ONTARIO

Superior Court of Justice

(Name of Court)

at **393 University Avenue, Toronto**

(Court office address)

Court File Number **FS-16-020833**

Endorsement

Date			
November 4, 2016	Applicant(s): Children's Aid Society of Toronto	[X]	Present
	Counsel: Samantha-Leigh Levenson	[X]	Present
		[ ]	Duty Counsel
Perkins J.	Respondent(s) Michelle Redel	[X]	Present
Appeal heard October 24, 2016	Counsel: Joseph H. Kary	[X]	Present
		[ ]	Duty Counsel

ISSUES

[1] This is an appeal from the order of the Ontario Court of Justice made on April 14, 2016. The order was made under sections 57.1, 64, and 65 of the *Child and Family Services Act.* It granted custody of the daughter of the respondent mother to the maternal grandfather and stepgrandmother, with no access for the mother. The order was granted on a motion for summary judgment, under rule 16 of the *Family Law Rules*, based on affidavit and other documentary evidence.

[2] The mother has appealed, submitting that the motion judge did not have a proper evidentiary basis for her order. She asks that the order be set aside and the case returned to the OCJ for trial. In the alternative, she asks this court to place the child with her, under CAS supervision, or to order that she have access to the child in person or by video.

[3] The CAS of Toronto submits that the order was properly made and the appeal should be dismissed.

RESULT

[4] The appeal is dismissed. The motion judge correctly stated and applied the law and did not make any palpable and overriding error in her decision.

[5] Costs were not sought and none are awarded.

FAMILY HISTORY

[6] The mother and the father lived together but were not married. The child C was born to them in 2008. C's father was violent to the mother during their relationship. They separated in 2009. C remained in the mother's custody after the separation and the father had limited access. He had little involvement in C's life after the separation and is not participating in the court case.

HISTORY OF THE CASE

[7] C was apprehended by the CAS in August, 2013, when she was not quite 5 years old, after someone reported that the mother had assaulted C. The mother was charged with two counts of assault against C, and one count of assault with intent to resist arrest, arising from C's apprehension. C went into foster care. In the CFSA

application, the mother proposed that C be placed on a temporary basis with C's maternal grandfather and stepgrandmother (the grandparents). The grandparents were approved by the CAS as a kinship placement. C went to live with them at their home in British Columbia, under a consent temporary supervision order, in November, 2013, when she was 5¼ years old. She has been living there ever since. She is now 8¼ years old.

[8] On arriving in BC, C had monitored access with her mother, first by telephone and then by video, twice and later three times a week. There was no in person access because of the distance and cost involved. By agreement of the grandparents and the mother, C began receiving counselling in BC in early 2014. Access was scaled back to twice weekly because C was experiencing nightmares and other problems that might be linked to her conversations with the mother.

[9] The mother's criminal trial was held in June, 2014. She was convicted in September of two counts of assault against C, but the conviction was set aside on appeal in June, 2016, and a new trial was ordered, because of insufficiency of the trial judge's reasons. It is not known whether the Crown will proceed with a new trial. The mother was also convicted of assault with intent to resist arrest, arising from the apprehension of C in 2013. That conviction was upheld on the appeal.

[10] The mother agreed to undergo a psychiatric assessment at the behest of the CAS. Her diagnosis of depression and borderline personality traits was consistent with an earlier diagnosis by her own psychiatrist.

[11] On November 4, 2014, the OCJ found C to be in need of protection on consent of the mother, who signed a statement of agreed facts. The SAF set out that C had "suffered physical harm, inflicted by the person having charge of the child … or caused by that person's failure to care and provide for or to supervise and protect the child …". This language tracks section 37(2)(a) of the *Child and Family Services Act.* The SAF also recites the fact of the mother's conviction in September, 2014 on two counts of assault against C (later set aside on appeal). The two statements are not expressly linked. They just appear one after the other. No specifics of physical harm were provided in the SAF, other than its recital as a fact that "concerns related to inadequate supervision … were verified," as a result of an incident in October, 2010 in which both C and the mother received second degree burns.

[12] On November 4, the OCJ also made a final order on consent of the CAS and the mother placing C with the grandparents for four months, with supervised access for the mother in the CAS's discretion.

[13] The grandparents reported that C was having nightmares and behavioural issues as a result of having access, or being about to have access, with the mother. In November, 2014, C's therapist, paediatrician, and psychiatrist all recommended that the mother's access be temporarily suspended to see if C's emotional state improved. In December, the CAS began an early status review and asked for an order giving it authority to suspend access. The order was made on December 15, 2014 and the CAS promptly suspended all access.

[14] On April 16, 2015, the OCJ heard a motion by the mother for in person access. It was dismissed, and at the same time, the temporary suspension of telephone and Skype access was continued. The mother has had no contact with C since December, 2014, a period of 23 months. According to the grandparents and C's treatment providers, C does not ask for any contact with the mother, and when asked, C says she does not want any. The mother says this may be because the grandparents and others have influenced C, whether deliberately or unconsciously.

[15] C was assessed, by order of the OCJ made on consent on May 6, 2015, by a psychologist chosen by the mother. In his report of June 12, 2015, the psychologist recommended there be no contact until C "makes sufficient progress in her treatment and recovery to request a resumption of contact with her mother."

[16] On September 28, 2015, the CAS's status review application was amended to seek an order under section 57.1 of the CFSA for custody of C to be given to the grandparents, with no access for the mother until C asks for it. The CAS moved for summary judgment for this relief. The motion was heard on March 21, 2016 and the order was granted on April 14, 2016.

[17] The mother's notice of appeal is dated May 2, 2016. The case was monitored monthly in this court and was moved on for hearing as soon as arrangements for preparation of the OCJ hearing transcript and for retaining a lawyer for the mother allowed. The appeal was heard on October 24, 2016.

STANDARD OF REVIEW

[18] The mother argues that the motion judge made an error of law in failing to evaluate and weigh the evidence of the two parties fairly or evenhandedly. For an error of law, the standard of review is correctness. This court must correct any error of law, and determine what disposition results from that.

[19] The mother also says that the motion judge made a palpable and overriding error in concluding that the evidence of crucial facts was uncontested or was definitive. For an error in applying the law to the facts, or in appreciating the evidence, this court must first determine that the motion judge made a palpable and overriding error, in order to overturn her decision.

GROUNDS ARGUED ON THE APPEAL

[20] In the mother's notice of appeal, the order sought and the grounds of appeal all relate to the disposition of the issues of custody or placement and of the mother's access. No issue is taken as to there being a continuing need of protection. It would be open to a party to argue on a status review that there was no continuing need of protection at the time of the motion for summary judgment. That argument was not made, no doubt because the mother did not think it would prevail.

[21] Of the nine grounds of appeal set out in the notice of appeal, the mother actually argued (in her factum and orally) only grounds 1-3 and 5. The first three grounds submit that the motion judge erred in finding on the record before her that there was no genuine issue that required a trial. Ground number 5 is that the large volume of CAS materials on the motion created unfairness to the mother and was contrary to natural justice.

APPLICABLE LAW.

[22] First, the statutory provisions applicable are sections 57, 57.1, 64 and 65 of the *Child and Family Services Act.* They incorporate a consideration of the child's best interests, as outlined in section 37(3).

[23] This case came before the motion judge on a status review (sections 64-65) in which the CAS was seeking an order of custody in favour of the grandparents, with no access for the mother (section 57.1). The statutory test in section 65 is the child's best interests. Case law has determined that the "less disruptive" placement options mandated by section 57(3) must be considered on a status review. The only available placement options were placement with the mother and placement with the grandparents. No presumption applies to the issue of access: the test is purely the child's best interests.

[24] The summary judgment provisions of the *Family Law Rules* are found in rule 16. It was amended last year to broaden the considerations available to a judge hearing a summary judgment motion. See also *Hryniak v Mauldin*, [2014] 1 SCR 87, on how the rule is to be applied. In determining whether there is no genuine issue requiring a trial, the court is required to follow these steps and ask these questions:

1. Has the moving party set out in its evidence "specific facts showing that there is no genuine issue requiring a trial"? (Rule 16(4))

2. Has the responding party set out in its evidence "specific facts showing that there is a genuine issue for trial"? (Rule 16(4.1)[1]

3. Does the use of hearsay evidence merit the drawing of unfavourable conclusions against the party who provided the hearsay evidence? (Rule 16(5))

4. The court may weigh the parties' evidence, evaluate the credibility of deponents, and draw any reasonable inference from the evidence. But is it in the interest of justice to require a full trial for these purposes? (Rule 16(6.1)[2]

5. Is a mini-trial on some or all issues needed for the court to carry out the powers in rule 16(6.1)? (Rule 16(6.2))

6. If the court does not make a final order on the motion or if it orders a trial of any issues, the court may give directions about what the trial will cover and when and how it will proceed. (Rule 16(9))

MOTHER'S CRITICISMS OF THE CAS EVIDENCE AND THE JUDGE'S EVALUATION OF IT

[25] The mother submits that the motion judge did not take a hard look at the CAS evidence. She says that the evidence shows C was being or may have been encouraged to make allegations against the mother; the allegations grew over time; yet C expressed wishes to spend more time, not less, with the mother. She says the judge relied on an admission of abuse by the mother that the mother never made and statements by the child that the child never made. And the judge relied on a medical report that was based only on allegations by the grandparents that were inconsistent with their statements to social workers and their affidavits filed in court.

[26] The motion judge spent 83 paragraphs of her decision dealing with various evidentiary objections made by the mother. I agree with her determination of those issues, and they were not argued on this appeal. Rather, the mother focused on whether the evidence admitted by the motion judge formed a sufficient basis for her decision that a trial was not necessary.

[27] The evidence the mother relies on in support of her claim that C was or may have been encouraged to make allegations against the mother is inferential, mostly gleaned from different statements made at different times by C and from speculation about the impact of others' words, either in asking C about whether she had been hit or in responding favourably to C's statements that the mother had hit her. However, the case does not turn on whether the mother hit the child beyond permissible and reasonable parental discipline (or even whether the mother perpetrated or permitted sexual abuse of the child, an allegation that arose recently and was never relied on by the CAS). The issue is whether living with the grandparents is in the child's best interests overall, and whether a restoration of access is in the child's best interests in light of all the evidence.

[28] The mother submits, and the CAS concedes, that there were positive access visits by phone and video. The mother goes on to say that the child's expressed feelings indicate a continuing wish to see her mother in person, not a desire to end contact with her. I note, however, that the child's wishes at her young age before access was suspended are not a big factor in her best interests, especially when weighed against other factors such as nightmares, and there is little or no evidence of expression of a wish to see her mother now that she is older.

[29] The mother attacks the reliability of the report of the psychologist who assessed C and diagnosed her with post traumatic stress disorder and nightmare disorder, because of the inconsistent statements made by the grandparents about when nightmares occurred and the psychologist's failure to interview the mother or to probe

[1] Note the inconsistency in wording, probably not intending a difference, between subrules (4) and (4.1).

[2] Again an inconsistency, and again probably of no significance, between subrules (5) and (6.1) par. 3.

the story given to him by C. The mother's factum points out inconsistencies in the evidence of the grandparents about C's nightmares and speculates about what the psychologist would have made of the actual events (if he had investigated further) before his report and of events after his report. But this is all just speculation, not evidence. As the motion judge noted, the mother did not pursue out of court questioning of the psychologist or lead any other evidence to counter it. The psychologist met with the child and pursued other sources of information as he felt necessary to diagnose C's problems and recommend treatment. That was his mandate. His report states that he complied with the standards of his profession and fulfilled his duty to the court as an independent expert. While it may be that the psychologist could have had more information and might have written a different report if he did, this does not mean that his report ought to be discounted. It was open to the motion judge to accept and rely on his evidence, and there was no expert evidence to the contrary.

[30] The mother also submits that the CAS materials on the motion, about 600 pages in length, were improper because they were too lengthy to respond to in detail, full of hearsay, and "unfocused". The motion judge had some sympathy with this objection. So do I. My own experience as a Family Court judge with CAS affidavits – and this case is no exception -- is that they are often longer and filled with more unhelpful (sometimes even inadmissible) information than they should be. The reason, at least in part, is lack of time for the CAS workers as deponents to make the affidavits shorter and more focused. Blaise Pascal said, in one of his letters writen around 1657, « *Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte.* » [I made this one longer only because I did not have the time to make it shorter.][3] Another reason is the related one that CAS counsel do not have the time to take a long and unfocused affidavit and rewrite it so that it is shorter and pithier, beyond culling out the truly improper material in the worker's first draft. The CAS has a duty on these summary judgment motions to put in all of its evidence, as required by rule 16(4). The affidavits in this case are really long. But it can not be said that they are full of irrelevant or inadmissible material; nor can it be said that there is an attempt by the CAS to overwhelm the mother. The motion judge very carefully analyzed the issue of the admissibility and reliability of the hearsay evidence. It may well be that the mother's lawyers, both at first instance and on the appeal, necessarily have contributed many hours beyond those authorized by their retainer arrangements, in order to do the job properly. But the evidence would have been equally extensive and time consuming, if not more so, if the case had gone to trial. And the evidence was required for the motion. The insufficiency of hours allowed on a Legal Aid retainer for a summary judgment motion or an appeal should be addressed by the appropriate authorities, but the remedy is not for this court to say that the mother does not need to counter the CAS evidence in detail. She has the obligation to raise a triable issue and must review all the CAS evidence for that purpose and respond where she needs to.

[31] The mother submits that the motion judge misstated or overstated the facts in paragraph [123] of her decision. In this contention the mother is correct on one important matter: the mother did not admit to using inappropriate physical discipline on C, and specifically did not admit to hitting C in any of the ways alleged against her. However, there were several instances of evidence provided by C to the criminal court, to the grandparents, and to others, that the mother hit her repeatedly. Even absent a finding that the mother hit C, the evidence of all the witnesses amply justifies the motion judge's conclusion that there was no genuine issue requiring a trial of the issues of custody and access.

[32] The evidence on this motion was certainly not perfect. It never is. I agree with the mother that there are inconsistencies in the evidence the grandparents and others provided. Inconsistencies are almost always present in the evidence on a motion or at a trial. On this motion, there are inconsistencies, but there are also consistent reports by the various witnesses on many central facts. There was a strong enough factual foundation for the motion judge's findings and conclusions. I do not agree with the mother's submission that important inconsistencies in the CAS evidence were ignored or that the motion judge applied different standards in looking at the evidence of the CAS as compared with the mother's.

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[3] 2006, *The Yale Book of Quotations* by Fred R. Shapiro, Section: Blaise Pascal, Page 583, Yale University Press, New Haven.

[33] The crux of the motion judge's decision is found in paragraphs [152]-[163], in which she concludes that there is no genuine issue requiring a trial of either custody or access. Her conclusion that there is no triable issue on custody rests on six points in paragraph [153], the first of which is that the mother has failed to accept responsibility for physical abuse of C. The mother's conviction for assault against C has been set aside and the mother has not admitted that she assaulted C. I think that the motion judge would have reached the same conclusion on the evidentiary record before her, on the balance of probabilities and without the need for any oral testimony, that the mother did in fact use inappropriate physical discipline on C that resulted in physical and emotional harm to C. Even without this finding or a finding that the mother posed a risk of continued physical harm to C, the other points in paragraph [153] and the points in paragraph [154]-[155] would sustain the motion judge's decision to make a custody order in favour of the grandparents.

[34] Similarly, the evidence amply supports the motion judge's reasons in paragraph [156] for finding that no access at the present time is in C's best interests.

Perkins J.