TAB 3

Summary Judgement in Proceedings Under *The Child and Family Services Act*

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Best Practices For The Conduct Of A Child Protection File - Part II

Strategies to Move your Case Forward to Settlement, ADR or Trial

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SUMMARY JUDGEMENT IN PROCEEDINGS UNDER THE CHILD AND FAMILY SERVICES ACT

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JURISDICTION:

Rule 16 of the Family Court Rules expressly provides jurisdiction for summary judgment in proceedings before the family court. The Family Court Rules apply to all family cases in the Family Court of the Superior Court of Justice, and in the Ontario Court of Justice.

AVAILABILITY:

Historically:

Prior to the enactment of the Family Law Rules, summary judgment was rarely pursued in family proceedings. The landmark case in which the remedy of summary judgment was introduced in a child protection proceeding is Catholic Children's Aid Society of Metropolitan Toronto v. O (L.M.) (sub. nom. Catholic Children's Aid Society of Toronto v. L.M.O and M.P. (Decmber 15, 1995) Toronto Registry No. C1670/88-(Ont. Prov. Div.)). In that case, Justice Joseph James of the Ontario Court (Provincial Division), as he then was, granted summary judgment on his own motion on the basis of the evidence set out in an Agreed Statement of Facts requested by the Court and filed by the Society on consent of the parties.

On appeal to the Superior Court, Justice Chapnik found that it was within the jurisdiction of a judge of the provincial court hearing a child protection matter to grant summary judgment. However, Justice Chapnik, also commented that "it was not a jurisdiction to exercised other than in the clearest of cases and with extreme caution." Justice Chapnik dismissed the appeal of Justice James' order of summary judgment, and her decision was appealed to the Court of

Appeal. The Court of Appeal upheld Justice Chapnik's decision, but the court was equivocal about whether a provincial court judge had jurisdiction to import Rule 20 of the Rules of Civil Procedure into a child protection proceeding. In the view of the Court of Appeal, the decision made by Justice James was not an order of summary judgment in the ordinary sense. At paras 8 and 9 the Court of Appeal had this to say:

> This was not a summary judgment case in the ordinary sense. Although it was characterized as a summary judgment by the trial judge, it did not constitute an importation of Rule 20 of the Rules of Civil Procedure into the Provincial Court CFSA procedure. What in fact happened was that the trial judge, once he had the agreed statement of fact, decided that on the basis of the extreme facts agreed to there was no real issue to be aired at the hearing. He gave both sides an opportunity, with prior warning, to make submissions as to the form the hearing should take, and then made his decision on what he considered to be in the best interests of the children.
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> We agree with the conclusion and the reasons of Chapnik J. on this issue that, in exceptional circumstances (which certainly existed in this case), jurisdiction exists to hear and decide a protection application in the manner adopted by James P.C.J.

In the wake of this decision, prior to the enactment of the Family Court Rules, summary judgment motions were pursued by child welfare agencies in Ontario, but the remedy was generally reserved to those cases involving "extreme facts." or "exceptional circumstances."

Today:

Since the introduction of the Family Law Rules in 1999, the remedy of summary judgment has been readily available in child protection proceedings by virtue of the existence of Rule 16. With the introduction of Rule 16, it is now generally accepted that the remedy of summary judgment is no longer limited to cases involving "extreme facts" or "exceptional circumstances." However, it is a jurisdiction that will be exercised "cautiously."

In F.B and S.G. v. Catholic Children's Aid Society of Toronto, (sub. nom. F.B. v. S.G.) [2001] O.J. No. 1586, Justice Himel reviewed Ontario jurisprudence before and since the enactment of the Family Law Rules in considering the jurisdiction of the Court to grant summary judgment in child protection matters. Referring specifically to the comments of Hardman J. in Children's Aid of the Regional Municipality of Waterloo v.T.S. [2000] O.J. No. 4880 (Ont. C.J.) at para. 25, and Lane J. in R.A. v. Jewish Family and Child Service [2001] O.J. No. 47 (S.C.J.) at para. 20, concerning the broadened availability of summary judgment afforded by the introduction of the Family Law Rules, Justice Himel had this to say at para. 23 of her decision:

> Rule 16 of the Family Court Rules gives the court specific legislative authority to use the summary judgment procedure in family law matters, including child protection cases. Considering the jurisprudence both before and since the enactment of Rule 16, it is clear that it remains appropriate that summary judgment be *exercised cautiously* since that is consistent with the principles of justice and the best interests of children . . ." (emphasis added)

THE TEST TO BE MET ON A MOTION FOR SUMMARY JUDGEMENT

The party moving for summary judgment must persuade the Court that there is no genuine issue requiring a trial. (Rule 16(4). If there is no such issue requiring a trial of a claim or a defence, then the court can make a final order (See Rule 16(6)).

THE ONUS ON THE APPLICANT

In considering test for summary judgment under Rule 16, the family courts have referred to and adopted the decisions of the courts in civil cases concerning the remedy of summary judgment under Rule 20 of the Ontario Rules of Civil Procedure. In North America v. Gordon Capital Corp. (1999), 178 D.L.R. (4^{th}) 1(S.C.C.), the Supreme Court of Canada stated that:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and

> therefore summary judgment is a proper question for consideration by the court. See [page11] Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577, at para. 15; Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 at pp. 550-51, 83 D.L.R. (4th) 734 (C.A.). Once the moving party has made this showing, the respondent must then 'establish his claim as being one with a real chance of success'. Hercules, supra, at para. 15."

THE ONUS ON THE RESPONDENT

The following comments of Lane J. in R.A. v. Jewish Family and Child Services are helpful in understanding the onus that is on the respondent to a motion for summary judgment. Lane J. commented that:

> The inherent logic of the rule imposes on the [responding party] the task of responding to the evidence of the [moving party] if they are to avoid an adverse decision. This could be done by delivering affidavit evidence themselves, or of others on their behalf, *showing a different state of facts from those relied on by the Society[ie. The moving party]*. It could be done by *showing that the evidence does not address a material fact at all, so that there is a gap in the proof.*" (emphasis added)

On a motion for summary judgment, the respondent party will succeed in convincing the court that a trial of the issues is required, if the respondent can:

a. adduce evidence that tends to show a different state of material facts than those asserted by the applicant, or;

b. show that the applicant has failed to provide prima facie evidence on an issue that the court is required to consider.

WHAT CONSTITUTES A GENUINE ISSUE

In Irving Ungerman Ltd. v. Galanis, (1991), 4 O.R. (3d) 545, the court made the following comment about what it means to raise a *genuine issue for trial*: "If a fact is not material to an

action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a "genuine issue for trial"."

The test as stated seems relatively simple. However, the extensiveness of the jurisprudence concerning what constitutes a "genuine issue requiring a trial" belies that assumption.

In Children's Aid Society of Algoma v. E.W. [2001] O.J. No. 2746 (O.C.J.), Kukurin J. asked the question "How does one determine whether or not there is a genuine issue requiring a trial?" Kukurin J. answered his own question by saying that the nature of that determination varies, and it will depend on the particular circumstances of the case. Kukurin J. referred to the comments of Morden J.A. in Irving Ungerman Ltd. v. Galanis, supra., on this point. He went on to say that, in child protection matters, factors to be considered in determining whether or not there is a *genuine issue requiring a trial* could include the following:

1. The nature of the evidence on the motion;
2. Any mandatory time frames involved;
3. The intrusiveness of the order sought;
4. The statutory criteria involved, if any; and in particular
5. How material are the facts in dispute to the issues in the case before the court.

(See C.A.S. of Algoma v. E.W., supra., para. 16)

THE ROLE OF THE JUDGE ON A MOTION FOR SUMMARY JUDGMENT

In Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C. A.), Borins J commented on the fact that motions judges often encounter difficulty in the exercise of determining whether or not the record raises a genuine issue for trial. Borins J. attributed this problem to confusion on the part of judges about the role of a judge on a motion for summary judgment. Referring to the decision of the Court in Aguonie v. Galion Solid Waste Material Inc. (1998), 156 D.L.R. (4th), 222, Borins J. emphasized that, on a motion for summary judgment,

the court must never "assess credibility, weigh the evidence or find facts." Beginning at para. 18 he says

> The caselaw and the experience of this court suggest that motions judges frequently encounter difficulty in the analytical exercise of determining whether the record demonstrates that there is no genuine issue in respect to a material fact which requires resolution by a trial judge or jury. In this regard, it is helpful to emphasize that the dispute must centre on a material fact, and that it must be genuine: Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 83 D.L.R. (4th) 734 (C.A.); Rogers Cable TV Ltd., supra; Royal Bank of Canada v. Feldman (1995), 23 O.R (3d) 798 (Gen. Div.), appeal quashed (1995), 27 O.R. (3d) 322 (C.A.); Blackburn v. Lapkin (1996), 28 O.R. (3d) 292, 134 D.L.R. (4th) 747 (Gen. Div.). In my view, the difficulty encountered by motions judges arises not so much because of any real problem in appreciating that the inquiry must focus on a genuine issue of material fact, but because of uncertainty concerning the role of a motions judge and that of a trial judge. Not infrequently, it is apparent from their reasons for judgment that some motions judges have come to regard a motion for summary judgment as an adequate substitute for a trial. In my view, this is incorrect and does not reflect the true purpose of Rule 20. This confusion of roles usually arises in the more difficult cases in which the parties have presented conflicting evidence relevant to a material fact. Each of the four cases cited above illustrates the more difficult type of motion, in which it is tempting for a motions judge to exceed his or her proper role.
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> In Augonie, this court discussed the role of a motions judge in determining whether a genuine issue exists with respect to a material fact. It is helpful to repeat what the court said at pp. 235-36:
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> > [32] . . . In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

The rule stated in Augonie that a judge ruling on a summary judgment motion must not confuse his or her role with the function reserved for a trial judge is repeatedly referred to in the cases decided by family court judges considering motions for summary judgment under Rule 16. In Children's Aid Society of the District of Nippissing v. M.N., supra, 98 A.C.W.S. (3d) 134, [2000] O.J. No. 2451 (Ont. S.C.) Valin J. states at para. 12 that:

> A motions judge, on a rule 20 summary judgment motion, should not resolve issues of credibility, draw inferences from conflicting evidence, or from evidence that is not in conflict when more than one inference is reasonably available. Those functions are reserved for the trier of fact.

(See also the comments of Kukurin J. in Children's Aid Society of Algoma v. E.W., supra at para. 25, Bedard v. Huard 5. R.F.L (5^{th}) 282 at para. 8, F.B. V. S.G. sub. nom. Catholic Children's Aid Society of Toronto v. F.B. and S.G., supra, at para. 27)

ONUS ON THE RESPONDENT: "PUTTING ONE'S BEST FOOT FORWARD"

Despite the rule that a judge considering a motion for summary judgment cannot assume the function of a trial judge when considering the evidence before it, he or she is still required to take "a good hard look" at the evidence in determining whether there is a genuine issue raised in the material before the court.

Rule 16 (4.1) provides that "the responding party may not rest on mere allegations or denials but shall set out, in an affidavit or other evidence, specific facts showing that there is a real issue for trial."

Subsection 16(4.1) was introduced in 2003 in the first round of amendments to the Family Court Rules. Prior to that, there was no specific requirement in Rule 16 that the responding party set out in affidavit or other evidence facts showing a genuine issue for trial. Nonetheless, in considering motions for summary judgment under Rule 16, the courts routinely imported the requirements set out in Rule 20 of the Rules of Civil Procedure, and adopted the rule that a respondent on a motion for summary judgement is required to put his or her "best foot forward". See Children's Aid Society of Toronto v. K. T. [2000] OJ No. 4736 at para. 10 ; and R.A. v.

Jewish Child and Family Services (Jan. 9, 2001) 102 A.C.W.S. (3d) 554, [2001] O.J. No. 47 (S.C.J.) at paras. 20 – 23.

Putting one's best foot forward means, for example, that a party responding to a motion for summary judgment cannot simply deny facts that are properly supported in evidence led by the moving party on the basis that the facts asserted would not withstand cross-examination at trial. This issue was addressed in C.A.S. of Toronto v. M.A. [2002] O.J. 2371 (O.C.J.).

In CAS of Toronto v. M.A., Spence J. considered whether there was a triable issue as to whether an order for access should be made pursuant to s. 59 of the Child and Family Services Act, where the child was a ward of the Crown. Section 59 of the Act provides that no order of access shall be made in respect of a child who is a ward of the Crown, unless the Court is satisfied that there is evidence of: (a) a relationship that is beneficial and meaningful to the child; and b) that the order of access will not impair the child's future opportunities for a permanent and stable placement. The effect of this section is that, once the Society has satisfied the court that a child should be made a Ward of the Crown, there is a presumption that no order of access should be made, and the onus shifts to the other party to prove that an order of access is appropriate. In this case, the mother had agreed to an order of Crown wardship, and the Society moved for summary judgment with respect to the issue of access, relying on an affidavit from an adoption worker that showed that the child had good prospects for adoption placement. The respondent was able to offer evidence in respect of the first prong of the test under section 59, but offered no evidence to contradict the evidence of the Society that the child was adoptable and that an order for access would likely impair the child's future opportunities for a permanent and stable placement. The

court rejected the respondent's argument that the matter should be put over for trial, because there were issues of credibility in respect of the evidence relied upon by the Society that would likely be revealed through cross-examination at trial. At paras. 21-22, Spence J. commented that:

> The law on summary judgment motions makes it clear that the respondent 'must provide *evidence of specific fact* showing that there is a genuine issue for trial or risk losing.' Children's Aid Society of Toronto v. K.T. and C.W., supra, [my emphasis added]. In effect, what the respondent argues is that she does not yet have those "specific facts" but would like an opportunity to "go fishing" for them at a trial.
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> This is not how rule 16 was intended to operate. To permit a trial to take place on the strength of such an argument would, in my opinion, defeat the very purpose for which rule 16 was enacted.

On a motion for summary judgment, where a party argues that there is a credibility issue in respect of the other party's evidence concerning a material fact, the party making that argument must point to specific evidence in the motion record that supports that claim. (With respect to the operation of section 59 of the Act on a motion for summary judgment, see also the decision of O'Neill J. in Children's Aid Society of Algoma v. C.D. [2001] O.J. No. 4739 at paras. 41 to 43.)

THE IMPACT OF CONTRADICTORY EVIDENCE IN THE MOTION RECORD

The fact that there is contradictory evidence concerning certain facts will usually, but not always dictate that the matter must be put over for trial. Where there is contradictory evidence in respect of certain facts, summary judgment may still be available to the moving party if the evidence relates to a fact that is not germane to issues in the case, or if the contradictory evidence tendered by one of the parties is not reasonably believable.

The case that is most often cited in relation to the impact of contradictory evidence on a motion for summary judgment is the decision of the Court of Appeal in Irving Ungerman v. Galanis (1991), 4 O.R. (3d) 545. In that case, at p. 552, Morden J.A. commented:

> To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force. (Whitaker v. Coleman (1940), 115 F. 2d 305, 306)

Family and Children's Services of Wellington County v. E.W. [2001] 2279 (OCJ) is an example of a case where despite contradictory evidence concerning many of the facts of the case, the moving party was still entitled to summary judgment because the disputed facts were not material to the issues to be decided by the Court. In that case, the Society alleged that the child's mother suffered from Munchhaussen by Proxy Syndrome, and relied on the report of a psychiatrist in support of that assertion. The respondent mother disagreed with the psychiatrist's findings and alleged that the psychiatrist was not sufficiently familiar with Munchhausen to offer the opinions set out in his report. The mother also introduced evidence contradicting some of the facts stated in the expert report. The court found that, even if the diagnosis and the findings set out in the report were ignored, there was still no triable issue. At para. 18, the court commented:

> While [the mother] disputed the findings of Dr. Glumac, [the mother] does not offer any evidence to dispute the applicant's report that [the child] is thriving in his present environment. Thus, even if one were to accept her assertion that all her efforts to seek medical attention for [the child] were genuine and valid and that she has done nothing more that provide loving care for [the child], there is no escaping the fact that he did not do well in her care. On her evidence, he was sickly, he suffered from many conditions,

> illnesses, injuries and ailments as well as learning disabilities. Between September 1996 and December 1998, he lived in seven different locations. He was socially isolated. He did not know his father. He is now, at sixteen, a healthy young man. He is attending a school that can address his specific educational deficits and allow him to catch up. He is succeeding, academically and socially. He has a developing relationship with his father and half siblings. He has a bond with his mother, which the applicant's proposal does not seek to sever. In short, the evidence that [the child's] best interests are served by remaining in the applicant's care is overwhelming. There is nothing before the court to contradict that conclusion

HEARSAY EVIDENCE ON MOTIONS FOR SUMMARY JUDGMENT

Hearsay evidence on a motion for summary judgment may be admissible. However, the admissibility of the hearsay will be governed by statutory and common law rules of evidence.

Where hearsay evidence is proffered in an affidavit, the deponent of the affidavit must state the source of the information by name, and the deponent's belief of the information. (See Rule 14 (19))

It is also important to keep in mind that, on a motion for summary judgment, if a party's evidence is not from personal knowledge, the court may draw conclusions adverse to the party relying on the hearsay evidence. (See Rule 16(5)).

Business records are admissible on motions for summary judgment. However, any party relying on the business records on a motion for summary judgment will need to establish in evidence that the records relied upon are business records as defined in section 35 of the Evidence Act, or that they meet the common law definition of business records set out in Ares v. Venner.

Generally speaking, in child protection proceedings in Ontario, it seems that the courts are prepared to consider opinion evidence on motions for summary judgment. However, a party relying on opinion evidence on a motion for summary judgment, should keep in mind the rules set out in R.v. Mohan concerning the admissibility of opinion evidence, generally.

The issue of whether opinion evidence contained in an expert report should be considered on a motion for summary judgment was considered by the Ontario Superior Court in Dutton v. Hospitality Equity Corp., [1994] O.J. No. 1071. Based on the decision of the court in that case, it would appear that, where the author of the report is not a practitioner included in one of the groups designated in section 52 of the Ontario Evidence Act, and the report is not appended as an exhibit to an affidavit in which the author of the report attests to the truth of the contents of the report, the court may disregard such expert evidence on a motion for summary judgment. At page 4 of that decision McDermid J. commented:

> In this case, there is no affidavit from the "expert" upon which the plaintiff might cross-examine as part of the process of preparing to resist the motion for summary judgment. Rather, the expert's report is appended to Mr. McCall's affidavit as an exhibit. Mr. McCall, a solicitor, has no demonstrated expertise in the field of engineering generally or in the interpretation of the Plumbing Code in particular. Moreover, compliance with the Plumbing Code, even if properly demonstrated, may not be conclusive on the issue of negligence, particularly with respect to matters in issue that do not fall under its umbrella or are open to interpretation such as the "reasonable compromise" referred to by Mr. James.
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> It does not seem proper to me in the circumstances of this particular case that the plaintiff's action should be dismissed summarily in the absence of any opportunity to cross-examine an expert, whose report is the foundation for the motion, on his affidavit. I express no opinion as to whether the same conclusion would be reached in the case of a medical report appended as an exhibit to a similar affidavit, given the provisions of s.52 of the Evidence Act, R.S.O. 1990. Ch.E.23.

The decision of the Court in Dutton, supra, was cited and followed by the court in Deslauriers v. Bowen [1994] O.J. No, 2198 (Ont. Ct. Gen. Div.). See Also Ewaskiw v. Zellers Inc. et al, 40 O.R. (3d) 795.

Submissions of a party concerning the views, preferences wishes, desires and fears of a child cannot be taken into account by a judge hearing a motion for summary judgment unless such statements are supported by admissible evidence. See the decision of Karswick J. in Children's Aid Society of the Region of Peel v. W.O. [2002] O.J. No. 1099 (O.C.J). In that case, the judge found that statements of a child's lawyer about the child's views and preferences that were not supported in evidentiary record should not be considered by the court.

The comments of the court in CAS of Peel v. W. O. supra, at para. 6 show that the court considered evidence on the motion for summary judgment concerning out of court statements of the children. These statements were set out in an affidavit of another individual on the basis of that individual's information and belief. There is no indication in the judge's reasons that the Court had any hesitation about admitting the hearsay evidence concerning the statements of the children. Generally speaking, the caselaw suggests that, on motion for summary judgment, the court will often allow hearsay statements from children without putting the party relying on the evidence to strict proof of the requirements of necessity and reliability.

The caselaw suggests that the restriction against hearsay evidence is somewhat relaxed on motions for summary judgment. However, the court may engage in considerations about the reliability of the hearsay in determining the weight to be attributed to that evidence.

In Children's Aid Society of Algoma v. E.W. [2001] O.J. No. 2746 (O.S.J), the court considered whether hearsay evidence that did not fall within any of the traditional exceptions should be considered on a motion for summary judgment. In that case, the children who were the subjects of the proceeding were placed with their grandparents subject to an order of supervision. The central issue before the court was whether an uncle who was a convicted paedophile had been permitted by the grandparents to live in the home and have unsupervised contact with the children. The respondent grandfather submitted affidavit evidence saying that the uncle had not lived in the home during the period of time the children were living in the grandparents care. The evidence of the applicant Society in respect of this issue was all hearsay, set out as information and belief in the affidavit of the Society social worker. The Society relied in particular on a statement made to the Society by a doctor who had repeated what the uncle had told him about about where he was living during the relevant period of time. In that case Kukurin J. determined that very little weight should be attributed to the hearsay evidence relied upon by the Society, and the motion for summary judgment was dismissed.

THE IMPORTANCE OF STATUTORY TIME LIMITS ON MOTIONS FOR SUMMARY JUDGMENT

On a motion for summary judgment, time limits imposed under section 70 of the Child and Family Services Act may impact on the availability of the remedy of summary judgment. Section 70 is the section of the Act that sets out limits on the cumulative amount of time a child may be committed to the care of the Society pursuant to temporary care and custody orders under section 51 and society ward orders under s. 57.

In CAS of the Regional Municipality of Waterloo v. R. S. [2000] O.J. No. 4880 (O.C.J), Hardman J. commented that on a motion for summary judgement in a child welfare proceeding, there may be a link between the time requirements set out in the Act and the existence of a triable issuee. In para. 26 of his decision, Hardman J says:

> [On a motion for summary judgment] any consideration of the children's best interests must also reflect the time concerns recognized as significant to children's best interest that are contained in the Child and Family Services Act and the rules. There may be a link between those time requirements and the existence of a triable issue, given the mandate imposed upon the court and parents to have children settled within a certain time depending on the age of the child, the age of the application (transition issues) and other factors. It is clear by both statute and case law that long-term planning for children is essential to their wellbeing and that there should be limitations on temporary placements.

In Children's Aid Society of Algoma v. C. D. [2000] O.J. 4739 (OSJ), O'Neill J. commented at paras. 30 - 31:

> In determining whether the evidence presented on the motion for summary judgment, as well as the fresh evidence filed before me, raise any genuine issues for trial in relation to the protection finding, the disposition and the no access order made, it is important to bear in mind the purposes of the Child and Family Services Act, prior to the 1999 amendments, as well as the provisions set out in s. 57(6), 59(2), 70 and 140
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> . . . . . .
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> There can be no doubt that the above noted sections of the Act incorporate important time lines and time provisions into the analysis, which relate to the best interests of children, the importance of continuity of care and the importance of permanency planning. The respondent's application was commenced on November 8th,1999. When the summary judgment motion was argued in May and June of 2001, and when the appeal was argued before me on November 5th, 2001, s. 70 and s. 57(6) had taken on even greater importance, given the passage of months and years since the commencement of the application. The motions court judge recognized that in his reasons, when he referred to the November, 2001 approaching date, and when he made reference to the unlikelihood of any change in circumstances within the meaning of s. 57(6) of the Act.

See also Children's Aid Society of Algoma v. L.P [2002] O.J. No. 2895, and the court's comments at paras. 20 and 21.

WHEN IS SUMMARY JUDGMENT AVAILABLE:

A party may move for summary judgment once an Answer has been filed, or once the time for filing an Answer has expired (Rule 16(1)). According to Rule 10(2), a Respondent party must file an Answer within 30 days of being served with an application, unless the Respondent party was served outside of Canada or the United States, in which case the Respondent has 60 days to file an answer.

APPEAL OF A SUMMARY JUDGMENT MOTION

The standard of review on the appeal of summary judgment decision is *a standard of correctness and not a standard of deference applied to findings of fact in a trial.* In explaining this test in Catholic Children's Aid Society of Toronto v. F.B. and S.G., supra, Himel J. had this to say at para 10 of that decision:

> In determining the appropriate standard of review on an appeal, a key consideration is the type of matter being appealed. . . . The traditional rationale for according deference to a trial judge is that the judge's findings of fact are connected to and based upon the opportunity to hear viva voce testimony and observe the parties and witnesses. In a motion for summary judgment, the judge hearing the motion is not finding facts but, rather, is determining whether or not there is a genuine issue for trial: Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161 (C.A.) On an appeal of an order of summary judgment, the appellate court must determine whether the judge applied the appropriate test and whether there was any error in its application. . . . The standard of appellate review is, therefore, a standard of correctness, not a standard of deference applied to findings of fact in a trial.

The rationale behind this rule seems to be as follows: The record before the court on a motion for summary judgment is generally a paper record, and the judge hearing the motion does not have the same opportunity a trial judge would have to observe witnesses during viva voce

testimony and cross-examination. Furthermore, the judge on a motion for summary judgment is not entitled to make findings of fact or credibility.

As a result of these factors there is no requirement on the court hearing the appeal to give deference to observations made by the motion judge concerning the facts contained in the record or the credibility of the evidence offered by a party on any point. Due to the nature of summary judgment proceedings, the appeal court is normally in as good a position as the motion judge in evaluating the evidence, so no special deference is owed to court from which the appeal is taken. The situation is therefore different from the situation where the appeal is taken from a final decision made by a trial judge following a full hearing of the issues.

PARTIAL SUMMARY JUDGMENT

There are many circumstances where, although the facts may not support summary judgment in respect of all of the issues, it may be supported in respect of some of the issues. See for example the decision of the Court in Children's Aid Society of Algoma v. C.A.A. [2000] O.J. 5519 (O.C.J). In that case, on a motion for summary judgment in respect of a protection application, the court found that the Society had proved that there was no triable issue in respect of a protection finding under s. 37(2) of the Act, but that there were triable issues in respect of the disposition, and the court put the matter over for trial on disposition, only.

A motion for summary judgment may also successfully narrow the issues, even in circumstances where the moving party does not obtain judgment in respect of any of the issues before the court. See for example the decision of Jones J. in Children's Aid Society of Toronto v. K.T. [2000] OJ

No. 4736. In that case, the court found that, although the moving party had succeeded in establishing a prima facie case, the respondent had succeeded in adducing sufficient evidence to raise triable issues in respect of the disposition sought by the moving party. Despite this decision, the Court found that it was possible to narrow the issues for trial and substantially reduce the amount of time required for a trial because the record disclosed a number of undisputed facts that were material to the issues before the Court. In her reasons for judgment Jones J. set out eighteen findings of undisputed facts that were relevant to the trial of the issues.

SUMMARY

Motions for summary judgment in childware proceedings are governed by Rule 16 of the Family Law Rules. The test on a motion for summary judgement is whether there is a genuine issue requiring a trial.

The onus is on the moving party to set out prima facie evidence showing that there is no genuine issue requiring a trial of a claim or a defence.

The onus is on the responding party either to adduce evidence tending to show a different state of material facts than that asserted by the moving party, or to demonstrate that there is a gap in the case presented by the moving party, i.e. that the applicant has failed to provide prima facie evidence on an issue that the court is required to consider.

The responding party is required to put his or her best foot forward. This means that the respondent cannot simply deny the facts asserted by the moving party, and rely on promises

about evidence that will be put forward at trial by the respondent, or assertions that the applicant's evidence will not withstand cross-examination. The respondent must be able to point to evidence in the motion record before the court that raises a triable issue.

A fact is only material to an action if the result of the proceeding turns on its existence or non-existence. Therefore conflicting evidence on facts that are not material to the issues before the court will not impact on the result of the motion.

Hearsay evidence that is not admissible pursuant to any statutory or common law exception may be entertained on a motion for summary judgment. However, the court is entitled to draw an advserse inference where a party relies on hearsay evidence, and the court will likely attribute little weight to hearsay evidence. Therefore, if a party relies on hearsay evidence for proof of a pivotal fact, the party is not likely to succeed.

The court will consider the mandatory time-frames imposed by the Child and Family Services Act when dealing with a motion for summary judgment in a child welfare proceeding. This means that in cases where the 12 month and 24 month deadlines in section 70 are approaching, the Society may have a better chance of obtaining summary judgment on an application for a Crown Ward Order.

Business records are admissible on motions for summary judgment. However, counsel should be mindful of notice requirements in section 35 of the Evidence Act, if the intention is to rely on the s. 35 definition of a business record.

Expert reports are admissible on a motion for summary judgment. However, if the author of the report is not a person who falls within the groups of practitioners set out in s. 52 of the Evidence Act, counsel should consider obtaining an affidavit in which the author adopts the contents of his or report under oath.

The Child and Family Services Act lends itself to motions for partial summary judgment. It is possible to obtain summary judgment on a finding, and proceed to trial on disposition only. There may also be cases where, summary judgment may be available on the finding and the order, and the only triable issues relate to the access order that is appropriate in the circumstances of the case.

The Court's jurisdiction to grant summary judgement will be exercised cautiously, and it will only be available in the clearest of cases.