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Family

Court grants kin caregiver party status in protection proceeding for Indigenous child

By **Amanda Jerome**

(March 14, 2023, 11:30 AM EDT) -- The Court of Appeal for Ontario has allowed the appeal of a kin caregiver, granting her party status in a child protection proceeding. Counsel for the appellant said that the "most important aspect" of the decision is that "it confirms that both temporary and final court orders granting custody of a child to a particular individual qualify that individual for party status under" the *Child, Youth and Family Services Act* (CYFSA).

In *Children's Aid Society of London and Middlesex v. T.E.*, 2023 ONCA 149 the court heard that the appellant, T.M., was the kin caregiver of a 2-year-old Indigenous child. The respondents include the "child's biological parents, the child's aunt, and the Oneida Nation of the Thames ('Oneida')."

According to court documents, the Children's Aid Society of London and Middlesex has "been involved with the child since her birth and commenced protection proceedings when she was two months old."

After a "series of unsatisfactory placements," the child was placed with the appellant as kin caregiver when the child was approximately 6 months old. The appellant, the court noted, was granted "temporary custody under the supervision of the Society."

After the child had been in the appellant's care for several months, she brought a motion "to be added as a party to the protection proceedings" launched by the society. Around the same time, the court noted, the biological father (J.G.) "brought a motion seeking to have the proceedings withdrawn because the respondents were planning to sign a customary care agreement with the child's aunt (O.T.)."

According to court documents, the Customary Care Agreement (the 'CCA') had been signed by the time the motions were heard and it "did not include the appellant, nor did it make any provision for her continued access to, or involvement with, the child."

The motions judge, Justice Paul Henderson of the Superior Court of Justice, allowed the father's motion to "dismiss the child protection proceedings as withdrawn" and dismissed the appellant's motion to be added as a party.

Justice Henderson, the court noted, "concluded that to add the appellant as a party would add considerable time to the proceedings — it would change a resolved proceeding into a protracted, conflicted proceeding."

The kin caregiver appealed, raising three issues: Did the motion judge "err in refusing to grant party status to the appellant" by "determining the motion to dismiss before considering the issue of party status" and by "dismissing the protection proceedings?"

On the first issue, Justice Mary Lou Benotto, writing for the Court of Appeal, noted that "Party status in child protection proceedings can arise in one of two ways: (i) pursuant to r. 7(5) of the *Family Law Rules*; or (ii) by way of provincial or federal statutes, which both define party status."

"The *Family Law Rules* provide a discretionary approach. The statutes are not discretionary: if a person is a 'parent', as defined by either statute, the court has no jurisdiction to find otherwise," she added.

She found that Justice Henderson "looked only to the discretionary pathway to party status under the *Rules*" and "did not address the provincial and federal legislation."

Justice Benotto noted that s. 74(1) of the CYFSA "provides that a 'parent' includes: (i) an individual who has lawful custody of the child; and (ii) an individual who has a right of access to the child."

"At the time of her motion for party status, the appellant qualified under both criteria. She had an order for temporary custody, as well as an order for access," she added, stressing that "While the Act does not expressly include kin caregivers as parents, s. 37(1) specifically excludes only foster parents."

The judge explained that kinship service "occurs when a child or youth is placed in the home of an approved kin but the child does not have 'in-care' status."

"Unlike foster parents, kin caregivers are generally known to the biological family. It is considered less intrusive for children because they are not being placed with strangers," she added, noting that the "defining feature of foster parent is that they receive compensation for caring for the child."

Justice Benotto emphasized that "Except for the 12 days in January 2021 when the child was with the appellant in foster care, she neither received nor requested any financial assistance from the Society for the child's care."

"Although the motion judge referred to the appellant as a foster parent, she was a kin caregiver, not a foster parent," she determined, stressing that "foster parents, and only foster parents, are excluded from the definition of 'parent,' and therefore from party status, under the *CYFSA*."

The court explained that in "denying the appellant party status," Justice Henderson "erred in considering only discretionary party status under rule 7(5) of the *Family Law Rules* and not the statutory entitlement to party status under the *CYFSA*."

"The appellant, who, at the time of the motion, had 'lawful custody of the child,' an order for access to the child, and was not a 'foster parent,' met the definition of 'parent' in s.74(1) of the *CYFSA* and so had a statutory entitlement to party status pursuant to s.79(1). Although the motion judge commented that the appellant did not file a plan of care, she did file Form 35.1 under the Family Law Rules indicating her plan of care for the child and included a vulnerable sector check," Justice Benotto wrote, allowing the appeal in a decision released March 6.

On the second issue, Justice Benotto found that the child protection proceeding "should not have been dismissed before determining who the parties were."

"Had the appellant's party status been recognized, the motion judge could not have concluded that the proceedings had been resolved on consent," she added.

On the third issue, the judge noted that Justice Henderson allowing "the father's motion to withdraw the Society's protection application" was "procedurally flawed, as only the Society is in a position to withdraw its own application."

However, she determined, it was "appropriate to decide this issue on the merits" and reviewed the "concepts which underly a customary care agreement."

The appellant submitted that "customary care agreements are an invention designed to circumvent the provisions of the *CYFSA* and are 'now being used to justify where a child resides outside the purview of the courts.' "

On the other hand, the respondents submitted that customary care agreements "reflect the inherent right of First Nations to self-government and must be viewed through the lens of the history of residential schools and the need for reconciliation. The agreements must be respected because First Nations must make decisions regarding the care of their own children."

Justice Benotto did not "completely agree nor disagree" with either side and instead took a "nuanced

approach."

"I do not agree with the appellant that an agreement reflecting a plan for customary care represents an attempt to bypass the legislative framework. Instead, it is the preferred approach for First Nations, Inuit and Métis children in care," she added, noting, however, that "the court's role is not eliminated."

"In every child protection case, the courts have an obligation to promote the best interests of the child," she stressed.

"Here," she noted, "the appellant was not involved in the customary care plan, nor was she a party to the CCA. Importantly, her court-ordered access was summarily terminated."

Justice Henderson, she added, "did not address why, after the appellant's extensive involvement with the child, this abrupt termination was in the child's best interests," nor did he "determine whether the ongoing exclusion of the appellant from the child's life was in the child's best interests."

"When considering the best interests of the child, the court is required to consider 'the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity,' " she highlighted, noting that the "matter was not resolved on consent because all parties had not participated in the CCA."

"Further, given the exclusion of the appellant from the proceeding, there was no analysis of whether and how the CCA was in the child's best interests. For these reasons, the motion judge erred by dismissing the protection proceeding," she determined, allowing the appeal, reinstating the proceeding before a different judge and granting the appellant party status to the proceeding.

"The issue before the court, with the benefit of the appellant's participation, will be whether the currently proposed CCA or some other arrangement is in the child's best interests," she concluded, with Justices Sarah Pepall and Katherine van Rensburg in agreement.

Jessica Gagné, counsel for appellant

Jessica Gagné, a family and child protection lawyer based in Toronto and counsel for the appellant, noted that "among other things, the respondents on this appeal had argued that only final — not temporary — custody orders entitled kin caregivers to party status under the CYFSA. The Court of Appeal rejected that argument, agreeing with the appellant that the statute does not distinguish between temporary and final orders — it just says 'order.' "

The Court of Appeal, she noted, was "also was unconvinced by the respondents' arguments as to why that statutory provision should be read down."

Gagné highlighted two takeaways following this decision: one, "if there is a court order granting you custody of a child before the Society files their Protection Application or Status Review Application, then the Society has to add you as a Respondent party to the case via their pleading (i.e. right at the outset of the case)." And two, "if you obtain a court order granting you temporary custody of a child during a Protection Application or Status Review Application, and if you want party status in the case,

then you bring your motion to be added as a statutory party pursuant to the CYFSA."

"It would appear that those motions should now be proceeding on consent in light of the ONCA's very clear interpretation of the statute," she explained.

Gagné also noted that this is the "second time that the Ontario Court of Appeal grapples with the concept of 'customary care agreements,' " which "first came before the ONCA in 2022 in *M.L. v. Dilico Anishinabek Child and Family Car*e."

"In both *M.L.* and this appeal, *T.E*., the ONCA has discussed the importance of customary care for Aboriginal children and the role of the court in overseeing the recently invented concept of 'customary care agreements.' The problem is that both *M.L.* or *T.E.* appear to assume that the child is actually before the court in a CYFSA proceeding, such that the court can ensure that any customary care agreement actually is in the best interests of the child," she said, noting that "this is not what is occurring in practice."

Children, Gagné explained, "are being separated from their parents via customary care agreements that are being entered into by societies and bands, without any judicial oversight at all."

"In many, if not most, 'customary care agreement' situations, no CYFSA proceedings are being initiated at all by these state actors (the societies and the bands). The societies and bands view customary care agreements as 'an alternative' to court — not a way of resolving court proceedings," she added.

Gagné noted that "in Canada, when government — whether provincial or Aboriginal — wants to separate parents from their children, they have to follow written laws, because that is a principle that is protected by the *Canadian Charter of Rights and Freedoms*."

"We have one statute, the CYFSA, that applies to all children in Ontario, and it says that when the state separates a child from his or her parents, it must bring the matter to court within five days. There are no written laws that authorize or circumscribe 'customary care agreements' or that say that they are an alternative way of separating parents from children, where you don't have to start a CYFSA court proceeding. How exactly is the court supposed to ensure that a customary care agreement is in the best interests of a child if there is no court proceeding even before the court?" she asked.

Highlighting what lawyers can learn from this decision, Randy Hammond, in-house counsel for the Children's Aid Society of London and Middlesex, said it is "the court rather than the parties that determines a child's best interests."

"Procedural fairness, including ensuring all proper parties are able to participate, is the means by which the court ensures a proper consideration of the best interests test. The best interests of the child must be viewed through the child's perspective to ensure relationships important to the child are not overlooked," he explained.

As for takeaways from the decision, Hammond noted that "while courts may presume a customary care agreement signed by all proper parties is in a child's best interests, the court's role is not eliminated, and it maintains jurisdiction to determine this ultimate issue."

"The court may examine both procedural and substantive features of the CCA to ensure the agreement is in the child's best interests," he added, noting that "all necessary parties must sign a CCA" and the "definition of a parent for purposes of the Act includes a caregiver under a temporary order made pursuant to the CYFSA."

"Deciding whether a person, who has the child placed in their temporary care and custody under the CYFSA, should be added as a party is not a matter of discretion," he concluded.

Counsel for the various respondents declined or did not respond to request for comment.

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