect to a Crown ward unless the statutory criteria are met. There is, however, a difference in terms of what must be established in order to satisfy the court that continued access to the Crown ward is desirable. The number of defined conditions that the court must find to exist before making an order for access has been reduced. For instance, conditions which no longer exist in the amended provision include the wishes of a child 12 years of age or older and the fact that the child is not likely to be placed for adoption.

3. Court's Jurisdiction to Order Access in Discretion of Society or to Make Order Silent as to Access

When a court orders access to a Crown ward, it can either define an access schedule to be followed or leave the parameters of the access to the discretion of the

children's aid society. A third alternative is the "silent" order, an order that says nothing about access whatsoever, which has the same effect as an order leaving access in the discretion of the society. In the past such orders were usually made without any discussion as to the court's authority to delegate the nature of access. However, beginning with the decision of Granger J. in *Children's Aid Society of London and Middlesex v. G.C.*, [2001] O.J. No. 5660 (Fam.Ct.), some courts have questioned this practice, concluding that it is an improper delegation of the court's authority bestowed on it by s.58 of the Act. There is no express authority in the Act for this type of delegation.

The debate in the case law on this subject has been a vigorous one. Currently, the law is clear on the illegitimacy of orders silent as to access, but not on the issue of whether access can be granted in the discretion of the society. For this reason, we will deal with these two issues separately.

(a) Order Silent as to Access (or No Order on Access)

In a straightforward simple judgment, the Ontario Court of Appeal concluded last year that the *Child and Family Services Act* does not permit a court to make an order "silent as to access": *CAS of Toronto v. D.P.*, [2005] O.J. No. 4075, 19 R.F.L.(6th) 267, 202 O.A.C. 7, aff'g [2005] O.J. No. 930 (S.C.J.).

The mother in that case had not discharged the onus upon her pursuant to ss.59(2)(b) of the Act of establishing that an order for access would not impair the child's opportunities for adoption or a future permanent placement. The Court of Appeal held that a trial judge cannot circumvent the provisions of ss.59(2) by making an order that is silent as to access, in order to give the society the right to determine whether a parent should have access indefinitely or pending an adoption placement. Where a parent, as in the case before the court, cannot satisfy the trier of fact that access should be granted, the court is required to make an order of no access.

The Court of Appeal, however, was quick to point out that an order of no access does not prevent the CAS, as custodial parent of a Crown ward, from permitting the parents to visit the child while in foster care and even while placed for adoption, as long as the latter has not been made final. On the other hand, where the court considers that the best interests of the child require that there no contact whatsoever between the child and his or her parents pending adoption, the court should make an order to make effect. In the absence of a "no contact" order, the CAS retains the right to control who may visit the child and when.

Despite the decision's clarity, some subsequent cases have misapplied the decision in *CAS of Toronto v. D.P.*, even while purporting to follow it. For example, in *CAS of London and Middlesex v. S.E.*, [2005] O.J. No. 4689 (S.C.J.), Heeney J. vacated the access order in favour of the mother, vis-à-vis one of her sons, and in its place made no order as to access, relying – both incorrectly and correctly - on the *D.P.* decision. He stated (at para. 31):

> In its place, there will be no order as to access. I decline to make an order that specificallly mandates that the Mother will have no access. The legal impact of my ruling is that it will remain open to the Society, if Mitchell desires it and it is in his best interests, to arrange for visits with his mother. The Court of Appeal, in Children's Aid Society v .D.P....has recognized that the Society, as the custodial parent of a Crown ward, has the right to control who may visit the child from time to time.

A similar example is found in the recent decision in *Kawartha-Haliburton Children's Aid Society v. R.B.*, [2005] O.J. No. 4435 (S.C.J.), in which the court terminated access but noted that the society would be free to permit the mother to visit with the children until their adoption was made final.

(b) Order Granting Access in Discretion of Children's Aid Society

Unfortunately, the Court of Appeal did not deal with this issue in *CAS of Toronto v. D.P.*, above, and so the debate continues to rage with case law on both sides.

The leading case for the proponents of the view that a court can delegate some of its decision-making regarding access is the Ontario Divisional Court's judgment in *C.H. v. Durham Children's Aid Society* (2003), 64 O.R.(3d) 84, 224 D.L.R.(4th) 378, 37 R.F.L.(5th) 124, [2003] O.J. No. 879. Other cases that support this view are:

Kawartha-Haliburton CAS v. V.C., [2003] O.J. No. 140 (S.C.J.)

CAS Toronto v. C.T., [2003] O.J. No. 860 (C.J.)

CAS Huron v. R.G., [2003] O.J. No. 3104 (C.J.)

CAS Algoma v. C.B., [2003] O.J. No. 4735 (C.J.).

In the last three of these cases, the jurisdiction to delegate was affirmed, but the courts all concluded that it was a narrow one that should not be exercised routinely.

In *C.H. v. Durham Children's Aid Society,* above, the court held that the combination of s.58 of the Act and ss.15(3), which endows the children's aid societies with the mandate of supervising the children in their care, authorize a court to make an access order to be supervised in the discretion of a society. The court reasoned that maximum flexibility is required to respond to a family's changing needs and that it would not be in a child's best interests to require the parties to return to court for day-to-day access issues.

The Divisional Court in *C.H.* made it clear that a court has the jurisdiction to delegate the "nitty-gritty" of access to the CAS to work out and supervise. The decision, however, does not mean that a court must do so; a court is still free to exercise its discretion to impose terms and conditions on a parent's access, or to set out the schedule that it believes is in the best interest of the child. However, the court does express the philosophy that it is better – ie., more practical and efficacious in terms of meeting a child's needs– to delegate this job to the CAS (at paras. 19-20):

> The parent-child relationship is dynamic, always changing. Where an application for protection has been commenced, the relationship may also be difficult. Maximum flexibility is required to respond to the family's ongoing needs on a day-to-day basis. The parties should not have to return to court for every day-to-day access issue [sic]. That would not be in the children's best interest.
>
> The Society has the statutory mandate and the expertise to deal with these day-to-day issues. It is thus appropriate to leave the day-to-day discretion with it.

On the other side of the issue, there are many decisions in which courts have determined that the CFSA bestows no jurisdiction on a court to allow it to delegate the matter of access to a children's aid society or any other third party:

> *CAS of Toronto v. D.P.*, [2005] O.J. No. 930 (S.C.J.), aff'd on different point, [2005] O.J. No. 4075, 19 R.F.L.(6th) 267, 202 O.A.C. 7 (C.A.)
>
> *Durham CAS v. R.R.*, [2005] O.J. No. 360 (S.C.J.)
>
> *Kawartha-Haliburton CAS v. R.B.*, [2005] O.J. No. 4435 (S.C.J.)
>
> *Durham CAS v. D.W.*, [2003] O.J. No. 271 (S.C.J.)
>
> *CAS Toronto v. B.O.*, [2003] O.J. No. 4247 (C.J.)
>
> *Durham CAS v. S.C.*, [2002] O.J. No. 4339 (S.C.J.)
>
> *CAS London and Middlesex v. G.C.* [2001] O.J. No. 5660 (Fam.Ct.).

The most recent case to deal with the issue in an intensive analytical fashion is the appellate judgment of Goodman J. in *CAS Toronto v. D.P.*, above. As well as holding that a court cannot make an order that is silent as to access, Her Ladyship also held that a court cannot delegate the specific terms and nature of access to a society or third party either, at least not on a final basis. She restricted the decision in *CAS Durham v. C.H.* to a situation of a temporary access order where the court had already held that a parent was entitled to some kind of access. In so doing, she relied on the decision of Murdoch J. in *CAS of Durham Region v. C.W.*, [1991] O.J. No. 552, which was affirmed by the Ontario Court of Appeal at [1992] O.J. No. 265, for the proposition that the decision-making authority in s.58 of the CFSA, regarding either whether a parent is to have access or what the precise access arrangements should be, cannot be delegated – at least on a final basis – to a children's aid society.

The other weighty decision on this side of the debate is *CAS Toronto v. B.O.*, above. There, the court relied on a recent Court of Appeal decision (*C.A.M. v. D.M.*, [2003] O.J. No. 3707), to rule that there was no discretion that would allow a court to delegate the matter of access to a children's aid society or any other third party. On the facts before it the court concluded that access to the girl, in favour of the mother, should be defined by it. Reinhardt J. then went on to address the question of the court's

discretion to delegate, even though the point had not been argued before him. He relied on the very recent decision in *C.A.M.*, in which the Court of Appeal reaffirmed its own decision in *Strobridge v. Strobridge* (1994), 18 O.R.(3d) 753, 4 R.F.L.(4th) 169, 72 O.A.C. 379, 115 D.L.R.(4th) 489, [1994] O.J. No. 1247 (C.A.), for the traditional proposition that there is no authority to delegate decision-making power over access rights to a third party, such as a psychiatrist or psychologist. *C.A.M.* like *Strobridge* was a custody/access case, not a child protection case. But while Reinhardt J. acknowledged this fact, he pointed out that in *Strobridge*, Osborne J.A. had formulated the ratio of non-delegation by reliance on a child protection case, namely *CAS of Durham Region v. C.W. v. K.W.*, [1991] O.J. No. 552 (Gen.Div.). As well, Reinhardt J. stated (at paras. 46 and 47):

> I am perfectly aware of the decision released seven months ago in *C.H. v. Durham Children's Aid Society and K.H.*....where the Divisional Court attempted to distinguish *Strobridge v. Strobridge* and the line of appeal decisions that followed it by restricting them to domestic access disputes between parents. The Divisional Court therefore felt justified in carving out an exception to *Strobridge v. Strobridge* for child protection cases that would allow for the making of an access order subject to the discretion of a children's aid society...
>
> Even if such a distinction were theoretically possible, it should be a source more of apprehension than of comfort. In each of *Strobridge v. Strobridge* and *C.A.M. v. C.M.*, the trial judge had delegated the discretion over access to a supposedly neutral third person, someone who was definitely not a party to the action. Despite this apparent arms-length relationship between this non-party and the litigants, the Court of Appeal in both cases was still opposed to the concept of delegation. How much more alarming then is the prospect that one of the litigants, whose neutrality cannot be presumed, should suddenly wield this discretionary dominion over the access to be enjoyed by the other litigants! Yet that is precisely the situation that arises when a court decides to allow access to the parents at the discretion of the local children's aid society. This perspective on the issue undermines one of the supposed benefits that the Divisional Court claimed for its ground-breaking decision - namely, the "convenience" of sparing the litigants the time and cost of repeatedly having to come to court to make adjustments to the access regime. That "convenience" seems questionable when parents with little sophistication and meagre financial resources feel compelled to accept the access terms meted out by an agent of the state, such as the children's aid society, that has an agenda that is less than sympathetic to the rights and interests of those parents.

4. Access to Crown Ward - TEST

As noted above, s.59(2) of the CFSA sets out a two-fold test for granting access. Thus, before ordering access to a Crown ward, the court must now be satisfied that there is a meaningful and beneficial relationship between the person seeking access and the child and that access will not impair the child's future opportunities for permanent placement. Once that threshold is crossed, the court must still be satisfied that ordering access is in the best interests of the child: *CAS Ottawa-Carleton v. T.C.*, [2002] O.J. No. 3711 (S.C.J.).

Although the Act no longer provides that a court shall not make an order of access to a Crown ward unless it is satisfied that a permanent placement in a family setting has not been planned or is not possible, or the child has been or will be placed with a person who does not wish to adopt the child, one academic writer submits that these may still be relevant considerations.

Nicholas Bala of the Faculty of Law, Queen's University in a paper entitled "*Reforming the Child & Family Services Act: Is The Pendulum Swinging Back Too Far?*" (May 5, 1999) made the following comments about the amendments to s.59(2) of the CFSA (at para.95):

> Bill 6 amends ss.59(2) & (3) which deal with parental access to Crown wards to make it easier to terminate access. Under the new s.59(2) there would appear to be an onus on the parent (or child or agency) to show the court that the "relationship" between the parent and child is "beneficial and meaningful" and that the access will not impair the "child's future opportunities for a permanent placement or stable placement [i.e. adoption]." The wishes of a child 12 or older and the fact that the child is not likely to be placed for adoption are no longer specific statutory factors, though presumably they are still relevant.

See also the comments of Blishen J. in *C. v. Children's Aid Society of Ottawa-Carleton* (2000), 9 R.F.L.(5th) 269 (Ont.S.C.J.). The court noted that the recent amendments to the CFSA and the new *Family Law Rules* encourage early resolutions of child protection matters within strict, short timelines to avoid delay and the resulting uncertainty for children and that permanency planning at the earliest opportunity is emphasized throughout the Act. It then continued on to state (at para. 37):

> The new s.59(2) outlines the presumption against access for Crown wards and emphasizes a child's right to a permanent placement. Previously s.59(2) gave the Court some discretion to order access to a Crown ward if one of the criteria had been met. These criteria included some other "special" circumstances which would justify access. As access would preclude an adoptive placement, even the previous legislation, required "special" circumstances. The section has now been completely redrafted and the court is directed not to grant access to a Crown ward unless satisfied that: (clauses (a) and (b) of s.59(2) set out).

This focus on early permanency planning is also reflected in s.70 of the *Child and Family Services Act*….

Permanency planning for a Crown ward takes precedence over a parent's rehabilitation, and access cannot be used as a tool to foster the latter at the expense of the former: *CAS of Lanark and Smith Falls v. S.W.*, [2004] O.J. No. 1897 (Div.Ct.). The appellate court reversed the trial judge's conclusion that the mother of three children should have weekly access to them for a period of six months to see if she could control her dependency on drugs and alcohol. The court concluded that, while the concept of providing the mother with one last chance was perfectly consonant with an order for society wardship, it was not an available option in the instant case, given the fact that the maximum period of time for society wardship had elapsed. The practical effect of the judge's order, however, was to make such an order and he had no jurisdiction to do so.

Similarly, in *CAS of Toronto v. M.W.*, [2005] O.J. No. 931 (S.C.J.), rev'g [2004] O.J. No. 3160 (C.J.), the appellate court reversed the trial judge's conclusion that the father should have access on a gradually-increasing basis, even though he had not met the prerequisite to access in ss.59(2)(b). The trial judge was convinced that with increasing access the father was going to be in a position to resume caring for the child. The effect of the order was to grant a further period of society wardship that was not contemplated by the CFSA.

Under the amended ss.59(2), even if the Children's Aid Society has no plans to place the children for adoption, or children 12 years of age or older express a wish to maintain a contact with their parents, these factors will not necessarily result in an order for access, particularly if there is no beneficial and meaningful relationship between them.

It will be particularly important to adduce evidence relating to the nature and quality of the relationship between the children and the person seeking access, as well as to establish the importance of the continuation of that person's access to the future wellbeing of the children. Such evidence presumably would be easier to adduce in relation to older children since there would be a history of their relationship whereas this may be more difficult with a younger child, particularly if that child has been in the care of the children's aid society longer than in the care of the parents.

In several cases courts have opined that the standard of proof on the society seeking Crown wardship without access is more onerous than the mere civil standard of a balance of probabilities: *Children's Aid Society of Niagara Region v. M.(D.)* (April 15, 2002), 113 A.C.W.S.(3d) 448, [2002] O.J. No. 1461 (Fam.Ct.); *Children's Aid Society of Niagara Region v. C.(M.)*, [2000] O.J. No. 3268 (Fam.Ct.); *Children's Aid Society of Haldimand-Norfolk v. C.B.L.*, [1995] O.J. No. 1107 (C.J.).

(a) Nature of Relationship

Before access can be ordered in respect of a Crown ward pursuant to s.59(2) of the CFSA, as amended, the court must be satisfied that the evidence establishes that there is benefit and meaning to be derived from access on the part of the child:

Children's Aid Society of Sudbury and Manitoulin v. C.T., [2002] O.J. No. 1213 (C.J.). However, as noted in *Frontenac Children's Aid Society v. C.P.*, [2004] O.J. No. 679 (S.C.J.), there is no specific direction in subsection (2)(a) as to the factors pertinent to a characterization of a relationship as "beneficial and meaningful." In fact, the court labelled the language of the subsection, "heavily loaded and subject to interpretation." In *Frontenac*, the court was of the view that the desire of three of the children not to see their mother, coupled with the fact that she could not provide for them in terms of their development and growth, meant that their relationship was neither meaningful to them nor beneficial.

Any access ordered by a court must support the society's long-term plans for the children as per their best interests: *Lennox and Addington Family and Children's Services v. M.S.*, [2005] O.J. No. 5109 (S.C.J.). More is needed from access with parents than simply a pleasant visit, which may just reinforce poor parenting styles and undermine the foster parents. In this case the court found that the children were making great gains in foster care, and it imposed a duty on the parents to also make changes so that the children would consolidate these gains. In that case the court made the parents' access conditional on their participation in a clincially-managed access program that would involve the parents' active involvement in planning structured, supervised access visits with debriefing sessions afterwards. Also, a parenting training program would be developed for both parents that emphasizes parent modelling, and both parents were directed to engage in counselling as recommended by the society.

Recently, in *CCAS of Toronto v. S.R.M.*, [2006] O.J. No. 1741 (C.J.), Zuker J. held that s.59(2) speaks of an existing relationship between the parent and child and not a future relationship. A court, therefore, may not consider whether a parent might cure his or her parental shortcomings so as to create, in time, a relationship that is beneficial and meaningful to the child. Justice Zuker also concluded that "beneficial" and "meaningful" mean a relationship that is "significantly advantageous to the child" (at para. 168).

An interesting interpretation of the criteria "beneficial and meaningful" was made by Keast J. in *Children's Aid Society of Algoma v. I.D.* (Ont.C.J., June 7, 2004, No. 85/95). While he concluded that the relationship between the mother and her two children was beneficial and meaningful on a superficial level, in that the children appeared to have fun and enjoy their visits with her, it was not an "attachment" relationship and was not necessary for their psychological development.

Where a child had detached from his parents, wanting no further contact with them, and hoped to be adopted by his foster parents, the court held that the relationship was not meaningful and beneficial: *CAS of Districts of Sudbury and Manitoulin v. C.T.*, [2003] O.J. No. 3041 (S.C.J.).

Where the only factor that favoured the retention of access was the relationship by blood, the court held that this was not sufficient to meet the test in s.59(2)(a): *Children's Aid Society of the County of Simcoe v. C.(C.)*, [2001] O.J. No. 4089, 2001

CarswellOnt 3654 (S.C.J.). The court stated that the children deserved and needed a positive relationship with parents and a secure place as members of a family. Similarly, in *CAS of Niagara Region v. D.P.* (2003), 36 R.F.L.(5th) 265, [2003] O.J. No. 619 (S.C.J.), the court held that the words "beneficial and meaningful" mean something much more than the existence of a biological tie. For that reason it can be very difficult to fulfill this requirement when the children have been apprehended at birth.

In assessing whether the relationship between a parent and the child is beneficial and meaningful to the child, courts have on occasion made reference to the age of the child. Clearly, the older the child is the deeper the bond or attachment may be to the parent(s), despite the parent's inability to adequately care for him or her. One court has suggested that in these circumstances a society, when considering permanency planning for the child, should look at a long-term foster care placement for the child with access to the parent: *Durham Children's Aid Society v. W.(G.)*, [2001] O.J. No. 3495 (S.C.J.). Indeed, in this case, the court found that the relationship between the mother and child as a result of the strong attachment between them was beneficial and meaningful to the child. Accordingly access was awarded, thus ruling out the option of an adoption placement.

Where the children know who their parents are, but they are constantly being disappointed by their parents' failure to exercise access regularly, a court may conclude there would be no benefit to the children in granting the parents access following an order of Crown wardship. In these circumstances, it may cause only further emotional harm to the children and prevent an adoption placement: *Children's Aid Society of London and Middlesex v. J.P.*, [2001] O.J. No. 4058, 2001 CarswellOnt 3676 (S.C.J.).

Access to a Crown ward will not be beneficial and meaningful to a younger child if the parents have become strangers to the child because of missed access visits: *Children's Aid Society of the District of Sudbury and Manitoulin v. P.M.*, [2002] O.J. No. 1217 (C.J.); *Kawartha-Haliburton Children's Aid Society – Victoria/Haliburton Branch v. M.(K.)*, [2001] O.J. No. 5047 (S.C.J.); *Children's Aid Society of the Regional Municipality of Waterloo v. W.(T.)* (Oct. 30, 2001), 109 A.C.W.S.(3d) 99 (C.J.).

Even though the three children who were made Crown wards were presently not adoptable because of a multitude of problems resulting from having been grossly neglected physically, emotionally and psychologically, the court declined to order continued access where the evidence indicated that access between the mother and the children was clearly inappropriate and detrimental in *Durham Children's Aid Society v. L.(C)*, [2001] O.J. No. 5131 (S.C.J.). The court found that the children reacted regressively as a result of the visits. There was no healthy attachment between the children and their mother. Indeed their connection to their mother through access visits was seriously impairing their ability to move away from the source of their traumas.

Where a mother's relationship with her child was meaningful to the child but not beneficial, she could not rely on the fact that the grandmother's was both meaningful and beneficial to argue that the first part of the test has been satisfied: *CAS Ottawa-Carleton v. T.C.*, [2002] O.J. No. 3711 (S.C.J.). The court held it could not order access

in favour of the mother in order to make access to the grandmother, who was not a party to the case, possible. For a similar holding, see *Kawartha-Haliburton CAS v. I.M.*, [2003] O.J. No. 3120 (S.C.J.).

Whether an order for access to a Crown ward should be reduced or increased must be considered in light of s.58 and s.59(2): *H.A. v. Children's Aid Society of Ottawa*, [2002] O.J. No. 1081 (S.C.J.). Accordingly, although the child had a strong psychological attachment to his parents and the child expressed his desire to see his parents more frequently, the court was persuaded that the frequency of access that had existed prior to the society cutting back the time was not in the child's best interests because of the conflict that had arisen from it between the parents and the foster parents. The conduct of the parents during their access to the child and their dealings with the foster parents who had been caring for the child for over two years had undermined the authority and importance of the foster parents as custodial parents. The previous frequency of access was impairing the child's current and future opportunities for a permanent and stable placement. Accordingly, access was to continue at the reduced frequency.

(b) Future Opportunities for a Permanent or Stable Placement

Once an order for Crown wardship is made, then pursuant to s.140 of the CFSA the children's aid society is to make all reasonable efforts to secure the ward's adoption. In addition, a society cannot place a child for adoption if there is an outstanding access order made under s.58(1) and it has not been terminated. Accordingly, in considering whether access ought to continue in the context of a Crown wardship order, the court must apply the second test set out in s.59(2) of the CFSA, namely, whether granting access would impair a child's possibilities for a permanent or stable placement.

The jurisprudence that has developed under s.59(2) of the CFSA both prior to and after the amendments indicates that, when courts are considering whether granting access would impair a child's future opportunities for a permanent or stable placement, they are looking at an adoption placement as opposed to long-term foster care placement. Although there has been discussion in some cases about whether an adoption placement is always the best option for a child, most courts are satisfied that a long-term foster placement will not meet the child's need for a secure, stable, permanent environment. On the other hand, there are other cases that take the view that children's aid societies and courts may be too quick to opt for an adoption placement even when foster parents are prepared to give long-term foster care with access to the birth parents. These views are reflected in the cases below.

In *Children's Aid Society v. G.(G.)*, (Dec. 31, 2001), 111 A.C.W.S.(3d) 84, [2001] O.J. No. 5226, 2001 CarswellOnt 4638 (S.C.J.), the court favoured adoption placement to long-term foster care. Eberhard J. stated (at para. 50):

> One description of excellence in foster parents is that they love a child like their own while in their care but remain prepared to return the child to the

> parents when that time comes. I have considered whether, based on the long-term commitment of the current foster parents to provide foster care and their openness to continued access with the parents, an order for Crown wardship with access would address the best interests of the children. I am persuaded that it would not. Evidence describes a multitude of risks of instability of placement and impediments to forming a family unit that could allow the children to feel they belong. Moreover, if this arrangement were imposed on the parties rather than offered voluntarily, I am pessimistic that the necessary goodwill could be maintained. I therefore reject such an order even though it had the potential to allow the devoted and pitiable mother continued contact with her sons and the father, whose effort and success in caring for his sons gave him some of the self-esteem that he has not found otherwise in life, a chance to show his better side. Whoever parents these children must have family autonomy to determine what is in their best interests.

See also *Durham Children's Aid Society v. N.(B.)* 2001 CarswellOnt 4506 (S.C.J.); and *Children's Aid Society of the County of Simcoe v. C.(C.)*, [2001] O.J. No. 4089 (S.C.J.).

In *Durham Children's Aid Society v. N.(B.),* above, the court stated that in adding up factors in favour of making the two children before it Crown wards with no access as opposed to making them crown wards with access, the best interests of the children required an order of no access.

In *Children's Aid Society of the County of Simcoe v. C.(C.)*, above, the court, in making an order for Crown wardship with a view to adoption, held that adoption rather than long-term foster placement provided greater stability for children in their family, in their schooling and in their neighbourhood. The evidence before the court revealed that, when children were placed in long-term foster care, the foster placements and primary workers changed, on average, every twenty-four months.

The risks to the child's future well-being associated with leaving him in the uncertain foster care system were found to be greater than the risks associated with terminating access and placing him for adoption in *Children's Aid Society of Toronto v. F.(N.)*, [2000] O.J. No. 4329, 2000 CarswellOnt 4429, [2001] W.D.F.L. 158 (C.J.) (decision rendered prior to the amendments). In *Children's Aid Society of Ottawa v. R.N.*, [2002] O.J. No. 1562 (S.C.J.), Aitken J. noted that long-term foster care does not import the same degree of stability and permanency as adoption, as illustrated by the high percentage of changes in foster homes for Crown wards in Ottawa-Carleton (50% in one year) as opposed to the adoption breakdown rate of 5% province-wide.

Likewise, in *Children's Aid Society of Algoma v. I.D.* (Ont.C.J., June 7, 2004, No. 85/95), the court held that the primary vehicle for permanency planning pursuant to s.59(2)(b) is adoption and not long-term foster care. The same thing was implied by the court in *Children's Aid Society of Lanark v. Smith Falls v. S.W.*, [2004] O.J. No. 1897 (Div.Ct.).

On the other hand, in *Children's Aid Society of Sudbury and Manitoulin v. C.T.*, [2002] O.J. No. 1213 (C.J.), in making an order for Crown wardship with access, the court questioned whether an adoption placement was always in the best interests of the child. Guay J. stated (at paras. 27 - 28):

> Although the twofold access test under subsection 59(2) of the Act suggests that no access will be ordered if such access impairs a child's future opportunities for a permanent or stable placement, inherent in this condition is the notion that such placement is in a child's best interests. We know too well that there are few, if any constants in his world and, certainly, permanent or stable placement is not one of them. Unsuccessful adoptions are a testament to the failure of various attempts to achieve permanent or stable placement. Even the probability of success of a proposed permanent or stable placement must be considered in the context of the child's identity and the positive benefits that continuing access to birth parents may have for a child who is permanently placed with others who are more capable of parenting him or her while he is a child, youth or adolescent. Accepting also that there are few, if any, certainties in this world, the personal commitment of proposed adoptive parents to wards of the State must be weighed against the damage inherent in the loss of a child's contact with his or her birth parents. Likewise, even the best intentions of adoptive parents vis-à-vis continuing contact of children with their birth parents must be scrutinized not cynically but prudently in assessing the damage or potential damage done to children who are legally and practically deprived of regular, ongoing contact with their birth parents.
>
> [The child's] needs today are great, but he, like most persons, has needs that surpass his immediate ones for care and nurturance that are anchored in his youthful dependency. The need to know who he is, both actually and conceptually, and to have both the experience and the memory of his birth parents and their respective families, with their beliefs, traditions and values, are examples of such needs.
>
> Do we, in our proposed rush to adoption as the universal panacea to failed parenting, pay more heed to the need of adults for security than to the need of children for a permanent structure in which to develop as adults? Is the legal construct of adoption fundamentally more important than the commitment that, one hopes, underlies an adult's

> desire to parent a child? Can adoption be guaranteed to establish those emotional ties and that ultimate bond that are its perceived goals? Is, for instance, a custody order really less instrumental in guaranteeing permanence of stability than an adoption order if the motivation behind the search for such an order is personal commitment, particularly if such commitment is grounded in the experience of previously living with and caring for a child, whatever the original reason or reasons for the initial contact?

However, in *Nouveau-Brunswick (Ministere de la sante et des services communautaires) c. L.(M.)* (1998), 41 R.F.L.(4th) 339 (S.C.C.), the court made it clear that, if adoption is in the best interests of the child, it must not be hampered by the existence of a right of access. As stated by Gonthier J., at p.384, "the courts must not allow the parents to 'sabotage' an adoption that would be beneficial for the child." As well, the court noted that, while there is no inconsistency in principle between a permanent guardianship (Crown wardship) order and an access order, access is the exception and not the rule.

For that reason, in *CAS of Ottawa-Carleton v. D.B.*, [2002] O.J. No. 4118 (S.C.J.), the court ordered Crown wardship without access to the father. Although the child's mother consented to the order of Crown wardship, the father opposed it and sought access. The latter was denied on the basis that he used a variety of illegal drugs including crack. The court reasoned that, even if access to the father would be beneficial to the child, it might impair the child's opportunity for adoption. See also *Children's Aid Society of Oxford County v. L.J.H.*, [2002] O.J. No. 4144 (C.J.), in which the parents' access was terminated because they failed to discharge the onus on them to show that the continued relationship outweighed the benefit to their child of a permanent placement for adoption.

It is clear that "placement" in s.59(2) is not restricted to adoptions, but also includes foster care placements. So where there is no evidence before a court regarding the adoptability of Crown wards and where there is a stable, happy foster placement, it is the ongoing viability of the latter that is relevant for the purposes of the second branch of the access test in s.59(2): *Children's Aid Society of the Niagara Region v. M.(D.)*, [2002] O.J. No. 1461 (Fam.Ct.). The court in *Lennox and Addington Family and Children's Services v. M.S.*, [2005] O.J. No. 5109 (S.C.J.) reached the same conclusion, concluding that permanency in s.59(2)(b) does not necessarily mean adoption. Robertson J. held that a foster home committing to permanency is not excluded by law as meeting the second branch of the test, although access by a parent should not be used as a method of preserving a specific placement.

It is clear that the choice required by ss.59(2)(b) is not between a specific permanent placement and a specific stable placement, since the court cannot order or direct a specific placement for a Crown ward: *CAS Ottawa-Carleton v. T.C.*, [2002] O.J. No. 3711 (S.C.J.). In that case the child was in a good foster home, the parents of which were happy with the mother's access. The mother argued that access should be continued so that this placement could continue. The court held, however, that it could

not order access solely or primarily in an attempt to preserve a particular placement. As the child was readily adoptable, it held that access would impair her future opportunities for a permanent placement.

The younger the child, the more likely it is that permanency planning will favour the termination of access for the purposes of an adoption placement in lieu of a long-term placement in a foster home: *CAS of Toronto v. A.R.* (2003), 36 R..F.L.(5th) 51, [2003] O.J. No. 423 (C.J.). This is especially so where there is evidence that the child is adoptable.

Finally, the strength of the judicial bias in favour of permanency planning over access is illustrated by the decision in *Frontenac Children's Aid Society v. C.P.*, [2004] O.J. No. 679 (S.C.J.). The court refused to make the orders of Crown wardship with access to the mother, despite the fact that only two of the five children were readily adoptable, the society had done no adoption planning for them yet, and there was no evidence before the court that adoptive homes would be available.

(c) Case Abstracts

(i) Access Granted

CAS of the District of Thunder Bay v. J.S., [2005] O.J. No. 2123 (C.J.)

The court granted access to the mother of an eight-year-old boy where all parties agreed that it should continue. There was evidence that the child loved his mother, that he was happy to see her and spend time with her, and that he benefited from a relationship with her. Because his foster parents were committed to his long-term care without thought of adoption, ongoing access would not impair his opportunity for a stable placement. Although the court allowed access, it ordered it to be supervised, because the mother had unresolved anger management problems that posed a risk to the child's safety.

CAS of Toronto v. V.J.L., [2005] O.J. No. 2735 (C.J.)

The court granted the mother access to her oldest two children, aged 15 and 13, after all three children were made Crown wards. The two oldest wished to continue seeing their mother and the court was satisfied that their relationship with her was beneficial and meaningful to them. The ordered access would not impair their future opportunities for a permanent and stable placement. Access could be increased if either child expressed a desire to see their mother more, as long as it was in their best interests and not contrary to his or her treatment needs. Access to the youngest child, aged two, would impair her chance for a permanent and stable placement and was not ordered.

Lennox and Addington Family and Children's Services v. M.S., [2005] O.J. No. 5109 (S.C.J.)

The court granted access to the parents of four children, aged 16, ten, seven and four on alternate months, with the option of the society increasing or expanding the access as it considered advisable in the children's interests. While the children suffered from poor parenting, neglect and emotional harm, the parents were totally committed and bonded to the children and the children were attached, albeit somewhat dysfunctionally, to their parents. The court held that the best interests of the children required the continuation of access with their parents even if it jeopardized their chances for adoption. In any event, the two foster families with whom the children lived were willing to continue caring for them long-term and were also willing to continue encouraging their relationships with their parents. A condition of the access, however, was that the parents participate in a clinically-managed access program because more was needed than simply pleasant visits.

CAS District of Thunder Bay v. S.E., [2005] O.J. No. 5833 (C.J.)

The mother successfully rebutted the presumption against access by demonstrating that the relationship between her and her children was beneficial and meaningful to them and that access would not impair their future opportunities for a permanent or stable placement. All parties acknowledged that the mother's access visits tended to be a positive experience for the girls, who were ten and 12. The foster parents had a clear and unwavering commitment to the long-term care of the children and to ensuring that the mother would be a part of their lives. However, since the mother found it problematic to pay attention to both children at the same time, the court ordered that she visit each one separately. As well, the court mandated a flexible schedule that would leave her visits unannounced.

Durham CAS v. V.B.C., [2005] O.J. No. 83 (S.C.J.)

The child was 15 years of age at the time of the hearing and wished to return home to her mother. She was also engaging in substance and alcohol abuse and was acting out at school. Her relationship with her mother, the court found, was "profound, loving and protective" (para. 66), but her mother suffered from a delusional disorder of the persecutory type and was often disconnected from reality. The mother could not control her daughter. Noting that the wishes of a 15-year-old should be given substantial weight, and acknowledging the positive aspects of the relationship between mother and child, the court ordered regular and consistent access – weekly if possible – but to be monitored and perhaps supervised by the girl's caregivers. The court found that access would not only be meaningful but would be "likely essential to S.C.'s developing ability to make her own decisions about how she must interact with adults to ensure her attaining of her goal for a normal life" (para. 74).

Chatham-Kent Integrated Children's Services v. L.M., [2004] O.J. No. 3612 (C.J.)

The children, aged 15 and 16, had been living in a group home for the past three years and wished to return home to their father, who had been exercising regular supervised access to them throughout. They had both made substantial gains at the group home. Given the age of the boys and their attachment to their father, it was obvious to the court that they would not be placed for adoption. The court had no doubt

that their access to him was both beneficial and meaningful to them. There was no evidence that the access would destabilize their placement in care, and so the court ordered access to the father in accordance with the wishes of the boys and as approved by the society.

Children's Aid Society of Toronto v. C.H., [2004] O.J. No. 4084 (C.J.)

The court placed great weight on the ten-and-a-half year old girl's feelings and made access to the mother, who had serious emotional problems, in the society's discretion and in accordance with the girl's wishes. The last access visit that had occurred had to be cut short because of a deterioration in the mother's behaviour. Since that time the child had not wished to visit with her mother. In the context of psychotherapy the girl made it clear that she did not want any contact with her mother until she was older and was able to stand up for herself.

Children's Aid Society of Toronto v. B.O. (2003), 45 R.F.L.(5th) 131, [2003] O.J. No. 4247 (C.J.)

The seven-year-old child had been in the care of the society for two and a half years, during which time the mother had consistently exercised her access rights. From the assessment reports and evidence at trial the court concluded that there was a strong and subsisting bond between the mother and girl. However, it also concluded that the mother had very little insight into her daughter's basic need for security and protection (from her father). The girl also had a good relationship with her foster mother, who was willing to continue caring for her over the long term. The court granted the mother access and specified that it should be not less than one and one-half hours every two weeks at the society's offices.

Children's Aid Society of Toronto v. D.G., [2003] O.J. No. 191 (C.J.)

The eight-year-old girl was made a Crown ward, but access was granted to her mother. The girl wanted to stay in her present foster home until she was 18, but she also enjoyed her visits with her mother. The court ordered supervised access in the community as agreed upon by the child. For the foreseeable future the court specified that it should be every second weekend from Friday evening to late Sunday afternoon at the supervisor's home.

Children's Aid Society of Algoma v. C.B., [2003] O.J. No. 4735 (C.J.)

The child, who was twelve, resided in a private institution some 800 kilometres from home. The mother had reasonable access to him at the discretion of the society, but she wished to have longer visits with him during the summer months in their home town. The evidence indicated that the child did not wish to visit his mother. The court determined that access in the discretion of the society made sense. It should also be subject to the child's wishes. The society had discretion to determine the time, frequency, duration, location and details of the supervision of access, and it had to exercise the same after consulation with the mother and the institution.

Children's Aid Society of Toronto v. C.T., [2003] O.J. No. 860 (C.J.)

The court granted the application to make the eight-year-old boy a Crown ward but granted the parents supervised access once a week for two hours per visit. At the time of the disposition, the child had been in care for almost three years, during which time the parents had exercised supervised access. The society had stopped this access after the child's behavioural problems esacalated out of control. The parents had been leading the child to believe that his return home was imminent and this had contributed to the increase in his dysfunctional behaviour. However, the court concluded that there was a beneficial and meaningful relationship between the child and his parents and that access would not operate to impair his future placement. While the court accepted that it had a limited jurisdiction to delegate access to the society, it held that the facts of the case before it did not warrant such a procedure.

Catholic Children's Aid Society of Toronto v. L.(J.) (Feb. 28, 2003), 120 A.C.W.S.(3d) 994 (Ont.C.J.)

Three female children, aged 13, ten and nine, were made Crown wards with access in the discretion of the society. The parents had a turbulent relationship and the father was an alcoholic. A parenting capacity assessment indicated that neither parent had the ability to parent the children as a result of their lack of insight and empathy. Access was granted but should be carefully monitored by the society.

Children's Aid Society of Toronto v. S.S., [2002] O.J. No. 3072 (C.J.)

The eleven-year-old boy had made solid progress in foster care. When apprehended he had been illiterate and had had a dysfunctional relationship with his mother, in which he was her best friend and confidante. His foster parents had no plans to adopt him and he expressed a strong desire to return to his mother. The court recognized that there was a strong bond between the child and his mother and that he would suffer enormously if deprived of reasonable and ongoing access to her. The court granted the mother unsupervised day access to him no less than twice a month. In its view this access would allow the two to maintain their relationship without undermining the boy's adjustment to his long-term foster placement.

Children's Aid Society of Northumberland v. M.D.F., [2002] O.J. No. No. 2485 (S.C.J.)

The court granted the mother access to two out of the five subject children. There was evidence that the two oldest, aged eight and five, were virtually unadoptable because they suffered from developmental disabilities. As well, there was evidence that these two (and the third child too) were highly interdependent and that their relationship was beneficial and meaningful. Relying on this sibling relationship, the court determined that the mother's access to them would permit them to have access to each other in the future, especially in the event that their residential placement did not continue to be together. The mother's relationship with them would provide them with much needed continuity. The court also noted with approval the fact that the mother had been a successful advocate in obtaining an proper diagnosis for the eldest.

Durham CAS v. G.(L.L.) (Feb. 1, 2002), 115 A.C.W.S.(3d) 638 (Ont.S.C.J.)

The court made the children Crown wards with access to their parents. After their apprehension the mother saw the children two to three times a week. She cooperated with the society and attended a parenting course. The father also completed a parenting course, as well as an anger management course. He had been convicted of assaulting one of the children, by biting her as a disciplinary technique. The court concluded that both of the parents had a reasonable chance of parenting the children at some point in the future.

Children's Aid Society of the Niagara Region v. M.(D.), [2002] O.J. No. 1461 (Fam.Ct.)

The court concluded that the factors in s.59(2) had been met. The access currently exercised by the father with the children, aged four and two, for three hours a week at the home of his father, was beneficial and meaningful to them. Termination of that access would not be in their best interests. The court also found that no evidence had been adduced to indicate that an access order would impair the future opportunities for a permanent or stable placement. There was no credible evidence before the court concerning the children's adoptability, but "placement" was broader than adoption and included foster care placements. As the foster mother had testified that was agreeable to providing long-term care for the children with the access ongoing, and as the evidence indicated that the children were very happy in this foster placement, the court held that access would not undermine the continued placement of the children in that foster home. In the circumstances, it was not necessary for the court to look beyond the current placement of the children.

Kawartha-Haliburton Children's Aid Society v. G.P., [2002] O.J. No. 310 (Fam.Ct.)

The mother's two children were both made wards of the Crown. If the seven-year-old child were placed with the mother's sister, as proposed by the society, the court stated that it would be artificial in the extreme for there to be no access by the mother to that child. The court presumed that since the society supported limited access between the older child and the mother, the society accepted that access was beneficial and meaningful to the child. The mother was granted access twice a month for a period of no less than two hours. While access was to be supervised, it was not to take place at the society's offices. The five-year-old had a lot of behavioural problems and because he was difficult to place, the society had no immediate plans for adoption. The society was recommending access by the child to his sibling and to his aunt and uncle. An assessment report recommended that there be no access between the mother and the younger child for at least one year. The court, however, stated that it failed to see how some limited access between the child and his mother would not be in the child's best interests, while he remained in the limbo of being a Crown ward but not quite an ordinary Crown ward. Accordingly, the court ordered access between the mother and child once a month.

Durham Children's Aid Society v. W.(G.), [2001] O.J. No. 3495 (S.C.J.)

The mother had poor parenting skills and did not appreciate the great risk posed to the six-year-old child by the father who was a dangerous sexual predator. The mother had allowed the child contact with the father in breach of a supervision order after the father was released from jail. The mother and child had a strong attachment and the mother attended her twice weekly access visits regularly. The visits went well and the foster mother confirmed that the child spoke about his visits with his mother and looked forward to the next visit. An expert report recommended Crown wardship but stated that given the significance of the attachment between the mother and child, it was important for the child to have access to his mother and know that his mother loved and cared for him. The court agreed that a loss of access would have a long lasting traumatic effect on the child which, given his age, should be avoided if at all possible. The court found on the evidence that access would benefit both the child and the mother and, therefore, this finding ruled out the adoption option. The court stated that long-term foster care would be ideal in these circumstances. The current foster mother had given her commitment to raise the child to majority. The court made an order for Crown wardship with access to the mother, which access was to be supervised so long as she had contact with the child's father, who was prohibited from having any contact.

Kawartha-Haliburton Children's Aid Society –Victoria/Haliburton Branch v. G.G., [2001] O.J. No. 2607 (Fam.Ct.)

Four children ranging in age from ten to 16 were apprehended from the care of their father, who was separated from their mother. The father's mental health and discipline methods were in issue. Both parents had ongoing access to the children since the apprehension. The Society sought and was granted an order for Crown wardship with access. With regard to access, the court noted that despite some difficulties with access, both parents had been until recently consistent in their attendances to visit with the children. Such consistency reflected a bond that existed between the parents and the children. Also, the Society had not led any evidence that the children did not have a significant relationship with the parents that was meaningful to them nor had it led any evidence that access would impair the children's future opportunities for permanent or stable placement. Accordingly, the order that best reflected the children's best interests was an order for Crown wardship with access to the parents. The father was encouraged to reinstate his supervised access. The court attached a number of conditions to the access order and stated that in the event of substantial compliance with the conditions, the Society ought to consider returning the boys and perhaps all of the children to the care of the parents or parent, under supervision. On the other hand, in the event of non-compliance with the conditions, then permanency planning had to be initiated in the best interests of the children.

(ii) Access Not Granted

Frontenac CAS v. J.W., [2006] O.J. No. 2460 (S.C.J.)

The court refused to grant access to the parents despite the fact that the two oldest children, aged 13 and 11, wished to have it. The court held that the relationship between the parents and the children was not beneficial to the latter. The parents were

delaying the children's development and the children needed to emotionally disengage from them in order to attach more fully and appropriately to other caregivers. Also, given the judge's conclusion that the oldest three children should live together, and the psychological evidence that it would be problematic for one or two of the children to have access and one or two not to have access, it was best that no access should be granted at all.

CAS of District of Thunder Bay v. K.K., [2006] O.J. No. 1786 (C.J.)

The mother's parenting deficiencies, including her reluctance to engage fully in play with her 13-month-old son, her frequent inability to soothe him, and her lack of focus on his needs spoke to the quality of relationship between them, which the court could not conclude was beneficial or meaningful to him. On top of that, the mother's track record of lies and broken promises to reform inhibited the court's confidence in her latest plans for change. Any further delays in permanency planning might serve the mother's interests, but not those of the child.

Children's Aid Society of Toronto v. M.A., [2006] O.J. No. 254 (S.C.J.)

The appellate court confirmed the trial judge's conclusion that the mother should not have access to her child, who was highly adoptable. At the time of the appeal, the girl had been in the care of her foster parents for three and a half years. The foster parents were committed to adopting her, and fresh evidence on appeal suggested that she was being hampered in her ability to settle due to the delay in a decision being made about her permanent placement. The court held it was open to the trial judge to conclude that "whatever benefits and meaning" the child derived from visits with her mother, they were outweighed by her need for continuity of care and for a secure place as a member of a stable family. In the court's words: "Adoption holds a promise. An order of access will prevent the child's adoption and would be contrary to her best interests" (at para. 9).

CAS of Toronto v. M.W., [2005] O.J. No. 931, rev'g [2004] O.J. No. 3160 (S.C.J.)

The court reversed the trial judge's conclusion that the father be awarded gradually increasing access because he had not met either of the prerequisites. At the time of appeal, the child was almost three years of age and had been in the society's care since he was nine months old. Given the relatively little time the father had spent with the child exercising access since he had gone into foster care – part of which was due to the father's two long-term periods of residential treatment for his alcohol addiction, it could not be said that their relationship was beneficial and meaningful to the boy. As well, access would impair his opportunities for a stable and permanent placement given his high adoptability and the lack of possibility that he could be placed on a long-term basis with his current foster parents. The child had been in the society's care for twice the period of time allowed by the Act and there was a good chance that the father would have another relapse. This latter factor belied the trial judge's conclusion that the father would soon be in a position to regain custody of his son.

Children's Aid Society of the Niagara Region v. S.K., [2005] O.J. No. 3570 (S.C.J.)

The court concluded that the mother should not have access to her two-year-old son. While there was no doubt that she loved him, she had consistently shown her inability to put his needs and interests ahead of her own. He was readily adoptable and it was clear that access would impair his opportunity for a permanent or stable placement.

CAS of Stormont, Dundas & Glengarry v. K.W., [2005] O.J. No. 690 (S.C.J.)

The court acknowledged that the three–year-old girl's access to her parents, especially to her mother, was beneficial, accepting the evidence that the access visits went well and that their relationship was loving, enjoyable, and appropriate. However, given her young age and the fact that she would be in long-term foster care for many years, the court held that she needed "to be given the sense of security that comes with adoption" and to have "a special place in the family" (at para. 115), and so ordered that neither parent have access.

Frontenac Children's Aid Society v. C.P., [2004] O.J. No. 679 (S.C.J.)

The court refused to make the orders of Crown wardship with access to the mother, despite the fact that there was no evidence before it that adoptive homes were available for these five children, two of whom had significant developmental problems. While the court acknowledged that the mother loved her children, it was not clear that she had a meaningful and beneficial relationship with any of them. A report prepared by the Office of the Children's Lawyer stated that the older two especially exhibited a "striking level of ambivalence" towards her. With respect to the younger three, who had an interest in continuing to see her, the court was unable to hold that her relationship with them was beneficial or meaningful in the long run, due to her inability to provide for them. Although the society's plan was to seek adoptive homes for all five, it had not done any adoption planning. Only two of the five were readily adoptable. Despite that reality the court emphasized that if it were to grant access and then the society were to locate adoptive homes it could take a year or more to obtain an order terminating access so that the adoptions could proceed.

Kawartha-Haliburton CAS v. N.H., [2004] O.J. No. 4782 (S.C.J.)

The court refused to grant the parents access to the two children, aged six and one, despite the fact that they had been devoted to their access visits to the children. Although the parents performed well in access visits with the children, the evidence at trial indicated that they could not cope with them in real life. The children were adoptable and there was no evidence that access would not impair their chances of having that happen.

CAS of Ottawa v. R.L., [2004] O.J. No. 3112 (S.C.J.)

The child was nine years old and had suffered from a profound hearing

impairment since her birth. It was clear that the father and daughter's relationship was beneficial and meaningful to her and that she would suffer from its termination. However, the court held that it was "necessary to ask whether the risks of emotional difficulty inherent in terminating P.(1)'s access to her father outweigh the benefits of placement in a permanent, adoptive home" (at para. 78). Answering that question in the negative, the court concluded that it would make no order as to access, so that the society could permit some contact between the two while it sought out a permanent adoptive placement for her.

CAS of Lanark and Smith Falls v. S.W., [2004] O.J. No. 1897 (Div.Ct.)

The appellate court reversed the trial judge's conclusion that the mother of three children, aged eight, six and four, should have weekly access to them for a period of six months to see if she could control her dependency on drugs and alcohol. The trial judge had erred in holding that access would not impair the children's opportunities for permanency. The children were highly adoptable, the current foster parents were not prepared to provide long-term care for them, and the average length of stay in a foster home in that county was less than two years, meaning that continued foster care would be neither permanent nor stable. Finally, fresh evidence admitted on the appeal revealed that the children had not seen their mother for almost a year and had not asked for her. As well, with respect to the child who had had the closest relationship with his mother, the fresh evidence indicated that he had become increasingly reluctant to attend access visits. Therefore, it could no longer be said that the relationship between the mother and the children was beneficial and meaningful to them.

CAS of Algoma v. I.D. (Ont.C.J., June 7, 2004, No. 85/95)

The court refused the mother's request for access to her two children. While Keast J. conceded that the relationship between them was beneficial and meaningful on a superficial level, in that the children appeared to have fun and to enjoy her visits, he was of the view that the visits were not necessary to the children's psychological development. Also, the mother had consented to the children's adoption, but she had a strong need to be identified as their biological mother and this would interfere with the children's ability to reattach psychologically to their new parents. Access would create interference in the new adoptive family in a variety of ways, including exposing the children to two different styles of parenting. Future access would probably reduce the size of the adoption pool, especially since it would have to be access supervised by the new adoptive parents.

Children's Aid Society of Waterloo v. D.K., [2004] O.J. No. 3657, 9 R.F.L.(6th) 280 (C.J.)

The trial judge held that the mother should not have access to her seven-year-old daughter. While the child loved her mother and enjoyed their access visits, she also had foster parents who were prepared to adopt her. The child had told her worker that she wanted to be adopted even though that meant that she would no longer see her mother. There was also evidence before the court that long-term foster placements

break down when access continues.

CAS of London and Middlesex v. K.D.N., [2004] O.J. No. 360 (S.C.J.)

The court concluded that the five-year-old child with special needs had a beneficial and meaningful relationship with his father who visited him fortnightly. Although the mother had her problems, her relationship with her son was also beneficial to him. Despite that and the fact that the prospect of a successful adoption placement was very low, due to the child's special needs, the court refused to grant access to either parent. The society had a home in mind for the child but the window of opportunity was shrinking with time.

CAS of Ottawa-Carleton v. D.M., [2003] O.J. No. 1454 (S.C.J.)

While the court acknowledged that the nine-year-old boy had a beneficial and meaningful relationship with his mother, he had been living in a foster home for three years and his foster parents wished to adopt him. He had special needs, including serious cognitive delays and behavioural problems, and everyone involved in the case had agreed that this foster home would be an excellent adoptive placement. There was expert evidence that his behaviour sometimes deteriorated because of the anxieties he experienced regarding his family of origin and the uncertainties inherent in his situation. The court concluded that the benefits that he would gain through adoption would outweigh the risks of the termination of contact with his family of origin.

Kawartha-Haliburton CAS v. K.L., [2003] O.J. No. 1127 (S.C.J.)

The court refused to grant the mother access to her two youngest children. She had a strong love for them, which they reciprocated, and they were very attached to her. After their apprehension and placement in foster care, she visited with them regularly. However, the court placed a great deal of weight on the evidence of a society adoption services worker, who blending "reality with hope" (para. 51) spoke to the children's needs and the possible pitfalls of any adoption placement. The court accepted this worker's view that an access order would impair the two younger children's future opportunities for a permanent or stable placement.

CCAS of Hamilton v. D.B., [2003] O.J. No. 1968 (S.C.J.)

The father was unsuccesful in obtaining access to his nine-year-old daughter. She suffered from a severe learning disability and was very needy. Her current foster family was not prepared to adopt her. The court determined that adoption was preferable to access because she had significant needs that had to be addressed in a stable environment, which only an adoptive placement could provide. As well, the child did not wish contact with her father, who had made only minimal efforts to exercise his right of access. The court also concluded that their relationship was neither beneficial nor meaningful. The father had his own emotional problems, a lack of insight and poor relationship skills.

Children's Aid Society of Sudbury and Manitoulin v. C.T., [2003] O.J. No. 3041 (S.C.J.)

The appellate court granted the society's appeal from an order for Crown wardship with access to the parents. This order had been made despite the child's wish to be adopted by his foster family instead of maintaining access to his birth parents. The child was ten years old knew his own mind on the matter. The trial judge had found that the past access visits had been successful, that the child had much to gain from access, and that he needed to know who he was and what kind of people his birth parents were. The appellate court, however, was of the view that these findings were not only vague and imprecise, but pointed to a benefit only for the parents. The findings did not indicate that the child found the relationship beneficial and meaningful. As well, the ordered access would impair his future opportunities for a permanent stable placement. His current placement in a foster home could not be considered a permanent placement. The placement with his current foster family would become permanent only after the adoption order had been made. The best interests of the child lay in being adopted by his foster family.

Children's Aid Society of Ottawa v. P.H., [2003] O.J. No. 2846 (S.C.J.)

The mother consented to a finding in relation to her two sons, aged four and six. She was incarcerated and incapable of parenting. She had an alcohol problem and had had many abusive partners. The court made the children Crown wards without access. There was no evidence to support the finding that the relationship between the mother and her sons was beneficial and meaningful to them and access would clearly hinder any future opportunity they might have for a permanent or stable placement.

Kawartha-Haliburton Children's Aid Society v. I.M., [2003] O.J. No. 3120 (S.C.J.)

The court ordered that the child, aged seven, should be made a Crown ward without access for the purpose of adoption. The mother had been enjoying supervised access twice a week, as had the maternal grandmother but usually at separate times. Implying that the relationship between the child and his mother was neither beneficial nor meaningful for him, the court noted that the access visits were problematic in that the mother acted inappropriately by discussing adult topics and denigrating the foster parents. As well, she often was sedated, sleepy or inattentive to him during visits. Noting that the foster parents wished to adopt the boy, the court accepted the assessor's evidence that the benefits of adoption outweighed any benefits derived from continuing his relationship with his mother. The child himself wished to remain in this foster home.

Children's Aid Society of Oxford County v. J.S., [2003] O.J. No. 1885 (C.J.)

The court held that the father should not have access to his two children, despite the fact that the mother did. The father had psychological and developmental problems, was self-centred, and accepted no responsibility for his behaviour. The children had been sexually assaulted while in his care. Not only was his relationship with them not beneficial to them, it also posed a risk of further harm.

Children's Aid Society of Niagara Region v. P.R., [2003] O.J. No. 680 (C.J.)

Although an expert assessment report was of the view that it would be detrimental for the child to lose all contact with his mother, it was also clear that he had bonded with his foster family and that it would be detrimental to remove him from their home. His foster parents were prepared to adopt him, but the court held that an order without access would provide him with more stability since the evidence indicated that the access was disruptive and upsetting to him and that his relationship with his mother was neither beneficial nor meaningful to him. Ordering access would impair his future opportunities for a permanent and stable placement.

Children's Aid Society of Ottawa v. K.T., [2003] O.J. No. 291 (S.C.J.)

The court refused to grant the parents access to their two children, aged one-and-a-half and two-and-a-half. It was in their best interests to make such an order. The relationship between the children and their parents was not beneficial or meaningful to them. There were a number of permanent, adoptive placements available for both children together. Access to the parents, however, would impair their opportunities for such.

Children's Aid Society of Toronto v. A.R (2003), 36 R.F.L.(5th) 51, [2003] O.J. No. 423 (C.J.)

The court ordered that the 20-month-old boy be made a Crown ward without access to his parents. The child had been apprehended at birth because the mother, who suffered from schizophrenia, had had another child adopted and was now incapable of parenting this child. The father was in his sixties and had his hands full caring for his wife. The court noted that there was some positive attachment between the boy and his father, but held that it would be a "stretch" to characterize it as a relationship that was beneficial and meaningful to him. It also held that given the boy's young age and his undisputed ability to form emotional bonds with adoptive parents he would enjoy a greater and more secure form of permanency by being adopted rather than by remaining in a foster home.

Children's Aid Society of Niagara Region v. D.P. (2003), 36 R.F.L.(5th) 265, [2003] O.J. No. 619 (S.C.J.)

The two children in question, aged one and two, were made Crown wards without access to the parents. They had been apprehended at birth. The mother's other five children were Crown wards as well. The court held that it was very difficult to establish that the children's relationship with their parents was beneficial and meaningful to them when they had been apprehended at birth. Given the combative and stubborn nature of the mother and her reluctance to change, Quinn J. was of the opinion that access by the mother would be disuptive to the children. The father's history of domestic violence placed him in the same category. Since neither parent could satisfy s.59(2)(a), access was denied.

CAS of Northumberland v. M.D.F., [2002] O.J. No. 2485 (S.C.J.)

Although the court granted the mother access to her oldest three children, it made the orders of Crown wardship with respect to the two younger children, who were twins, without access. They were only about ten months old when they were apprehended and the mother herself testified that she felt that there was no bond or attachment between them. Her history of visiting with them had been inconsistent and very restricted for a considerable period of time.

Children's Aid Society of Dufferin v. J.R., [2002] O.J. No. 4319 (C.J.)

The five-year-old boy in question had lived with his maternal grandmother following his father's arrest for his mother's murder. His aunt (his father's sister) applied for custody, but the court denied it. The court granted the motion for summary judgment and made him a Crown ward without access to the aunt. The aunt had not cared for him other than as a temporary arrangement, nor had she demonstrated an intention to make him a permanent part of her life. The evidence indicated that he found his visits with his aunt difficult and upsetting. The court held that he did not have a meaningful or beneficial relationship with his aunt in the sense that maintaining contact was essential to his wellbeing and his future development. As well, he should have a new start with his maternal grandmother and his mother's family and given the potential for conflict between the two sides of his family it was in his best interests that access be denied.

Children's Aid Society of Oxford County v. H.(L.J.), [2002] O.J. No. 4144 (C.J.)

Where the evidence indicated that the three-year-old child had a happy disposition and responded positively to all persons and not just the parents, the court concluded that this evidence detracted from the parents' allegation that the child was specifically bonded to them and that a loss of that relationship would have serious consequences for her. Accordingly, the parents had not met the onus on them to prove that it would be beneficial to her to have access continue. The court found that a continued relationship through access with either parent was totally outweighed by the benefit that would accrue to the child by a permanent placement in a family with no access to the parents.

Children's Aid Society of Toronto v. M.A., [2002] O.J. No. 2371 (C.J.)

The society's motion for summary judgment for Crown wardship with no access to the mother was granted. The child in question was 25 months old. The mother agreed to Crown wardship but desired to maintain access. The society relied upon an affidavit that attested to the child's adoptability. Although there was evidence of a bond between the mother and child, the mother failed to demonstrate that access would not impair his future opportunities for permanent or stable placement. It was clear that the mother, who did not present any evidence of her own regarding adoptability if access were to be maintained, wished to proceed to trial in order to fish for evidence or to expose weaknesses in the position taken by the society.

Children's Aid Society of the Region of Halton v. G.(S.) (May 29, 2002), 114 A.C.W.S.(3d) 247 (Ont.C.J.)

The mother had severe substance abuse problems and her child had been apprehended at birth. She had made no progress resolving her drug dependency problem and, in fact, refused to admit that she had such a problem. Her professed desire to maintain contact with the child was egocentric and was not with his best interests in mind. The boy was clearly distressed by the access visits. He was psychologically bonded to his foster parents, who were willing to adopt him. The adoption would provide stability and permanency for him; by contrast, access would impair his opportunities for a permanent or stable placement.

Children's Aid Society for the Region of Halton v. O.(S.), [2002] O.J. No. 2319 (Ont.C.J.)

The subject child had been apprehended at ten months of age and was now three years old. The mother was not capable of raising the child alone and a suggested placement with the grandparents was too risky. The least restrictive alternative was Crown wardship without access. While there was evidence that the child and the mother and the child and the grandparents enjoyed meaningful relationships (as a result of maintaining regular access to him since the apprehension), the court was unable to find, on a balance of probabilities, that they were beneficial relationships. The grandparents had deliberately withheld information from the court. As well, the court was satisfied that if access were ordered if would impair his future opportunities for a permanent and stable placement.

Children's Aid Society of Ottawa v. N.(R.), [2002] O.J. No. 1562 (S.C.J.)

The child, aged eight, had had behavioural and school problems when living with her mother. Although she had a warm and loving relationship with her mother, the mother was incapable of ending her relationship with the father, who was abusive. The child bloomed in foster care, and enjoyed – for the most part – the access visits with her mother, but there was no indication that the mother would ever be able to achieve an ending of the relationship with the father. Therefore, despite the child's wish to remain with the foster family and to continue the relationship with her mother, the court concluded that she should be made a Crown ward without access. The girl was anxious about her mother's safety when she thought her parents were together and the foster parents were not in position to adopt her. For this reason, although the court was satisfied that there was a meaningful relationship between mother and daughter, it was not satisfied that it was beneficial. As well, the evidence indicated that the child was eminently adoptable, despite her age, and continuing access would jeopardize her chances for a stable and permanent placement. Long-term foster care does not import the same degree of stability and permanency.

Children's Aid Society of the District of Sudbury and Manitoulin v. P.M., [2002] O.J. No. 1217 (C.J.)

Where there had been no contact between the mother and the child, who was almost four years old, for 19 months, the court found that the mother and child did not

have a relationship that was either beneficial or meaningful to the child. Aside from the mother's belated attempt to obtain access through counsel, there was nothing to sufficiently explain her failure to have contact with the child for a period of months when the foster home was a twenty-minute walk away. The court found that the mother had effectively abandoned the child and it would now be difficult to establish that the relationship between her and the child was beneficial and meaningful. In addition, since the stated objective of the society was to facilitate adoption and the child was healthy and without manifest problems, granting an access order would clearly tend to frustrate permanency planning for the child by way of adoption.

Children's Aid Society of the Region of Peel v. O.(W.), [2002] O.J. No. 1099 (C.J.)

Three children were made Crown wards. The two younger children were adoptable whereas the older child was not. Although it was conceded that it would be beneficial to the older child to have access to her two younger siblings, the court noted that if an order for Crown wardship were made with access, the children could not be adopted. It was important and in the best interests of the younger children to be given the opportunity to be adopted by a good family and to become safe, secure and loved members of that family unit. The court stated that each child's best interest had to be ultimately addressed on the individual needs and interests of each such child. Here, it was of greater benefit for the two younger children to each have a placement in an adoptive home, even if, it meant that they might not have access to their older sister and possibly, access to each other.

Children and Family Services for York Region v. M.A.G., [2002] O.J. No. 287 (S.C.J.)

The court observed that a child who had been a Crown ward could not be adopted if there was an outstanding access order. In any event, access by either parent would not be in the child's best interests. Due to their conduct at arranged visits, the parents could not adequately manage even supervised access and an access order would impair the child's future opportunities for a permanent and stable placement. Accordingly, the court held that the Crown wardship order should be without access for the purpose of the child's adoption.

P.(S.) (Re) (Apr. 3, 2001), 104 A.C.W.S.(3d) 338 (Ont.S.C.J.)

All four children were made Crown wards without access. The court held that even though the oldest child, aged nine, had an attachment to her parents and stated that she wanted to return home, a long-term placement was required. The court concluded that it would be more beneficial for the child to be placed for adoption with the second child, than in long-term foster care with access. Accordingly, while access would be beneficial, it could not be ordered because it would interfere with permanent placement.

R.W. v. Children's Aid Society of Ottawa-Carleton, [2001] O.J. No. 2359 (S.C.J.)

The court refused to grant the father access on a status review application. The

parents were drug addicts who had neglected and abused the children. The father, however, had reformed his life and argued that he had a loving relationship with them. The children were extremely frightened of their mother and continued to associate their father with their mother's behaviour. They did not want to see him and hated him for the abuse to which they had been subjected. The court held that there was no beneficial and meaningful relationship from the children's point of view and concluded that access to them by their father would not be in their best interests.

Frontenac Child and Family Services v. S.S., [2001] O.J. No. 1132 (S.C.J.)

The court declined to make an order of access in respect of two children, aged two and one, as an access order would compromise the children's opportunity for adoption. See also *Children's Aid Society of the Regional Municipality of Waterloo v. R.S.*, [2000] O.J. No. 4880 (C.J.) in which the court held that given the age of the children (seven years to seven months), the adoption plans for the children, certain of the bonding issues, the position taken by child counsel, and the tests set out in s.59(2) of the CFSA, there would be no order for access to the mother's five children because it would interfere with permanent adoption placement for all them.

Kawartha-Haliburton Children's Aid Society – Victoria/Haliburton Branch v. M.(K.), [2001] O.J. No. 5047, 2001 CarswellOnt 4507 (S.C.J.)

The child had been apprehended at birth and the court found that the child's relationship to his mother was virtually non-existent. Indeed the only connection was a biological one. The court held that this level of relationship could not be more beneficial or meaningful than the elimination of the impediment to an opportunity for the child to obtain a permanent and stable placement in a family. Accordingly, Crown wardship with no access for the purposes of adoption was ordered.

Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v. V.(S.), [2001] O.J. No. 5114, 2001 CarswellOnt 4544 (S.C.J.)

The primary issue was whether the order for Crown wardship should be made with or without access. The mother opposed the society's request for no access to her son, born July 1, 1997, and she proposed a detailed plan for access. The evidence, however, was overwhelming that the child reacted very negatively to any visits with his mother even though she had taken steps to improve herself and her relationship with her child. The court was not satisfied that the relationship between them was beneficial or meaningful to the child. Rather the court found there was a lack of psychological bonding between mother and child, who had now bonded with his foster family. In addition, the court was not satisfied that access would not impair the child's opportunities for a permanent and stable environment. Although the society's plan was for the child to remain in long term foster care with his current foster family until he reached adulthood, the court was not prepared to make an access order, which could be terminated at a later date. The evidence was clear that access was not in the child's best interests. It had not worked and was not working for the child. He was being damaged by the visits and thus disrupting his development. Accordingly, access was to

be terminated forthwith.

Children's Aid Society of the Regional Municipality of Waterloo v. W.(T.) (Oct. 30, 2001), 109 A.C.W.S.(3d) 99 (C.J.)

The child, now aged ten months, was apprehended at birth and the mother missed most of her access visits with the child. The parents were now total strangers to the child. See also *Kawartha-Haliburton Children's Aid Society v. W.-W.* (June 25, 2001), 106 A.C.W.S.(3d) 670, [2001] O.J. No. 2679 (S.C.J.), in which the child's relationship to either or both of his parents was tentative at best given the sporadic nature of their attendances in the last six months before trial (which was one-half of the child's life). The court opined that to find such an attachment may be based on a projection of the importance of the biological connection as opposed to anything actually experienced by the child, now aged 13 months. On the evidence, the court found that this relationship could not be more beneficial or meaningful than the elimination of this impediment to an opportunity for the child to obtain a permanent and stable relationship. Accordingly, the court ordered Crown wardship without access for the purposes of adoption.

An order for Crown wardship without access for purposes of permitting an adoption placement was also made in *Children's Aid Society v. G.(G.)*, [2001] O.J. No. 5226, (S.C.J.); and *Children's Aid Society of Ottawa-Carleton v. A.*, [2001] O.J. No. 2887 (S.C.J.).

5. Pre-Amendment Case Law

Prior to the amendments that came into force on March 31, 2000, a court could not make an order of access in respect of a child who had been made a Crown ward except in specified conditions, namely:

> (a) permanent placement in a family setting has not been planned or is not possible, and the person's access will not impair the child's future opportunities for such placement;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with the person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.

In *Children's Aid Society of the Regional Municipality of Waterloo v. R.S.*, [2000] O.J. No. 4880 (C.J.), the court opined that although the wording was different, essentially the former clause 59(2)(a) and the new clause 59(2)(b) mandate that a court not order access where it would interfere with permanent adoption placement. Accordingly, the pre-amendment case law will continue to be applicable.

As noted above, however, two of the criteria set out in s.59(2) of the CFSA prior to March 31, 2000 are not present in the current provision. Thus, the wishes of a child who is 12 or more years of age to maintain a contact with the person seeking access and the fact that the child has been placed with or will be placed with a person who does not wish to adopt him or her are no longer statutory factors. Although not having the force of statutory criteria, these factors arguably are still relevant in considering the best interests of the child.

In *Children's Aid Society of Toronto v. L.(E.L.)* (1999), 2 R.F.L.(5th) 78 (Ont.C.J.), the court set out several questions that it should ask itself when deciding whether access to a Crown ward should continue. Jones J. stated (at para. 40):

> In evaluating the effect of continued access to his parents might have on B.L.L. and his best interests, I have identified the following questions as to such a determination.
>
> (1) What is the society's long range plan for this Crown ward?
>
> (2) Does this plan satisfy the need for permanency planning in light of the child's age?
>
> (3) What effect has the current access regime had on the child?
>
> (4) What effect would termination of access have on the child?
>
> (5) Would continued access to the biological parents support or undermine the child's placement?

(a) Permanent Placement Not Planned or Not Possible; Access Not Impair Future Opportunities

(i) Access Awarded

If the Children's Aid Society seeks an order of Crown wardship of the subject child or children with access by family members, the Society is generally signalling that that there are no immediate plans for an adoption placement and continued contact between the child and his/her biological family will be beneficial to the child.

Children's Aid Society of Toronto v. C.(J.) (Nov. 16, 2001), 110 A.C.W.S.(3d) 88 (Ont.C.J.)

Although the society had no plans to place two children, aged six and five, for adoption immediately or in the foreseeable future because of their very special needs, it sought an order for Crown wardship with no access to facilitate adoption. The parents exercised regular access to their sons and expressed their commitment to maintaining the relationship. The evidence indicated that the boys enjoyed their visits with their

parents and their older sister. The six-year-old child was in a residential setting and needed a family now and in the future. The court stated that since he had a family that wished to remain involved in his life, the Society should foster the relationship to the full extent possible. Similarly, the younger child, who was in a "special needs" foster home for so long as the foster parents were able to manage his behaviour, should be exposed to all his relatives and their families and feel that sense of belonging that comes from being a member of a family. The court noted that this child had already been in two foster placements and might experience multiple placements before he reached adulthood.

Children's Aid Society of London and Middlesex v. C.(S.-M.R-A) (Apr. 27, 2001), 105 A.C.W.S.(3d) 264 (Ont.Fam.Ct.)

Four children were made wards of the Crown with access to the parents at the discretion of the society, to be supervised by the society. The court held that it would not be in the best interests of the children if access schedules were imposed because the deprivations that the children had been subjected to left them with weak links to their parents.

Catholic Children's Aid Society of Toronto v. M.(B.) (June 29, 2000), 101 A.C.W.S.(3d) 536 (Ont.C.J.)

Where the 24-month limitation period was fast approaching and the current home situation was unlikely to change in the foreseeable future, the court held that the least intrusive order was Crown wardship with access subject to supervision by the society. The child had expressed a desire to remain in foster care and visit with her family on a regular basis. Because it was in the best interests of the child to visit with her parents in circumstances where the family could maximize their enjoyment of their time together, the court expressed the hope that the parents pursue counselling in order that supervised access would become unnecessary.

Children's Aid Society for the Districts of Sudbury & Manitoulin v. L.D., [1993] O.J. No. 2951 (Prov.Div.)

The only choice available to the court was to make the children Crown wards. Since the Society and the mother agreed that the mother should continue to have access to her children and since the evidence strongly supported such access, the court ordered Crown wardship with access.

Children's Aid Society of Sudbury & Manitoulin v. L.(S.), [1993] W.D.F.L. 1056, 41 A.C.W.S. (3d) 338 (Ont.Prov.Div, June 18, 1993)

The mother was of borderline intelligence, had been abused as a child and had attempted suicide. She was in an abusive relationship that she saw no need to terminate. She was unable to benefit from society assistance in parenting. The court ordered Crown wardship with access. The Children's Aid Society's position was that the two children, aged five and three, should be adopted, but offered no evidence to support

their position nor did it lead any evidence to establish any future opportunities for a permanent placement of these children in a family setting. Therefore, the court concluded that no permanent placement in a family setting had been planned. Planning, in the court's view, contemplated something more than merely a bald statement about the existence of a plan. Since the contact between the mother and the children had been described as being regular and appropriate for the most part, the court held that it was in the best interests of the children to continue to have contact with their mother. If the Children's Aid Society formulated a concrete plan for permanent placement of these two children, then the issue of access would have to be re-examined. Until then, the mother was to continue to have weekly access to the children for periods of no less than two hours per week.

C.A.S., Nipissing v. S.(S.), [1993] W.D.F.L. 323, 37 A.C.W.S. (3d) 678 (Ont. Prov. Div., Dec.1, 1992)

Because of the time limitations in the CFSA, the court had no alternative but to make an order of Crown wardship. Accordingly, the only issue was whether the either or both parents should have access to the children. The court held that on a reading of s.59(2) of the CFSA, it was appropriate to grant the mother access. The society's evidence indicated that it would take a year to place all the children in a single adoptive home. If it failed to obtain a court order for Crown wardship without access, the society's plan was to integrate the children as a group into an approved foster home. There was no evidence that that access by the mother would impair the children's future opportunities for permanent placement in a family setting. The court also noted that the children and their mother were bonded and attached to each other. The court stated that while the children's future should be resolved without undue delay, this was not an ideal situation. There was no guarantee that the placement of the children on a permanent basis, if such could be found, would guarantee them a life untroubled by their past history of sexual abuse by their parents, particularly their father. There was reason to believe, however, that once the mother dealt with her past problems of physical, emotional and sexual abuse, she would be able to parent the children. The court denied access to the father as well as the paternal grandparents because they denied any wrong-doing by their son.

C.A.S. Algoma v. D.(M.), [1990] W.D.F.L. 375 (Ont.Prov.Ct. [Fam.Div.], Oct.4, 1989)

Notwithstanding the fact that the mother had failed to deal adequately with her alcohol problem, the court made an order for Crown wardship with access. She had made good efforts to work with the society and there was evidence that the child had a bond with his mother. If she were unable to make further progress with her alcohol problem within a two-year period, then the matter would be brought back for further disposition. The child would reside with his younger sibling and his adoptive parents who indicated that the granting of access to the mother would not deter their plans to raise the oldest child as their own.

(ii) No Access

An appeal of a Crown wardship order with no access made on summary judgment was dismissed in *D.(C.) v. Children's Aid Society of Algoma* (Nov. 28, 2001), 110 A.C.W.S.(3d) 309 (Ont.S.C.J.). The appellate court held that a careful review of the evidence in relation to permanency planning and adoption led to the conclusion that there was no genuine issue for trial before the motions court judge or before it that could justify the trial of an issue with respect to access, or displace the no access presumption in s.59(2). The three children, aged seven, four, and two, were thriving in foster care and were adoptable.

Although the mother and a younger sister exercised weekly access to a four-year-special needs child and the foster parents who had been caring for the child for three years were not prepared to adopt him, the court ordered Crown wardship without access: *Catholic Children's Aid Society of Toronto v. D.S.*, [2001] O.J. No. 4245 (C.J.). The court held that it was in the child's best interests that be placed in a permanent home with parents who were able to meet his special needs and who were prepared to make a life-long commitment to him. If an order for access were made, the child, who was nonetheless adoptable, would be left in the foster care system. There was no guarantee that he would not be moved from his present placement, even though the foster parents were prepared to offer long-term foster care and there was no realistic hope that he would be returned home in the foreseeable future. Indeed, given the length of time he had been living away from home, he had no memory of living at home. See also *C.A.S. of Stormont, Dundas & Glengarry v. W.(D.)* (Sept.3, 1987), 9 A.C.W.S.(3d) 428 (Ont.Prov.Ct. [Fam.Div.]) in which the court held that, although the child was seriously ill, she was adoptable. Accordingly, to continue parental access would increase the bond between the child and her parents, which would make the eventual separation even more difficult. Crown wardship without access was ordered.

Where the children had been in and out of care since 1994 due to neglect, lack of supervision and violence in the home, an order for Crown wardship without access offered the best chance of stability and consistent parenting for the children in *Re T.(M.),* [2000] W.D.F.L. 410, 97 A.C.W.S.(3d) 93 (Ont.S.C.J., May 11, 2000). The mother had exercised access to the children one hour per week for six months and then ceased making visits. Neither parent demonstrated any commitment to obtaining personal counselling.

The risks of allowing parents to have access to the five-year-old child who had been made a Crown ward and leaving him in the uncertain foster care system were found to be greater than the risks associated with terminating access and freeing the child for adoption in *Children's Aid Society of Toronto v. F.(N.)* (Nov. 2, 2000), 101 A.C.W.S.(3d) 96, [2000] O.J. No. 4329, 2000 CarswellOnt 4429, [2001] W.D.F.L. 158 (C.J.).

Similarly, in *Children's Aid Society of Toronto v. L.(E.L.)* (1999), 2 R.F.L.(5^{th}) 78 (Ont.C.J.), the court, after balancing the factors for and against access, also determined that Crown wardship without access for the purpose of adoption was the least intrusive order that it could make in the best interests of the child. The court, having heard expert evidence regarding permanency planning from the view point of long-term foster care

versus adoption, was satisfied that an adoption was most likely to result in a permanent placement in a family setting for an infant or young child. Accordingly, the court ordered that there be no access. The long-term plan proffered by the Children's Aid Society was to have the child adopted by his current foster parents who were the child's psychological parents. Although the child's biological parents loved the child and the child enjoyed visits with his birth parents, his primary attachment was to his foster family. The court opined that the child was young enough that if access were terminated he would not remember his parents.

Where the children were thriving in foster care, the mother had not taken advantage of her access opportunities and the father agreed to an order for Crown wardship without access, the children were made wards of the Crown without access with a view to adoption: *Children's Aid Society of Sudbury & Manitoulin (Districts) v. C.(T.)*, [1994] W.D.F.L. 1701 (Ont.Prov.Div., Oct. 14, 1994).

Because of the father's abusive interference with his parents, his brother and the foster when his child was in their respective care, the court held that there were no alternatives available to meet the child's needs except an order of Crown wardship without access for purposes of adoption: *V.(M.T.B.) v. Children's Aid Society of Sarnia-Lambton*, [1994] W.D.F.L. 986, 48 A.C.W.S. (3d) 115 (Ont.Prov.Div., Apr. 7, 1994).

An award of Crown wardship without access was upheld on appeal in *C.(L.) v. Catholic Children's Aid Society of Metropolitan Toronto*, [1993] W.D.F.L. 1292, 40 A.C.W.S. (3d) 1099 (Ont. Gen. Div., Aug.10, 1993). The court held that the trial judge did not err in refusing to order as an order of access would have left the child floating between two families with only the Crown as a legal parent. This was not in the child's best interests.

As it was proposed that the child be adopted, access by the mother was inappropriate. However, the parents were allowed some diminishing access in the immediate future: *Children's Aid Society of Metropolitan Toronto v. L.(B.)*, [1994] W.D.F.L. 573, 45 C.W.S. (3d) 678 (Ont.Prov.Div., Feb. 11, 1994).

Where the court found that it was unlikely that the mother would ever change, the children were made wards of the Crown with no access by the mother, as access would impair the chance for the children to be adopted: *Children's Aid Society of Sudbury & Manitoulin v. T.(W.)*, [1994] W.D.F.L. 004, 43 A.C.W.S. (3d) 952 (Ont. Gen. Div., Sept. 21, 1993), dismissing appeal from [1993] W.D.F.L. 148, 37 A.C.W.S. (3d) 681 (Ont.Prov.Div., Sept.16, 1992).

The court weighed the benefits of adoption for three children against their need and wish to have continued contact with their mother in *Children's Aid Society, Metro Toronto v. B.(K.)*, [1991] W.D.F.L. 849 (Ont.Prov.Div., June 14, 1991). The evidence was clear that the mother was incapable of benefiting from the many services provided to her and that her child care was marginal at best. The court held that, because s. 134(2) of the CFSA did not permit children to be placed for adoption if there is an outstanding order of access, the only viable alternative for the children was Crown wardship without access for the purposes of adoption. Their present need to have

some sort of contact with their mother could not outweigh the compelling need for a permanent and stable home, which only adoption could provide. Furthermore, the society had an informal plan to maintain contact with the mother. Accordingly, Crown wardship without access was ordered.

Where the five-year-old child had already been placed with adoptive parents and there were expectations that the seven-year-old would soon be adopted and where expert evidence stressed that, as battered children, the interests of two children, would best be served by a denial of access, an order for Crown wardship without access was upheld on appeal: *Children's Aid Society of Haldimand v. B.(R.) and B.(S.)* (1981), 25 R.F.L.(2d) 56 (Ont.C.A.). Though MacKinnon A.C.J.O. sympathized with the parents' natural desire to pursue the matter, the needs of the children could never be met by the parents.

Courts also held that children were entitled to permanency planning and that it was in their best interests to sever their ties with their parents once and for all so that they could get on with their lives and be placed in a stable and secure environment by way of an adoption in: *Children's Aid Society of Ottawa-Carleton v. L.(R.)* (1998), 38 R.F.L.(4th) 224 (Ont.C.A.); *Catholic Children's Aid Society of Metropolitan Toronto v. O.(L.M.)* (1997), 30 R.F.L.(4th) 16 (Ont.C.A.); *Children's Aid Society of London & Middlesex v. S.(M.)* (1998), 158 D.L.R.(4th) 554 (Ont.Div.Ct.); *Children's Aid Society of the Region of Peel v. H.(G.)* (Dec. 18, 2000), 102 A.C.W.S.(3d) 352, [2000] O.J. No. 5117 (C.J.); *Children's Aid Society of the County of Simcoe v. M.(L.A.)* (Feb. 9, 2000), 94 A.C.W.S.(3d) 934, [2000] O.J. No. 389 (Fam.Ct.); *Children's Aid Society of Simcoe v. B.(G.)* (Jan. 4, 1999), 87 A.C.W.S.(3d) 90, [1999] W.D.F.L. 429 (Ont.Fam.Ct.).

(b) Access granted pursuant to child's wishes

Children's Aid Society of Toronto v. C.(J.) (Nov. 16, 2001), 110 A.C.W.S.(3d) 88, 2001 CarswellOnt 4134 (C.J.)

Since the 14½- year-old was not a candidate for adoption and since she wished to have access to her two younger brothers, six and five, who were also Crown wards and to her mother, the court ordered reasonable supervised access in the discretion of the Society. To facilitate future unsupervised access between the mother and older child and to strengthen their relationship, the court directed the society to arrange joint counselling between mother and daughter.

Children's Aid Society of Sudbury & Manitoulin (Districts) v. H.(C.), [1996] W.D.F.L. 2371 (Ont.Prov.Div., Apr. 10, 1996)

An application for Crown wardship of three children was granted on the basis of evidence indicating that the mother had had several relapses in her battle to gain control over her drug addiction. Access was granted to the mother because of the children's desire to see their mother and each other. Access was also justified because the society did not intend to have the children adopted.

Children's Aid Society of Durham (Region) v. L.(D.), [1995] O.J. No. 3752, [1996] W.D.F.L. 413 (Ont.Prov.Div., Nov.23, 1995)

The court held that since the society did not plan to place the 13-year-old child for adoption and since the child may at one point want to renew ties with her mother, the mother's access to the child was to be totally in the discretion of the Society, but only if the child wished it.

F.(B.) v. Children's Aid Society of Kingston (City) & Frontenac (County), [1995] W.D.F.L. 1633, A.C.W.S. (3d) 1025 (Ont.Prov.Div., July 31, 1995)

The boy, aged 14, had been a Crown ward with limited access to his parents for almost two years. The child had been diagnosed as suffering from a personality disorder, he had a learning disability and very low self-esteem. The child's parents could not be meet his special needs. He was making significant progress in intensive treatment and in his special treatment home. For a while the child refused to see his parents at all. Then he requested to see his mother only every second week for half an hour, and he still refused to see his father. The parents' application to expand access was dismissed as the child was not ready nor willing to have more visits with the parents and they were unable to cope with his needs even for short periods of time and with professional assistance. This was a clear case for limiting access even though there was no anticipation of replacing the family unit.

(c) Long-term foster placement

Children's Aid Society of London and Middlesex v. P.H. (Nov. 28, 2000), 101 A.C.W.S.(3d) 535, [2000] O.J. No. 4580 (Fam.Ct.)

The court made an order of Crown wardship with access in respect of three aboriginal children. With regard to access, the court stated that the presumption against access in s.59(2) of the Act did not apply because each of the children was placed, and would remain, with a person who did not wish to formally adopt them. The court was of the view that although the relationship between the three children and their mother had been substantially interrupted for a lengthy period and although it was inconsistent to view access as a vehicle that would pave the way for the children's return to their mother, some access was appropriate. The mother's access to the children was to be at the discretion of the Society. The Oneida band in its answer also sought an order of access in favour of "the Band" and in favour of unnamed "extended family members" of the children to ensure their cultural identity. The court questioned whether it could make an access order in favour of "the Band", as s.58 of the CFSA appeared limited to named individuals. However, the court did not have to decide that issue because there was clear evidence of a positive, co-operative relationship between the agency and the band and the court had no doubt that individuals and the agencies would ensure that all the children maintained their cultural heritage.

A.S.H. (Re), [2000] O.J. No. 3779, 2000 CarswellOnt 3723 (S.C.J.)

On a status review application, the Children's Aid Society requested that three girls, aged 11, 10 and 8, be made wards of the Crown with access to the parents and paternal grandparents. In considering the criteria listed in s.59(2), the court noted that all three children were placed in foster homes and that there was no plan for adoption. The children all wished and needed to maintain contact with their parents. The court opined that as stabilization of the children was critical, an access arrangement that was the least disruptive to the stability of the children in their foster homes should to be considered. The court noted that access to the paternal grandparents had been beneficial to the girls and should continue. Access was to be at the discretion of the Children's Aid Society.

Children's Aid Society of Kingston (City) & Frontenac (County) v. B.(D.) (June 29, 2000), 98 A.C.W.S.(3d) 1042, [2001] W.D.F.L. 178 (Ont.Fam..Ct.)

The court granted the society's application for Crown wardship of the children with access. The best interests of the children required that they continue to live in their present foster home where they were thriving. The foster parents, however, were unable to adopt the children for financial reasons. The children had a close bond with their mother and enjoyed their visits with her. Visits with the father caused one child, serious distress. The court held that access to the mother was clearly in the best interests of the child but the amount and nature of the access should be at the discretion of the Children's Aid Society, so that they could monitor her mental health. The father's access was also to be at the discretion of the society and subject to supervision.

Children's Aid Society of London and Middlesex v. V.(D.) (Nov. 19, 1999), 93 A.C.W.S.(3d) 853 (Ont.Fam.Ct.)

The three children, aged 12, seven and five, were made Crown wards with access to both parents. No permanent placement by way of adoption was planned for any of the children. All three lived together in a foster home that was prepared to provide long-term, but non-adoptive care. The youngest two children had had regular weekly, supervised contact with their mother. Although the oldest had refused parental visits, he now wanted to re-establish contact. The court found that continued contact with the parents was in the children's best interests. The court opined that in light of the significant differences between society wardship and Crown wardship, it was reasonable to conclude that the nature of the contact or access between a child and parent should also be different where a society ward is made a Crown ward. The mother was granted six supervised visits per year at the agency; the father of the youngest child was granted two supervised visits per year. The court stated that, while some contact would allow the children to preserve their memory of their natural parents, the legislated goal of re-unification of the original family had been supplanted by the Crown wardship order. Only the well-being and stability of the children in the security of their permanent placement was now relevant.

Children's Aid Society of London and County of Middlesex v. G.(L.) (Oct.21, 1996), 66 A.C.W.S. (3d) 485, [1996] O.J. No. 3698 (Ont.Fam.Ct.)

The court found that there were no present prospects for the child's adoption. No evidence had been introduced as to the possibility or probability of adoption. The court noted that "permanency planning" could involve non-adoption and a long-term foster placement. Here, the present foster parents had made a commitment to an indefinite, long-term placement for the child. In the absence of any evidence of the possibility of adoption by the present foster parents or anyone else, and given the expert's recommendation that the child should not be removed from his current foster home for at least another year, the court concluded that the child was not likely to be adopted in the foreseeable future. Absent conclusions that the child could be placed for adoption in a relatively short period of time, or that access would foreclose the success of a long-term foster placement, the mother ought to continue to have a right of access but not on a frequent basis. In this case, frequent access was viewed as exacerbating the stress the child showed over access.

Children's Aid Society of Sudbury and Manitoulin (Districts) v. G.(D.) (Mar.1, 1996), 62 A.C.W.S. (3d) 312 (Ont.Prov.Ct.)

The mother had a severe alcohol problem and lived a transient and disruptive life. The children were physically and emotionally abused. Crown wardship with access was held to be the least restrictive order that was consistent with the best interests of the children. Considering that the children needed quality time with their foster families and that the mother had previously attempted to sabotage the society's plan, the court found that infrequent supervised access was appropriate.

(d) Special Circumstances

The presumption against access to a Crown ward set out in s.59(2) of the CFSA may also be rebutted if the person seeking access is able to satisfy the court that special circumstances pursuant to clause (d) exist.

Although the Act does not specify what condition or conditions would qualify as a special circumstance and although it cannot be stated strongly enough that each case is fact-specific, some guidance may be gleaned from *Children's Aid Society of Sarnia (City) & Lambton (County) v. L.K.*, (Feb. 10, 1999), 86 A.C.W.S.(3d) 343, 1999 CarswellOnt 400, [1999] W.D.F.L. 303 (Gen.Div.), and *J.M.(Re)*, [1988] O.J. No. 2374 (Ont.Prov.Ct.[Fam.Div.]). In both cases, the courts identified circumstances that justified access or some form of limited access.

In *Children's Aid Society of Sarnia (City) & Lambton (County) v. L.K.*, above, the appellate court held that the trial judge erred when he focused his attention almost entirely on the adoptability of the children and did not analyze the relevant evidence in a coherent fashion to determine whether there were "special circumstances" that justified an order within the meaning of s.59(2)(d). The court found the following evidence supported a conclusion that there were special circumstances that justified the making of an access order in favour of the mother (at para. 40):

- the evidence of the strong bonds between the children (aged eight, seven and five) and their mother;

- the evidence that severance of those bonds would be traumatic for the children;

- the evidence that the children will need to know their mother as they grow up and begin to address the issues surrounding their apprehension;

- the evidence that the children had been in a stable, nurturing environment for two and one-half years as at the trial date;

- the evidence that the A.S. (the foster parents) were prepared to have C.L.L. and C.G.L. (the two younger children) continue living with them indefinitely;

- the evidence that the foster placement have continued, unchanged, notwithstanding ongoing access by the Appellant from the time of apprehension until the trial date;

- the evidence that the family bonds that the children have developed with their foster families would be severed by adoption, resulting in further loss and trauma to the children;

- the evidence as to the willingness of the Appellant to cooperate within an access order;

- the evidence that the special needs of W.A.L. Jr., in particular, and C.G.L. to a lesser extent, may impair their adoptability;

- the evidence as to the wishes of the children (to the extent that they are able to communicate) to continue to see their mother.

In *J.M.(Re)*, [1988] O.J. No. 2374 (Ont.Prov.Ct.[Fam.Div.]), the court identified the following factors:

(1) the age of the child and the fact that he was not opposed to a form of limited access;

(2) the fact that the child was not emotionally disturbed and was capable of bonding well with a family who offered him acceptance and permanence;

(3) the fact that the mother and child had been together for more than 8 years and the mother had adequately met the child's needs in many respects until her mental deterioration;

(4) the fact that the child would likely wish to renew some kind of relationship with the mother when he was older;

(5) the fact that the child was very adoptable and would likely flourish with a family which was sufficiently flexible to accommodate some limited access;

(6) the fact that the society had not yet located an adoptive family and had not demonstrated that such a family would not be prepared to accommodate some limited form of access; and

(7) the fact that an assessment had not ruled out limited access.

See also the cases set out below under the heading "Access Awarded", below, in which the existence of a bond between the child and the parent constituted a "special circumstance" to justify the continuation of access. Generally, in these cases there was no plan for an immediate adoption placement, the access visits to the date of Crown wardship had gone well, and the evidence indicated that the children would benefit from an ongoing contact.

The fact of the biological connection and the parents' love for their children convinced the court in *CAS Toronto v. L.(C.) and T.(K.)* (Ont.C.J., July 26, 2002), C312/00 to grant them supervised access as per a schedule determined by the court.

Although the wishes of a child who is under twelve years of age do not fall within s.59(2)(b) of the CFSA, his or her wishes are relevant under s.59(2)(d) as a "special circumstance", which could along with others justify an access order: *Children's Aid Society of Sarnia (City) & Lambton (County) v. L.K.*, (Feb. 10, 1999), 86 A.C.W.S.(3d) 343, 1999 CarswellOnt 400, [1999] W.D.F.L. 303 (Gen.Div.). The court opined that the best interests of the child were clearly a special circumstance, within the meaning of clause (d).

A child's native heritage or ancestry may be a special circumstances within the meaning of s.59(2)(d) of the CFSA: *Catholic Children's Aid Society v. A.V.W.*, (2002), 27 R.F.L.(5th) 9, 158 O.A.C. 274, [2002] O.J. No. 1512 (C.A.), application for leave to appeal to S.C.C. dismissed, [2002] S.C.C.A. No. 266. In this case, however, although the Court of Appeal opined that the child's Cree ancestry was a special circumstance, it was not sufficient to rebut the presumption against access. The child in that case, now aged six, had been a ward since she was three months old and was happily bonded to her foster family, who were exposing her to native culture. Similarly, a child's African-Canadian heritage and Innuit heritage were considered in *B.(H.) v. C.C.A.S.* [1989] W.D.F.L. 1383 (Ont.Dist.Ct., June 30, 1989) and *M.T.(Re.)*, [2000] O.J. No. 1662 (S.C.J.) respectively, but their heritage was not sufficient to rebut the presumption against access.

Where an order for Crown wardship without access for purposes of adoption would cause the children to lose four important parental figures and where the older child had already experienced deprivation and loss and only recently found some happiness and stability in his foster home and the visits with his mother, the court held that this constituted a "special circumstance" under clause 59(2)(*d*) of the Act. Accordingly, the presumption against the making of an access order was rebutted and there was no reason now to risk the boys' sense of security by terminating access: *Children's Aid Society of Toronto v. T.(K.)* (Apr. 3, 2001), 104 A.C.W.S.(3d) 333 (Ont.C.J.).

The court rejected the parents' argument that the assessment report and its recommendation for access with or without adoption constituted some other special circumstances justifying an access order within the meaning of s.59(2)(d) of the CFSA in *Children's Aid Society of Toronto v. L.(E.L.)* (1999), 2 R.F.L.(5th) 78 (Ont.C.J.). The court noted that the recommendation focused on the interests of the parents rather than the best interests of the child as required by s.58(1) of the Act.

The fact that the mother was personally in much better shape than she had been at the date of her child's apprehension and the fact that she expressed concern for her ten-year-old daughter did not constitute the special circumstances referred to in s.59(2)(d) of the CFSA: *Children's Aid Society of Ottawa-Carleton (District) v. H.(L.)*, [1994] W.D.F.L. 1702 (Ont.Prov.Div., Sept. 25, 1994). Indeed, the purpose of s.59(2) was not to provide access as a means of enabling a parent to rehabilitate himself or herself. In this case, the child had not bonded with her mother, harboured a lot of anger towards her and did not wish to have continuing contact with her mother or grandmother. Expert opinion stating that access to or continued contact with her family carried grave risks of undoing any progress towards child's emotional and psychological stability.

The court, having found that clauses (a) to (c) of the CFSA did not operate in favour of access, went on to query whether the possible damage to a four-year-old child of uprooting him from the home of his foster parents with whom he had bonded was a special circumstance within clause (d) in *Children's Aid Society of Durham Region v. D.L.*, [1995] O.J. No. 3752 (Prov.Div.). The court noted that if it ordered access to the child, he could not be placed for adoption. On the other hand, if the child were not placed for adoption, it did not mean that he would necessarily be left with the current foster family indefinitely or, for that matter, for any length of time. The Children's Aid Society had the discretion to place a Crown ward where they saw fit. The court stated that it could not decide the child's best interests on the possibility that the mother would be in a position to care for him in the near future and that she would be successful on a review application. All this left the child dangling. The court opined that the child needed a settled future now. Accordingly, the child was made a Crown ward with no access.

Unfairness or delay in the disposition of child protection proceedings are not "special circumstances" under s.55(2)(d) [now s.59(2)(d)] of the CFSA. Therefore, the trial judge erred in considering unfairness and delay as justifying an order for access to

a Crown ward: *Children's Aid Society of Durham County v. W.(C.)*, [1991] O.J. No. 1493 (Gen.Div.).

(i) Case Abstracts

Because each situation in a child protection case is so fact-specific, the dispositions regarding access are as varied as the factual situations that give rise to them. Thus, as is illustrated by the abstracts set out below, what may constitute a special circumstance in one case will not necessarily be viewed the same way in another case.

A. Access Awarded

B.(S.) v. Children's Aid Society of Algoma (Jan. 9, 2002), 111 A.C.W.S.(3d) 288, [2002] O.J. No. 101 (S.C.J.)

The parents of three First Nations children appealed from an order for Crown wardship without access. The mother did not oppose an order for Crown wardship in respect of the oldest child but wanted access, and she sought the return of the two younger children or in the alternative access. The father did not oppose the order for Crown wardship but wanted access to continue. The parents did not want the children to lose contact with their aboriginal heritage. Both parents did not take full advantage of their opportunity to exercise access. The father's ability to exercise access had been limited as a result of being incarcerated for a period of time and the mother moved some distance away from where the children were living. The court held that the trial judge did not err in making the order for Crown wardship. The court varied the order for access. With regard to the oldest child, the court held that although maintaining ties with the child's native heritage was important, it was not an overriding one and in the case at bar, it was outweighed by the emotional harm that would be caused by continuing access to the mother. The mother's negative influence outweighed any positive value in preserving her heritage. Accordingly, an order for no access was appropriate in order to facilitate her adoption by her foster parents. With regard to the two younger children, there had been a change in circumstances in that their foster parents had separated thereby necessitating a further disruption. In the interests of offering some form of continuity and stability, continued contact with their mother was a positive factor despite her weakness as a parent. Given the loss of the first foster mother, it was more likely to be harmful to the children to terminate all contact with their biological mother. Accordingly, the mother was to have supervised access to the two younger children for four hours on alternating weekends.

Children's Aid Society of Toronto v. T.(K.) (Apr. 3, 2001), 104 A.C.W.S.(3d) 333 (Ont.C.J.)

Although the two children were made wards of the Crown, the court declined to terminate access. The court opined that generally, adoption offered young children their best chance of being raised to maturity in one home but if the court were to follow that course, access by the natural parents had to be terminated. Because the foster

parents in this case had decided not to adopt the boys for financial reasons, adoption would mean the removal of the children from their foster home with the result that the children would stand to lose four important parental figures. The court weighed the benefit to the children of being placed in a home — yet to be identified — with parents who were prepared to adopt and offer the children a permanent home as members of a new family, against the risk that the children, especially the older child, would pine for their foster family and their mother and would not successfully re-attach to their adoptive parents. In this case, the importance of a permanent "adoptive" home to these children was reduced because the foster parents were prepared to provide long-term fostering. In addition, there was a real risk that the older child would not be able to attach to a new set of parents. The court stated that in his short life the older child had experienced deprivation and loss and had only recently found some happiness and stability. The child enjoyed his visits with his mom and felt loved and accepted in his foster home. Accordingly, the court was not prepared to risk the child's sense of security by making an order of no access in order to free the children up for adoption.

Children's Aid Society of the City of Kingston and County of Frontenac v. A.(D.) (Sep. 6, 2000), 100 A.C.W.S.(3d) 262, [2000] W.D.F.L. 697 (Ont.S.C.J.)

An order for Crown wardship was made in respect of an 11-year-old boy. However, because of the strong relationship between the mother and child, the court held that an order for access was in the child's best interests.

L.(K.) v. Children's Aid Society of Sarnia-Lambton (Feb. 4, 1999), 86 A.C.W.S.(3d) 343, [1999] W.D.F.L. 303, 1999 CarswellOnt 400 (Gen.Div.)

The mother appealed the denial of access to her three children, who were the subjects of a Crown wardship order. The children, aged eight, six and five were apprehended and placed in a foster home after their mother shot their father. She was an abused wife and had been in a state of shock at the time of the homicide, as a result of his sexual assault on her that evening. The children made significant progress in the foster home and enjoyed regular access with her until it was cancelled. As well, the older child expressed the wish to see his mother. On appeal, the court noted that the wishes of a child under 12 was one factor to consider with respect to the best interests of a child. As well, the court concluded that there were "special circumstances" within the meaning of s.59(2)(d) which justified an access order. Wardship with access had worked in the best interests of the children.

Children's Aid Society of Sudbury & Manitoulin (Districts) v. H.(C.) (Apr.10, 1996), 62 A.C.W.S. (3d) 933, [1996] W.D.F.L. 2371 (Ont.Prov.Div.)

The court found that there were special circumstances to merit the its approval of the Crown wardship order with access to the mother. Here, the mother had an on-going battle with drug and alcohol addiction. The mother negotiated a settlement with the Children's Aid Society under which her children, aged 15, 13 and 11, would be made Crown wards subject to specified access to the mother. The court interviewed the children in chambers and explained the ramifications of the order. The children were

bonded to the mother and had expressed a desire for continued contact with each other and the mother. The society had no intention of putting the children up for adoption.

Children's Aid Society of the County of Essex v. G.(M.) (Feb.26, 1996), 61 A.C.W.S. (3d) 936 (Ont.Prov.Div.)

The children, aged seven and nine, had been in foster care, where they were well cared for, with access to their father, to whom the children had maintained strong ties and affection. The crown sought wardship and to continue the arrangement. The mother, who was Ojibway, had abandoned the children in 1992 and had never shown an interest in exposing the children to native traditions. The Ojibway band proposed a native foster placement about 1,400 km away. The court found that the band's plan would sever the children's ties with all that was familiar to them, including their father and it was not in their best interests. Thus, the court ordered Crown wardship with access to the father.

Children's Aid Society for the Districts of Sudbury and Manitoulin v. D.K., [1996] O.J. No. 1610 (Prov.Div.)

The court gave effect to the parties' agreement and ordered the 11-year-old child be made a Crown ward, subject to access by his mother at the discretion of the Children's Aid Society. The evidence available to the court supported this latter provision of the agreement whereby the child would not be placed for adoption, would continue in long-term foster care and would maintain contact with his two older siblings and his mother to the extent that it was in his best interest to do so.

Children's Aid Society of Metropolitan Toronto v. L.(R.), [1994] W.D.F.L. 1163, 48 A.C.W.S. (3d) 753 (Ont.Gen.Div., May 4, 1994)

The child's grandparents applied for access while the mother appealed an order for wardship. Access was allowed, as the trial judge found that it was in the child's best interests to retain the status quo. The appellate court subsequently awarded the grandparents temporary care and custody of the child, subject to supervision, for six months: *L. (R.) v. Children's Aid Society of Metropolitan Toronto* (1995), 21 O.R. 724 (Ont.Gen.Div.)

Children's Aid Society of Sudbury & Manitoulin v. D.(L.), [1994] W.D.F.L. 149, 44 A.C.W.S. (3d) 289 (Ont. Prov. Div.)

The children's father had been imprisoned for a vicious attack on the mother, and the parents had generally had an abusive relationship. The children had been placed in a foster home. The daughter was a difficult child and the son suffered from several medical conditions. The father had since been killed in a fight, and the mother was involved in a stable relationship. She was closely bonded to the children. Crown wardship was granted with access to the mother. The children needed to overcome their difficulties arising from the violent home, and should remain in care until the mother

demonstrated that she would be able to adequately protect and parent them.

Children's Aid Society of Sudbury & Manitoulin (Districts) v. A.(R.G.), [1994] W.D.F.L. 862, 47 A.C.W.S. (3d) 558 (Ont.Prov.Div., Apr. 18, 1994)

The child had extreme behavioural problems. He was violent, unstable and unpredictable. He talked about killing himself and others. The child's psychiatrist recommended that the child be in long-term care and not have any contact with his family. The court, however, made the child a Crown ward with access to his parents. The child had special needs that should be addressed by clinical intervention and strategies, but he was not to be deprived of continuing his relationship with his family.

Children's Aid Society of Sudbury & Manitoulin (Districts) v. C.(C.), [1994] W.D.F.L. 826 (Ont.Prov.Div., Apr. 8, 1994)

The mother and child were allegedly sexually abused by the grandmother. The mother and child entered a shelter for abused women. The child was returned to the grandmother's care. The grandmother began making allegations that the mother and her new boyfriend were acting in a sexually inappropriate manner in front of the child and that the new boyfriend was physically abusive towards the child. The child was found to be facing greater developmental challenges than other children his age and had special needs requiring consistency. The child was placed with the grandmother under a six-month supervision order and the mother was granted access. The mother had many problems that had to be resolved before she could care for the child on a full-time basis. It was clear that the child wished to reside with the grandmother. Access to the mother was in the child's best interests as he had retained a bond with her.

C.C.A.S. of Metro Toronto v. S.(J.), [1987] W.D.F.L. 1452, 5 A.C.W.S.(3d) 174 (Ont.Prov.Ct. [Fam.Div.], Jun.12, 1987)

In this case the children were made Crown wards. The evidence indicated that continued contact with the natural mother would be important for the children in terms of their identity, as they were black and the foster parents were Caucasian.

(B) Access Refused

Children's Aid Society of Toronto v. M.L. [2003] O.J. No. 653 (S.C.J.)

The appellate court confirmed the trial judge's determination that there should be no access for the mother. The case was decided pursuant to s.57(2)(d), the "special circumstance" clause. Counsel for the mother had argued at trial that the significant bond between the child and her mother and the extensive access that they had enjoyed constituted a special circumstance in favour of ordering access. The child had been initially placed with a foster family, where he had difficulty adapting and where he behaved aggressively. The society then made a plan for his permanent adoption by another family and applied for an order of Crown wardship without access. The trial judge considered an expert report that recommended that the child's best interests

would be promoted by cutting all ties to the mother. Further, the evidence also showed that the child had improved considerably in the foster home environment and that the mother's access visits did not generally go well. The trial judge had concluded that the plan for adoption was in the child's best interests and this conclusion, the appellate court held, should not be disturbed.

Re T.(M.), [2000] W.D.F.L. 410 (Ont.S.C.J., May 11, 2000)

The children had been in and out of care since 1994 due to neglect, lack of supervision and violence in the home. The society brought an application for Crown wardship without access. The court held that the grounds on which the temporary care order had been made still existed. There was no evidence that the parents would change their pattern of inconsistent and absentee parenting. The mother had exercised access to the children one hour per week for six months and then ceased making visits. Neither parent demonstrated any commitment to obtaining personal counselling. An order of Crown wardship without access offered the best chance of stability and consistent parenting for the children.

Kawartha Haliburton Children's Aid Society v. B.(S.M.) (Apr. 19, 2000), 96 A.C.W.S.(3d) 799, [2000] W.D.F.L. 409, 2000 CarswellOnt1478 (S.C.J.)

The mother consented to Crown wardship for two of her children, who had been taken into care, but sought access. The parents resided in a rural area, had minimal education and poor financial skills, and lived on a disability allowance. Although the mother attended for access, the children interacted very little with her and gained nothing from her visits. The father had substantial anger problems, refused to co-operate with the agency, and eventually withdrew from the action. The children were progressing well in care. The mother was pregnant again, but had no parenting plan. The court ordered Crown wardship without access.

Kawartha-Haliburton Children's Aid Society v. R.(S.) (April 10, 2000), 96 A.C.W.S.(3d) 247 (Ont.S.C.J.)

Both parents came from abusive backgrounds and had emotional problems. As well, they led nomadic and unstable lives. The child had no bond with either parent and the risk to the child was almost a certainty. Neither parent had any parenting skills nor had they made any attempt to obtain them. The child was made a Crown ward without access.

Kawartha-Haliburton Children's Aid Society v. M.(K.), [2000] W.D.F.L. 364 (Ont.S.C.J., March 20, 2000)

The child was currently in foster care as a result of an injury that might not have been accidental. The mother had previously been charged and pled guilty to assaulting the child. Attempts to supervise and instruct the mother had failed and any supervision ordered would be inadequate to protect the child. It was in the child's best interests that the Crown wardship order be made without access to the child.

Children's Aid Society of Durham Region v. L.(M.) (Jan. 12, 2000), 94 A.C.W.S.(3d) 302

(Ont.Fam.Ct.)

The mother's four children were all made Crown wards, but access was not granted with respect to the youngest. Each of the children had a different father and there was no prospect of the mother being capable of parenting any of the children in the foreseeable future. The mother was granted access to the oldest three children on certain conditions. However, the youngest boy showed behavioral improvement including a sense of relief after the previous access was terminated, and therefore, there should be no access to the mother with respect to him.

Children's Aid Society of Sarnia Lambton v. J.(B.), [1999] W.D.F.L. 775 (Ont.S.C.J., June 30, 1999)

Custody of four children was granted to the Children's Aid Society. The mother appealed and sought access to three of them. The appeal was dismissed. At the time of the trial more than two years had passed since the children were taken into care and the mother presented no plan for their care. While the children were bonded to the mother, no evidence was presented that it would be in their best interests to have contact with her.

Children's Aid Society of Hamilton Wentworth v. I.(C.), [1999] W.D.F.L. 830 (Ont.S.C.J., June 22, 1999)

In this case the court was of the view that the mother's shortcomings were so great that 24-hour supervision would be required. The society had taken custody of the child at birth and the mother had not visited it for seven months prior to the hearing. When she did so her interaction with the baby was inappropriate and lacking in affection. The mother's first two children had been made Crown wards for the purposes of adoption. She was engaged to a man with a conviction for assault causing bodily harm to an infant. Finally, she was unwilling to accept any assistance towards improving her parenting skills.

Children's Aid Society of Ottawa-Carleton v. P.(M.)), [1995] W.D.F.L. 1140, 55 A.C.W.S. (3d) 566 (Ont.Gen.Div., May 12, 1995)

The child had spent half of her life with her foster parents and they wished to adopt her. The child expressed distress whenever she had access visits with her father. The court made the child a Crown ward and denied the father access because of his lack of stability and hostility towards the society. The father's appeal was dismissed. The appellate court found that the trial judge had made no errors in his reasons.

6. Access Pending Appeal

B.(M.V.) v. Children's Aid Society of Ottawa (Apr. 19, 2001), 105 A.C.W.S.(3d) 1070, [2001] W.D.F.L. 617 (S.C.J.)

Access pending an appeal from an order of Crown wardship without access was also denied. The court held that to reinstate access only to have it terminated again if

the mother failed to have the decision reversed on appeal would be detrimental to the child's well-being and not in her best interests.

Children's Aid Society of London and Middlesex v. S.(M.) (1998), 158 D.L.R.(4th) 554 (Ont.Div.Ct.)

The child had been placed with her paternal grandmother after birth and had been cared for by her continuously ever since. The child was made a Crown ward without access for the purposes of adoption. The grandparents then applied for access pending the appeal of their decision. The possibility existed that the order of Crown wardship without access would be set aside on appeal and the child would be subjected to the unnecessary trauma of being separated from the grandparents. The court, therefore, ordered reasonable access to the child to provide a provisional foster home and to facilitate transition to the adoptive placement.

G.(A.) v. C.A.S., Metro Toronto (Apr.5, 1989), 15 A.C.W.S.(3d) 33, [1989] W.D.F.L. 793 (Ont.Dist.Ct.), aff'd [1990] W.D.F.L. 1222 (Ont.Gen.Div., Sep.19, 1990), aff'd [1992] W.D.F.L. 177, 30 A.C.W.S. (3d) 391 (Ont.C.A., Nov. 27, 1991), leave to appeal to S.C.C. denied: (1992), 139 N.R. 240 (note).

An order for Crown wardship without access was made following a 15-day trial. The mother who had exercised weekly access until the order was made and the grandfather applied for access to the child pending final disposition of the appeal. The application was dismissed on the grounds that the preponderance of evidence indicated that it was not in the child's best interests to have access pending appeal. In addition, there had not been a substantial material change in circumstances affecting the best interests of the child necessitating or compelling such an order from the date of the trial to the date of the application nor was there evidence that the trial judge's decision was substantially wrong and contrary to the child's best interests.

B.(H.) v. C.C.A.S., Metro. Toronto, [1989] W.D.F.L. 909, 15 A.C.W.S.(3d) 135 (Ont.Dist.Ct., Feb. 17, 1989)

In October 1988 the child was made a Crown ward without access for the purpose of adoption. The child had been in care on six different occasions, and after being apprehended in 1985, the child remained in foster care except for a three-week period. The evidence indicated that the child viewed the foster mother as the psychological parent. The mother appealed the wardship order but did not seek access immediately because she did not obtain legal assistance. She therefore did not see her child for three and one-half-months. The mother applied for overnight access pending the appeal. The court granted the mother supervised access, but refused her application for overnight access on the ground that it would not be in the child's best interests to resume overnight access because of the risk of exposure in the mother's home to violence, alcohol abuse and sexual abuse. The court held that the mother was not to be penalized for having been unable to take timely legal steps to restore some measure of access.

7. Access Varied

H.A. v. Children's Aid Society of Ottawa, [2003] O.J. No. 713 (Div.Ct.)

A previous court had made the child a Crown ward with access to his parents. The mother applied for increased access. Because the child had lived with the same foster parents for well over two years, the society claimed that the mother had to prepare a status review application and obtain leave to file the same. The judge, however, ruled that the CFSA did not require a status review application in such a case. Section 58(2) of the Act provided sufficient jurisdiction for a court to review and vary access. The fact, however, that the child had lived with the same foster parents for two years was an important factor to be considered on the variation of access.

8. Access Terminated/Not Terminated

CAS of the Niagara Region v. J.C., [2006] O.J. No. 1731, 2006 CanLII 13956 (S.C.J.)

The court dismissed the society's application to terminate the children's access to their mother and maternal aunt. The children were aged eight and ten and retained strong bonds of loyalty to their mother, maternal aunt, and to each other. The court was critical of the society's policy that insisted on terminating all access before it began to work on finding suitable adoption placements, even in the face of access that was beneficial and meaningful to the children and where the adoption prospects were speculative. It concluded that the time was not ripe for an order terminating access because the society was not in a position to offer a concrete alternative to the present and happy status quo. The court opined that terminating access was not the least disruptive course of action, nor was it in the children's best interests in all the circumstances.

Children's Aid Society of London and Middlesex v. S.E., [2005] O.J. No. 4689 (S.C.J.)

The court granted, in part, the society's application to terminate the mother's access to three of her children. Initially, the court granted the mother access one weekend a month. Two years later that access was restricted because of her behaviour, which was harmful and which undermined the children's foster home placements. Conditions were placed on her access, but she did not abide by them. The court terminated the mother's access regarding the youngest child, who stated that he no longer wished access with her and that he did not enjoy her visits. Instead of making an order of no access to the mother, the court made no order of access so that it would remain open to the society and to this child, if he so wished it, to have access in the future. The other two children, aged 14 and 16, wished to continue seeing their mother, so the court ordered that it should continue but pursuant to a lengthy list of terms. The court also ordered that, if the mother breached any of these terms, her access would be suspended.

Kawartha-Haliburton CAS v. R.B., [2005] O.J. No. 4435 (S.C.J.)

The court granted the society's status review application to terminate the mother's access to her two boys, aged ten and eight. The mother's access was for a short, supervised visit once a month for one child and twice a month for the other. However, this access was not going well and was frustrating for the children. The mother had some mental health issues and was blind to the reality of the effect of her controlling and insensitive behaviour on her sons. A psychiatrist testified that her relationship with them was pathological. She had demonstrated that she was unable to refrain from acting in ways that were psychologically harmful to them, so the court concluded that the existing access regime was no longer in the boys' best interests. The court, therefore, terminated the mother's access to them, while pointing out that the society could, in its discretion and on its terms, continue to allow the mother to have contact with them.

Children's Aid Society of Niagara Region v. T.P., [2002] O.J. No. 3462 (S.C.J.)

On a status review the court granted the society's motion for Crown wardship without access to the parents for the two boys. They had been neglected by both parents and suffered from developmental delays. However, they had improved while in foster care and their foster parent wished to adopt them. The court concluded that to uproot them now and place them in unknown, unproved circumstances would require a leap of faith that was mired with uncertainty. Although the society had failed to foster access between the boys and their parents, such a fact was not a circumstance in favour of ongoing access. The access of both parents should be terminated to give the adopting parent the opportunity to bond with them.

Children's Aid Society of Oxford County v. L.J.H., [2002] O.J. No. 4144 (C.J.)

The court terminated parental access to a Crown ward. The child's best interests lay with being cared for and reared by some other person, despite the mother's efforts and improvements since the commencement of the proceedings. The best opportunity for the child's future happiness, development and progress were to be found in his being adopted and becoming a member of a stable family unit.

Children's Aid Society of the District of Thunder Bay v. G.(K.) (July 5, 1995), 56 A.C.W.S. (3d) 703 (Ont.Gen.Div.)

The child had been made a Crown ward subject to access to the mother, which would be gradually increased. The child had resided with the foster parents since she was 13 days old and had bonded with them. Fresh evidence indicated that access would now interfere with successful bonding and created a risk of chronic depressive problems for the child. The court found that the mother failed to establish the required special circumstances meriting access following an order for Crown wardship and, therefore, all references to access were ordered deleted.

Children's Aid Society of Metropolitan Toronto v. P.(C.) (May. 31, 1994), 48 A.C.W.S. (3d) 114 (Ont.Prov.Div.)

The biological father's access was discontinued where he had exercised access very inconsistently and had long-standing drug and alcohol addiction problems. The child was placed with her maternal grandparents under a six-month supervision order. The grandparents provided a close-knit family, well able to meet her needs and the child, aged six, consistently expressed a desire to live with them. The child did not wish to live with her statutory parents who had looked after her for two years prior to being made a Crown ward. Access by the statutory parents was also discontinued as it would continue the custody battle for the child and threaten a stable and long-term plan for the maternal grandparents' care of the child.

C.A.S., Guelph & Wellington v. F.(K.), [1993] W.D.F.L. 322, 37 A.C.W.S. (3d) 882 (Ont. Prov. Div., Sept.10, 1992)

The mother had been granted access to her child who had been made a Crown ward, to be exercised as agreed upon by the society and the mother's therapist. The mother had not made any attempt to engage in treatment until shortly before the trial. She had not seen the child for four years. Access was cancelled, as the mother was not meeting any of the needs of the child.

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Children - Children in Need of Protection - CFSA

CROWN WARDSHIP AND INTER-SIBLING ACCESS

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General Overview

There is conflict in the case law regarding the court's jurisdiction to make an order for sibling access that survives adoption. Although the *Child and Family Services Statute Law Amendment Act*, R.S.O. 2006, c.5, Bill 210, proclaimed in force as of November 30, 2006, introduced new language into the access and adoption provisions of the Act, none of the changes directly address this jurisdictional question. Arguably, however, the new provisions introduced under ss.59(4), 145 and 153.6 of the Act cover a gap in the previous legislation and now govern sibling access for a Crown ward. Under s.59(4), the society may, in the best interests of a Crown ward, permit contact and communication between the Crown ward and another person where there is no access order or openness order in effect. Under s.145, the society may apply for an openness order with respect to a Crown ward before an adoption is finalized, where there is no access order in effect under Part III of the Act, and where all the parties, including a Crown ward 12 years or older, consent. Pursuant to s.153.6, an openness agreement facilitating inter-sibling access may be made with the consent of the parties at any time before or after an adoption order is made. Regardless of the court's jurisdiction regarding sibling access, a fixed order for sibling access carries the potential for compromising an adoption placement. The new provisions create an avenue for ongoing and post-adoption inter-sibling access, while providing the society and the court with the ability to monitor and review that plan if it is unsuccessful.

Cases Decided Under Previous Legislation

In a case decided under previous legislation, the Court of Appeal in *M.A.R.P. v. Catholic Children's Aid Society of Metropolitan Toronto*, [1995] O.J. No. 2277, 126 D.L.R.(4th) 673, 15 R.F.L.(4th) 330 (C.A.), aff'g 122 D.L.R.(4th) 719, 11 R.F.L. 95 (Gen.Div.), aff'g 9 R.F.L.(4th) 385 (Prov.Div.) made it clear that, when a licensee places a child for adoption, s.140(2)(a) (now s.141.1) of the *Child and Family Services Act*, R.S.O. 1990, c.C.11 has no application and an order for sibling access may be made. In dismissing the appeal of the trial judge's order for sibling access, the court noted that s.140(2)(a) had no application because the adoption in the case was not a society adoption but a licensee adoption. Although s.143(1) applied, the order being sought was "precisely what [was] excepted from the ambit of section 143(1), namely an order made under Part III. Accordingly, subsection 143(1) does not support the appellant's argument that all access orders are terminated by adoption" (at para. 18). Further, the court was not persuaded that s.160(1) constituted an absolute bar. It opined (at paras. 19-21):

> Reading s.143(1) and s.160(1) together may shed some light on the purpose of the second "under this Part" in s.160(1). It may have been inserted to make it clear that while the policy of the Act was to exclude the birth family after the adoption and that access orders in their favour were not to be made as part of the adoption process, there would still be room for access orders made under Part III, the child protection part of the Act.

> Counsel for the Society also recognized the possibility of an application for access by a member of the birth family based upon the establishing of a post-adoption relationship. This was the exception suggested in C.G.W. [*C.G.W. v. M.J. et al.*, (1981), 34 O.R.(2d) 44]. Such an application would not be absolutely barred according to counsel because it would be based, not on the blood relationship, but rather upon the establishing of a post-adoption relationship. Section 160(1), however, refers solely to the birth relationship and on its face, at least, does not restrict the prohibition of applications based upon that relationship; on its face it prohibits any application made by a member of the birth family on any basis. The fact that counsel for the Society concedes such an exception also suggests to us that s.160(1) is not an absolute bar.
>
> For these reasons we are not persuaded that subsection 160(1) constitutes the absolute bar asserted by the appellants.

Prior to the 2006 amendments to the CFSA, the weight of authority supported the view that an order for sibling access could also survive a society adoption: *Children's Aid Society of the Niagara Region v. J.C.,* 2007 CanLII 8919, [2007] O.J. No. 1058, rev'g 2006 CanLII 13956, [2006] O.J. No. 1731 (S.C.J.); *CAS of the Regional Municipality of Waterloo v. P.B.*, [2004] O.J. No. 5823 (C.J.); *Children's Aid Society of Owen Sound and the County of Grey v. T.T.,* [2004] O.J. No. 2309 (C.J.); *CAS of Northumberland v. K.L.H.,* [2001] O.J. No. 1423 (Fam.Ct.); *CAS of Oxford County v. C.M.*, 1999 CarswellOnt 4812 (Ont.C.J.). The leading authority for the contrary view was the decision in *Windsor-Essex Children's Aid Society v. E.S.*, 2004 ONCJ 414, [2004] O.J. No. 5824.

The Divisional Court decision in *Children's Aid Society of the Niagara Region v. J.C.,* 2007 CanLII 8919, [2007] O.J. No. 1058, rev'g 2006 CanLII 13956, [2006] O.J. No. 1731 (S.C.J.), rendered under legislation predating the 2006 amendments, affirmed the view that the right of a child who is a Crown ward to apply for access to a sibling under s.58(1) of the CFSA continues post-adoption and that s.160 of the Act does not prohibit a sibling from seeking access to an adopted child. The court also held that s.140 of the Act (now s.141.1), which requires the termination of all access orders before a child is placed for adoption, did not apply to an order for sibling access. Aitken J. stated (at paras. 26-27):

> As well, the trial judge erred in law in assuming that sibling access and access by a birth parent or member of the birth parent's family were treated the same under Parts III and VII of the Act. Different legal principles apply under the Act to sibling access than to access by a parent or other person. Under s. 58(1) and (2) of the Act, a child who is in the care of the Society may apply for access to a sibling, and this ability continues even after the child making the application has been placed for adoption. The prohibition against access applications under s. 58(7) does not apply to an application brought by a child who has been placed for adoption. As well, the prohibition in s. 160 of the Act to the effect that the

> court cannot order access to an adopted child by a birth parent or a member of a birth parent's family, does not apply to prevent a sibling from seeking access to an adopted child *(V.(A.) v. P.(M.A.) (Litigation Guardian of)* (1995), 15 R.F.L. (4th) 330, 126 D.L.R. (4th) 673 (Ont. C.A.); *P. (M.A.R.) v. V.(A.)* (1998), 40 R.F.L. (4th) 411 (Ont. Gen. Div.)). Section 140(2) of the Act requires that any outstanding order of access to the child made under s. 58(1) be terminated before the child is placed for adoption. This does not mean that an order that the child have access to another person (namely another sibling) has to terminate before the child is placed for adoption.
>
> Additionally, an option available to, but not considered by, the trial judge was to have the order state that no order was being made as to access or to have the order silent as to access. This would have enabled the Society to allow inter-sibling access consistent with the best interests of the children, without infringing any court order or preventing the placement of the children for adoption. (See *Children's Aid Society of the City of Kingston and County of Frontenac v. L.K.*, [2004] O.J. No. 4947 (S.C.J.) at paras. 50-54.) In fact, it has been held by the Ontario Court of Appeal that even if there is an order giving no right of access to the siblings, that does not prevent the Society, in its capacity as custodial parents of Crown wards, from permitting the siblings visits with each other. (See *Children's Aid Society of Toronto v. D.P.*, [2005] O.J. No. 4075 (C.A.) approving *Family, Youth and Child Services of Muskoka v. R.S.* (2004), 11 R.F.L. (6th) 39 at para. 16 (Ont.S.C.Div.Ct.).) It is only if there is a court order stating that there will be no contact between the siblings that the Society would be legally obliged to ensure no contact.

Aitken J. chose, however, not to make an order for inter-sibling access. He concluded that an order "silent as to access" would enable the society to allow inter-sibling access without jeopardizing the children's placement for adoption.

In *CAS Waterloo v. P.B.*, above, one of the issues before the court was that of inter-sibling access between the children, three of whom were being made Crown wards without parental access for the purpose of adoption. The court held as a starting principle that the siblings had to satisfy the test in ss.59(2) of the CFSA. The court was satisfied that the relationship between the siblings was beneficial and meaningful to all of them. With respect to the second branch of the test, despite the society's submission that sibling access would impede prospective adoptive planning, neither prospective placement had been queried about it and there was no evidence that ongoing access would be a hindrance. The court then held, based primarily on the decision of Justice Schnall in *CAS of Oxford County v. C.M.,* above, that inter-sibling access was not prohibited by s.140(2), because that subsection referred only to a person who has access to the child as opposed to access by the child to a person, which was what sibling access was. The court found the jurisdiction to make such an order in s.58(1)(a) and s.37(3) of the CFSA.

Justice Schnall's decision in CAS of Oxford County v. C.M. is referred to at some length in *Windsor-Essex Children's Aid Society v. E.S.*, above. The case involved the question of access following the court's conclusion that the two children should be made Crown wards. The society had plans for the adoption of only one of the children. Schnall J. held that s.140(2) of the Act did not prevent a child's placement for adoption in the face of an outstanding inter-sibling access order because there is a distinction between a person's access to the child and a child's access to a person. She stated (as quoted at para. 26 of *Windsor-Essex CAS v. E.S.)*:

> [Orders for sibling access and adoption] oblige the court to embark on a course of legislative acrobatics because the Act does not specifically deal with sibling access in the context of Crown wardship and access and proposed adoption. It is a gap, which, in my respectful view, should be addressed, but apparently will not be in the proposed new legislation amending the Act...It would appear that the legislation did not anticipate that siblings would be dealt with in separate, different dispositions when the society intervenes, and therefore there is no specific provision that governs this situation.

The conclusion of Justice Schnall was mentioned by Justice Timms in *CAS of Northumberland v. K.L.H.*, above. Although he resiled from concluding whether or not he agreed with her analysis (describing it as "somewhat tortuous"[para. 48]), he did state that he saw no error of logic on her part and that she maintained the appropriate focus on the best interests of the child. Timms J. ordered inter-sibling access for one of the two children who were made Crown wards and for whom a plan of adoption was in the works.

In *CAS of Owen Sound v. T.T.*, above, the court made an order for inter-sibling access, without stating the basis on which he was doing so, holding that it was in the best interests of the children. The court also specifically stated that it was intended to survive adoption.

A contrary position was expressed in *Windsor-Essex Children's Aid Society v. E.S.*, above. In that case, a status review, the society sought an order of Crown wardship of a six-year-old child with no access to her parents. The society planned to seek an adoptive placement for the girl, but there was evidence that she had a beneficial and meaningful relationship with her sisters. Wrestling with the issue, the court was critical of Schnall J.'s distinction between a person access to a child and a child's access to a person (at 32):

> ...I am not convinced that the plain wording of section 140 of the Act contemplates a distinction between a "person's access to a child" and "the child's access to a person" as suggested by Justice Schnall or that there is a distinction to be drawn for adoption placement purposes under either of the present amendments to section 58 and section 59 of the Act so as not to act as an impediment to the process of placement and adoption. It is important to note that section 140 reads that it is ANY (my emphasis)

> order of access to the child made under subsection 58(1) that prohibits the process of placement.

Since the court's conclusion was that there was no jurisdiction pursuant to s.140 of the CFSA to make an order for inter-sibling access, it opted to adopt the approach of Justice Mary Marshman in *CAS of London and Middlesex v. S.M.*, [2000] O.J. No. 2064 (Fam.Ct.), which was to encourage the society to use its best efforts to encourage access between the siblings. Bondy J. stated (at para. 38):

> Under all of these circumstances, I am inclined to follow the approach of Justice Marshman in "ordering" that the society use its best efforts to encourage access between the siblings, without the issuance of a formal order, as I am of the view that to allow for a fixed order of access between the sibings, would compromise the process of adoption placement for E.D.H. Coupled with the recommendation for inter-sibling access is my further recommendation that any plan for adoption of E.D.H. be accompanied by a "therapeutic relationship" or psychological counseling contemplated by Dr. Ricciardi. It seems to me that a "best efforts" order may well accomplish what the legislation does not appear to contemplate – the seemingly incompatible objectives of access between siblings and adoption and the court's ability to monitor and review that plan, should it go awry.

In *Kawartha-Haliburton Children's Aid Society v. C.P.*, 2007 CanLII 5147, [2007] O.J. No. 696 (Div.Ct.), the court dismissed an appeal of a trial judge's decision to deny post Crown wardship sibling access between two children ages 14 and 15, who were made Crown wards with access and a four-year-old child who was made a Crown ward without access for the purpose of adoption. Regarding the judge's denial of access by the older siblings to the youngest, the court held that the judge was entitled to determine that the prospect of adoption for the four-year-old took precedence over ordering sibling access, particularly as the society had undertaken to make all reasonable efforts to have any adopting parents co-operate with access to the older children. Accordingly, the mother's appeal was dismissed.

Cases Decided Under Amended Legislation

In recent cases decided under the amended legislation that are reviewed below, the courts have declined to make formal orders for sibling access, reasoning that such an order may have the potential effect of diminishing the society's chances of finding a suitable adoptive family. This is particularly true where the child who is to be adopted has access to older siblings who have ongoing contact with their biological parents. While declining to make formal orders for access, the courts have in some cases made an order "recommending" that the society encourage sibling access pre-adoption and seek out an adoptive family willing to continue the access. In other cases, the courts have made an order silent as to access and accepted an undertaking from the society to the same effect, or an undertaking from the society that it will recommend an "openness" agreement with a prospective adoptive family.

In *Children's Aid Society of Ottawa v. C.W.,* 2008 CanLII 13181, [2008] O.J. No. 1151 (S.C.J.), the society applied for Crown wardship of four children with no access to the two youngest children for the purpose of adoption. The eldest child, age 14, had resided in a foster home since 2006, while the younger children ages 13, ten and eight had been in another foster home for the same period. The court declined to make an order with respect to sibling access on the basis that it might impede the society's ability to find an adoption placement for the younger children. The court was concerned that any prospective adoptive parents would have to be informed of the eldest children's ongoing access with their biological parents. The court noted, however, that the absence of an order for sibling access would not prevent the society from allowing sibling access, while an adoptive home was sought for the two younger children, preferably one that would agree to continue the children's access to their older siblings.

The court in *Children's Aid Society of the Niagara Region v. S.C.*, 2008 CanLII 52309, [2008] O.J. No. 3969 (S.C.J.) made a similar ruling based on the same reasoning. The nine-year-old child subject of the proceedings had been apprehended at age five and eventually was placed with his father and his wife, who had two other younger children. The placement broke down and the court made an order for Crown wardship with no parental access for the purpose of adoption. In considering the issue of sibling access, the court endorsed the view expressed by the court in *Children's Aid Society of Niagara Region v. J.(M.),* [2004] O.J. No. 2872 (S.C.J.), that there is no presumption against sibling access, but the access must be in the best interests of all of the children involved. Here, in the context of a summary judgment motion, there was no evidence about the circumstances and best interests of each of the children that would be affected by sibling access. The court accepted the society's evidence that the child was clearly adoptable and its position that the prospects of finding an adoptive family would be diminished if the court were to make a binding order for sibling access. The court accepted the society's written undertaking to consider recommendations to the prospective adoptive family for an "openness" agreement with respect the child's siblings.

In *Catholic Children's Aid Society of Hamilton v. R.B.,* [2007] O.J. No. 3157 (S.C.J.), the court made an order for Crown wardship of the three older children with access to their father, and an order for Crown wardship of the two younger children with no parental access for the purpose of adoption. With regard to inter-sibling access, the court recommended, but did not order, that the three older children were to continue to have access with each other on a regular and frequent basis. The court made no recommendation with respect to access between the older children and their younger siblings who were to be placed for adoption.

In *Catholic Children's Aid Society of Toronto v. S.R.M,* [2006] O.J. No. 1741 (C.J.), the court considered the issue of inter-sibling access between two children ages 11 and two years. The younger child had been apprehended at birth. The older child had been in and out of the care of his grandparents and various foster parents for several years. At the time of the status review, the children were living in separate foster homes. With respect to the eldest child, the court made an order for Crown wardship with access to his mother. The younger child was made a Crown ward with no parental

access for the purpose of adoption. With respect to inter-sibling access, the court held that any request for such access should be granted only if it is in the best interests of both children. In this case, the court left open the question as to whether an order for sibling access might prohibit a child's placement for adoption. However, rather than issuing a formal order for access that might have a negative impact on the younger child's adoption, it made an order recommending that the society encourage inter-sibling access. Zuker J. stated (at para. 167):

> I agree with the approach of Justice Marshman [in *Children's Aid Society of London and Middlesex v. S.M.* (2000), 97 A.C.W.S. (3d) 472, [2000] O.J. No. 2064 (Fam.Ct.)] in "ordering" that the society use its best efforts to encourage access between B.M. and J.R. without the issuance of a formal order, as I am of the view that to allow for a fixed order of access between the siblings would compromise the process of adoption placement for J.R. I would further recommend that the plan for adoption be accompanied by a "therapeutic relationship" or psychological counselling. It seems to me that a "best efforts" order may well accomplish what the legislation does not appear to contemplate, the seemingly incompatible objectives of access between siblings and adoption and the court's ability to monitor and review that plan, should it go awry.

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Children - Children in Need of Protection - CFSA

DUTY OF THE CHILDREN'S AID SOCIETY TO ASSESS A FATHER'S PLAN OF CARE

1. Introduction

This memorandum considers the issue of whether a children's aid society has a duty to consider and assess the plan of care presented by the child's father before taking a position in favour of a relative's or another third party's plan of care.

2. Discussion

Section 57(4) of the *Child and Family Services Act* (CFSA) provides:

> Where the court decides that it is necessary to remove the child from the care of the person who had charge of him or her immediately before intervention under this Part, the court shall, before making an order for society or Crown wardship under paragraph 2 or 3 or subsection (1), consider whether it is possible to place the children with a relative, neighbour or other member of the child's community or extended family under paragraph 1 of subsection (1) with the consent of the relative or other person.

There is case law supporting the proposition that, where the society is apprised of a plan to place a child with relatives or members of his or her extended family or community, the society has a positive duty to evaluate the proposed plan. Current legislation falls short of imposing a mandatory obligation on the society to conduct an evaluation of any and all plans of care put forward by relatives, extended family and community members. Under Part II of Ont. Reg. 206/00, where the society has determined that a child is in need of protection, and it is apprised of a plan of care by

the child's relative or extended family or community member, it has a positive obligation to conduct an evaluation of the proposed plan **before placing the child in the care of the person proposing the plan**. Note however that in *Catholic Children's Aid Society v. M.R.*, [2008] O.J. No. 4468 (S.C.J.), the court allowed the society's temporary wardship application and adjourned the hearing to allow the society to expedite its kinship care assessments with respect to three different competing plans of care put forward by different relatives and extended family members. In that case, the court referred to a statement made by the society worker to the effect that "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" (at para. 26).

Assuming that the client qualifies as a "parent" under Part III of the *Child and Family Services Act*, the society arguably has an equivalent if not a higher duty to evaluate a reasonable plan of care proposed by the child's biological father. I could not find any case directly addressing this issue. However such a duty may be implied from the case law. See, for example, the decision in *A.M. v. Chatham Kent Integrated Children's Services*, 2007 ONCA 411, [2007] O.J. No. 2135 (copy enclosed), where the society, upon learning of the father's identity after a Crown wardship order was made, took steps to put his plan of care before the court and undertook to do a home study and initiate a parenting capacity assessment. If the society does not accept the father's plan of care, then it should advise the father and leave it to the court to determine which of the competing plans of care will meet the best interests of the child. Note that rule 33(5) of the *Family Law Rules* provides that "a party who wants the court to consider a plan of care or supervision shall serve it on the other parties and file it not later than seven days before the case conference, even if that is sooner than the timetable (set out in rule 33(1) would require."

Legislation

Reflecting the emphasis of recent amendments to the CFSA on placement with relatives or extended family, Part II of Regulation 206/00 provides for practices and procedures that the society is required to follow with regard to the investigation of such placements.

Part II of the Regulation applies where:

5.(1) This Part applies where,

> (a) a society has determined that a child is in need of protection and cannot be adequately protected if he or she remains with the person having charge of the child;
>
> (b) the child,
>
> > (i) has received services from the society but has not been placed in the society's care by an agreement under subsection 29 (1) or by an

order made under clause 51 (2) (d), paragraph 2, 3 or 4 of subsection 57 (1), subsection 65 (1) or clause 65.2 (1) (c) of the Act, or

(ii) has been placed in the society's care and the agreement or order described in subclause (i) will be terminated; and

(c) the society proposes or is apprised of a plan to place the child in the care of a person who is a relative of the child or a member of the child's extended family or community in any of the following situations:

(i) in the context of a court proceeding for a supervision order under clause 51 (2) (c), paragraph 1 or 4 of subsection 57 (1), subsection 65 (1) or clause 65.2 (1) (a) of the Act,
(ii) in the context of a court proceeding for an order relating to the custody of the child, or
(iii) where the person having charge of the child agrees to the placement. O. Reg. 21/06, s.2; O. Reg. 113/07, s. 5.

(2) If a society proposes or is apprised of a plan to place a child with a relative or member of his or her extended family or community before the placement occurs, the society shall follow the procedures set out in section 7. O. Reg. 21/06, s. 2.

(3) If a society is apprised of a plan to place a child with a relative or member of his or her extended family or community after the child has begun living with that person, the society shall follow the procedures set out in section 8. O. Reg. 21/06, s. 2.

6. If a society proposes or is apprised of a placement plan in the circumstances described in subsection 5 (1) and the plan relates to the placement of a child who is an Indian or native child, a child protection worker shall,

(a) use his or her best efforts to consult with the child's band or native community respecting the placement of the child before beginning to follow the procedures set out in section 7 or 8; and

(b) if the consultation with the band or native community does not occur before the procedures set out in section 7 or 8 are begun, continue to use his or her best efforts to carry out the consultation after the procedures are begun. O. Reg. 21/06, s. 2.

7.(1) Before a child is placed in the care of a relative or member of the child's extended family or community, the society shall conduct an evaluation of the proposed plan for the care of the child to determine whether the person is capable of providing the child with a safe home environment. O.Reg. 21/06, s. 2.

(2) In an evaluation under subsection (1), the society shall use its best efforts to ensure that all of the following procedures are completed:

1. A child protection worker or person designated by the society shall obtain information,

i. as to the identity of every person who is 18 years of age or older and resides in the home in which the child will be placed, and

ii. as to the nature of the relationship between the child and every person referred to in subparagraph i.

2. A child protection worker or person designated by the society shall meet with the proposed primary caregiver and conduct an interview of the caregiver.

3. A child protection worker or person designated by the society shall meet in private with the child who will be placed and conduct an interview appropriate to the child's age and developmental capacity.

4. A child protection worker or a person designated by the society shall conduct an assessment of the home environment, including an assessment of the physical aspects of the home.

5. A child protection worker shall conduct a review of the society's record and files for information relating to any person who is 18 years of age or older and resides in the home in which the child will be placed.

6. A child protection worker or a person designated by the society shall obtain the consent of the proposed primary caregiver to a criminal record check.

7. A child protection worker or a person

> designated by the society shall obtain the consent of the proposed primary caregiver to the disclosure of information related to themself by any society in Ontario or any child protection authority outside of Ontario. O. Reg. 523/06, s. 1(1).
>
> (3) As soon as practicable but no later than 30 days after completing the evaluation under subsection (1), a child protection worker shall document the evaluation. O. Reg. 21/06, s. 2.

Caselaw

In *Children's Aid Society of Algoma v. K.A.H.,* above, the court was critical of the society's case management of its file, noting that it was of the belief that the society knew very early on that the prospect of returning the child to his parents was poor, but chose the foster parent system rather than the extended family as its back-up (at para. 295). The court observed that had the society focused on the extended family member much earlier and conducted a proper home study or at least scrutinized the home study that was done, then the outcome would have been different. However, the child was now attached to his foster parents and he saw them as his psychological parents. Accordingly, it was in the best interests of the child that he be made a Crown ward without access. The court observed that it was the society's mismanagement of material aspects of the case that had led to this conclusion (at para. 314).

That a plan of care put forward by a parent or extended family member should receive serious consideration by a children's aid society at an early stage of its involvement is supported by the obiter comments of the court in *Children's Aid Society of Peel (Region) v. W.(M.J.) (sub nom. Children's Aid Society of Peel v. W.(M.J.))* (1995), 23 O.R.(3d) 174, 81 O.A.C. 56, 14 R.F.L.(4th) 196 (Ont.C.A.), reversing (1994), 7 R.F.L.(4th) 349 (Ont.Gen.Div.). In that case, the court held that while a court is required at a status review hearing to consider the least restrictive alternative, including a plan proposed by the extended family to care for the child, such a plan is not to be given any elevated status. Osborne J.A. then went on to state (at para. 52):

> Values which the CFSA seeks to preserve through s.57(3) and (4) come into play when the child is removed from the care of the person in charge of the child immediately before state intervention. It is at that point that relatives, neighbours, and extended family are given a sort of priority consideration. This is because these potential placements may be in a child's best interests because they tend to be less intrusive. When more permanent steps are in issue, as was the case here, once it is determined that the child is in continued need of protection and that the court intervention is required, the court is required to consider among other things, the least restrictive alternative (s.65(3)(h)) consistent with the pervading principle of the child's best interests. That is not to say a plan

> of care advanced by a relative, or extended family, may not be the least restrictive alternative and be a plan consistent with the best interests of the child. Such a plan should, in my view, simply be considered with other viable options.

In *Children's Aid Society of Ottawa-Carleton v. T.(M.)*, [1996] W.D.F.L. 479, 59 A.C.W.S.(3d) 1133 (Ont.Gen.Div., Dec. 8, 1995), the court held that the trial judge erred in failing to conduct the mandatory determination of whether it was possible to place the child with a relative, neighbor or other member of the child's community or extended family before making an order for society or Crown wardship.

Note that in *Durham Children's Aid Society v. G.(L.L.)* (2002) 2002 CarswellOnt 1395 (S.C.J.), the court makes reference to the testimony of the society worker who acknowledged the society's "ongoing obligation to review parents' plans of care" even though it had amended its protection application to seek Crown wardship without access (at para. 146). The court expressed a similar view in *Children's Aid Society of Halton Region v. R.R.N.*, 2008 ONCJ 95, [2008] O.J. No. 870.

See also the decision in *A.M. v. Chatham Kent Integrated Children's Services*, 2007 ONCA 411, [2007] O.J. No. 2135, where the child was made a Crown ward on a summary judgment motion in which the father was identified as "unknown." The custodial mother did not inform the father that she had a second child by him until after the Crown wardship order was made. The society, upon learning of the father's identity, took steps to put his plan of care before the court and undertook to do a home study and initiate a parenting capacity assessment. Ultimately, the court upheld a final order for the child's adoption on the basis that the father failed to move in timely fashion to set aside the Crown wardship and put his plan before the court.