**TAB 9**

# The Law Regarding the Rights of Foster Parents

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# THE LAW REGARDING THE RIGHTS OF FOSTER PARENTS

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## I. INTRODUCTION:

The role of foster parents in proceedings under the *Child and Family Services Act* ("CFSA") has increasingly been the subject of litigation since proclamation of the legislation in 1984. One of the major contributing factors to the increase in foster parent litigation are delays in the justice system and use of "risk" foster homes by some children's aid societies.

Delay in child protection hearings is an issue across Ontario. Children are routinely in foster care beyond the maximum periods permitted by the *Child and Family Services Act* and trials are frequently not conducted within the timelines prescribed by the Family Law Rules.

The creation of 'risk foster homes' has been a response by many children's aid societies to court delays and concerns about children 'in limbo' was the creation of 'risk foster homes'. Persons approved as risk foster parents are persons wishing to adopt a child. They are approved both as foster parents and as adoptive parents. They are advised that their role is that of foster parent until such time as the child placed with them is made a Crown ward, without access. At that juncture, the expectation is that the child will be placed for adoption with this family and the 'foster parents' will become 'adoptive parents'. Risk foster parents are required to attend foster parent training. This training cautions them that the mandate of a children's aid society is to work with the parent, or

other person having charge of a child prior to the society's intervention, and use their best efforts to assist that person in addressing the protection issues with a view to returning the child to his/her care. They are also advised that the society's mandate requires that it consider placement with relatives and members of a child's extended family and community prior to proceeding with a Crown wardship application.

The reality is that persons who became foster parents for the sole purpose of adopting a child often have difficulty internalizing their role as foster parents. It is, therefore, not surprising that 'risk' foster parents are likely to have greater difficulty than traditional foster parents accepting a decision by a children's aid society to amend a Crown wardship application to effect placement of a child back with the person who had care of the child at the time of the society's intervention or placement with a member of the child's extended family or community.

The longer a child remains in a foster home, the stronger the attachments and the greater the distress of foster parents at the prospect of the child's removal from their care, whether or not they are 'risk foster parents'.

This paper will examine the legislative scheme of the *Child and Family Services Act,* including the specific provisions in the legislation, regarding the role of foster parents, the distinctions between child protection proceedings and status review proceedings, and strategies for foster parent participation in proceedings under the *Child and Family Services Act.*

## II. THE LEGISLATIVE SCHEME:

### 1. Overview:

The Ontario Court of Appeal has considered the legislative scheme of the *Child and Family Services Act* as it relates to foster parents in two cases, *G.(C. ) v. Catholic Children's Aid Society of Hamilton-Wentworth* (1998) 40 O.R. (3d) 334, [1998] O.J. No. 2546 and *L. (R.) v. Children's Aid Society of Niagara Region* 34 R.F.L. (5th) 44.

In *G. (C. ) v. Catholic Children's Aid Society of Hamilton-Wentworth,* supra, the Court of Appeal examined the place of foster parents in the Part III regime of the CFSA. After setting out several of the provisions in the CFSA limiting the ability of foster parents to participate in CFSA proceedings, Justice Rosenberg states:

> In effect, foster parents provide care to Crown wards as delegates of the society. It is as delegates of the society that foster parents come in contact with Crown wards and develop relationships, sometimes long term relationships, as did these respondents with these children. The fact that the legislature has carefully circumscribed the rights of foster parents suggests implementation of a policy to prevent the foster parents from potentially acquiring an advantageous position to that of the natural parents. The fact that, in a particular case, the natural parents are no longer on the scene and there is little risk of a conflict between the natural parents and the society's delegate does not warrant departing from the clear words of the statute as an expression of that intention. (p.5)

In *L. (R.) v. Children's Aid Society of Niagara Region, supra* the Court of Appeal examined the role of foster parents in child protection proceedings and stated the following:

> The Act does not envisage a contest between members of a child's family and a foster parent at a hearing to declare whether the child should be declared to be a society or Crown ward. (para. 9)
>
> ...prior to the initial hearing foster parents are meant to provide temporary care for children pending their return to their family or transfer to a more permanent placement. They are not intended to provide a comparative basis for the determination of the child's best interests from the outset. A best interests comparison between the foster home and the original family at this stage would run contrary to the entire scheme of state intervention in cases where there is reason to believe that a child is in need of protection. As Nasmith J. aptly put it in *Children's Aid Society of Metropolitan Toronto v. S. (D.)* [1991] O.J. No. 1384 (Prov. Div. Ct.):
>
> > There is no logic in the notion that there can be a "best interests" comparison of two placements in the sense of determining which of two placements is "better" and at the same time accommodating the legal priorities given to the family at the initial stages... Once the family placement has been deemed inadequate, then and only then, do temporary foster placements open up for comparison.
> >
> > ....
> >
> > If comparisons between foster parents and original families were legitimate from the outset, it would be tantamount to declaring open season on each and every child who has moved, however temporarily, into a foster home. When could it not be said that there was an attachment between a foster parent and a child and that moving the child back to the family would break the attachment. When could it not be said that the foster home had advantages over the original home. It would be ironic if

> foster homes were being chosen where the foster parents were so casual that there was no attachment or where the resources were no better than the family that was being assisted. (para. 38)

**2. <u>Relevant Statutory Provisions</u>:**

**a) Purposes of the CFSA:** The paramount purpose of the *Child and Family Services Act* is to promote the best interests, protection and wellbeing of children. (*Child and Family Services Act,* s,1(1)). The additional purposes of the legislation, so long as they are consistent with the best interests, protection and wellbeing of children are:

1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.
2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.
3. To recognize that children's services should be provided in a manner that,
    i. respects children's need for continuity of care and for stable family relationships, and
    ii. takes into account physical and mental developmental differences among children,
4. To recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences.
5. To recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to

> Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family. (*Child and Family Services Act,* s.1(2))

In C*atholic Children's Aid Society of Metropolitan Toronto v. M. (C. )* [1994] 2 S.C.R. 165, the Supreme Court of Canada stated that:

> The Ontario CFSA governs every aspect of child protection proceedings in Ontario. The Act specifies the procedure to be followed, the evidentiary requirements under this process and, most of all, spells out the objectives of the legislation in s. 1, of which the first and "paramount" objective of the Act is to promote "the best interests, protection and wellbeing of children". (para. 24)

Madam Justice L'Heureux-Dube went on to state that, in attempting to fulfill its objective, the CFSA carefully sought to balance the rights of parents and, to that end, the need to restrict state intervention, with the rights of children to protection and well-being. While recognized as one of the least interventionist regimes in the country, Madam Justice L'Heureux-Dube noted that this non-interventionist approach was premised "...not with a view to strengthening parental rights but, rather, in the recognition of the importance of keeping a family unit together as a means of fostering the best interests of children." (para. 25).

When investigating information that a child may be in need of protection, children's aid societies are required to assess risk to children in the care of their parents or other person having charge. Depending on the outcome of that risk assessment, it may be necessary for a child to be admitted to the society's care. Absent special needs that preclude care in

a family setting, children admitted to a society's care are generally placed in a foster home.

**b) "Foster Care":** Foster parents provide care to children as delegates of the children's aid societies. The *Child and Family Services Act* defines "foster care" as follows:

> **"**foster care**"** means the provision of residential care to a child, by and in the home of a person who,
>
> (a) receives compensation for caring for the child, except under the *Ontario Works Act 1997,* the *Ontario Disability Support Program Act, 1997,* and
>
> (b) is not the child's parent or a person with whom the child has been placed for adoption under part VII,
>
> and "foster home" and "foster parent" have corresponding meanings (s. 3(1))

Prior to the proclamation of the *Child and Family Services Act*, a child could not be placed for adoption with his/her foster parent. This prohibition ensured foster parents were not placed in a conflict of interest position with either the children's aid society or children's families as a result of the foster parents' attachment to a child placed in their care and desire to be that child's permanent caregivers. However, it also meant that children who were made Crown wards without access and not adoptable as a consequence of age or special needs were forced to remain children of the Province until they left the system, even if they were in a foster home where their caregivers wished to adopt them.

This prohibition does not exist in the *Child and Family Services Act.* The legislation sought, through other means, to ensure foster parents did not acquire an advantageous position to that of the biological parents. Specific provisions were included circumscribing the role of foster parents. Presumably such provisions were considered necessary as, in the event of a comparison of plans as between a parent whose personal difficulties resulted in a child's removal from their care and foster parents who are specifically approved by a children's aid society as a suitable caregiver for children, the parent would rarely be the successful party. This would undermine the child protection system and be inconsistent with the underlying principles of the legislation. Parents would become extremely reluctant to consent to their child being placed in foster care, and the focus of intervention by children's aid societies would likely change.

**c) "Parent":** Foster parents are specifically excluded from the definition of "parent" even if they otherwise meet the criteria including demonstration of a settled intention to treat the child as a child of their family in the twelve months before intervention under Part III of the legislation (s.37(1))

In *D.J. v. The Children's Aid Society of Ottawa,* 42 R.F.L. (5th) 363, the Court was required to consider the applicability of the definition of 'parent' in s.37(1) to a <u>former</u> foster parent. The persons entitled to bring a Status Review Application are enumerated in s.64(4) and include "any parent of the child". The Honourable Justice V. J. Mackinnon held that a person cannot rely upon their settled intention to treat a child as a member of his or her family demonstrated during a period of time when he or she is a

foster parent to the child. Justice Mackinnon further held that the reference in s.37(1) to "the twelve months before intervention under this Part" is to the twelve months prior to the initial Protection Application and not the twelve months prior to the current Status Review Application.

**d) Assessments:** Once a child has been found 'in need of protection', a court may order that the child or parent or person in whose charge the child has been or may be undergo a medical, emotional, developmental, psychological, educational or social assessment. The legislation specifically excludes foster parents as persons who can be included in the assessment order.

**e) Parties:** A foster parent is not a party to a proceeding under the *Child and Family Services* Act. However, any person including a foster parent, who has cared for a child continuously during the six months immediately before a hearing,

a) is entitled to the same notice of the proceeding as a party;

b) may be present at the hearing;

c) may be represented by a solicitor; and

d) may make submissions to the court,

but shall take no further part in the hearing without leave of the court. (CFSA, s.39(3))

Rule 7(4) of the Family Law Rules provides that in a case about custody of or access to a child, a child protection case, or a secure treatment case, every parent or person who has

the care and control of the child involved except a foster parent under the Child and Family Services Act shall be named as a party, unless the court orders otherwise. (emphasis added)

Rule 7(5) provides that a court may order that any person who should be a party shall be added as a party.

**f) Placement Decisions:**

**i) Society wards:** Section 61 of the *Child and Family Services Act* addresses the factors to be considered by a society in making placement decisions. Subsection 61(6) enables a society having care of a child to remove the child from a foster home where, in the opinion of a Director or local director, it is in the child's best interests to do so.

**ii) Crown wards:** Where a child is a Crown ward and has lived continuously with the same foster parents for two years:

i) s.61(5) requires that a society consider the wishes of the foster parent in its major decisions concerning the child;

ii) s.61(7) provides that a society shall not terminate the foster placement without first giving the foster parents ten days notice of the proposed removal and their right to a review further to the society's internal complaint procedure;

iii) In the event the foster parent elects to access the internal complaint procedure, the society shall not remove the child until the review and

any further review by the Director has been completed and unless the society's board of directors or the Director, as the case may be, recommend the removal (s.61(8));

iv) s.61(7) and (8) do not apply if, in the opinion of the Director or local director, there would be risk that the child is likely to suffer harm during the time necessary for notice to the foster parent and review under the s.68 complaint procedure.

**g) "Another Person":** When a hearing is adjourned, the court may make one of several temporary orders for care and custody which are set out in s.51(2). One of the orders the court may make is to place the child in the care and custody of a person other than the person who had charge at the time of the society intervention (emphasis added) with the consent of that person and subject to the society's supervision (s.51(2)). Similarly, the Court may make a final order disposing of a Protection Application or Status Review Application placing a child with a parent or another person, (emphasis added) subject to the supervision of the society for a specified period of time ( s. 57(1)).

A foster parent is not "another person" pursuant to s.57(1) of the *Child and Family Services Act*.

See: *Children's Aid Society of the City of Kingston and County of Frontenac,* [1994] W.D.F.L. 1325.

*The Children's Aid Society of Brant v. J. H. and P.B.* 2002 Ontario Superior v Court of Justice, OCJ File No. C-16/01

In *The Children's Aid Society of Brant v. J. H. and P.B., supra,* Borkovich J. held that the Court does not have the jurisdiction to make an order directing a child's placement in a specific foster home.

**h) "Community Placement":** The *Child and Family Services Act* provides that, prior to making an order for Society or Crown wardship, the court shall first consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family (s.57(4). In *Children's Aid Society of the City of Kingston and County of Frontenac v. T.C., supra,* Justice Pedlar held that a foster parent cannot be considered a "community placement" pursuant to s.57(3) of the *Child and Family Services Act.*

**i) s. 144 Review:** Where a children's aid society makes a decision refusing to place a child with a person, including a foster parent who is caring for the child, for adoption or, the society makes a decision to remove a child who has been placed with a person for adoption, a Director may review the decision and either confirm or rescind the decision and do anything further that the licensee may do under the adoption provisions of the CFSA. In conducting a review under this section, the Director must consider the importance of continuity in the child's care.

The legislation does not prescribe a procedure for this type of review which leaves it vulnerable to challenge. In my opinion, s. 144 reviews under the CFSA are governed by

the *Statutory Powers and Procedures Act.* As such, they must be conducted in a manner that ensures adherence to the principles of fundamental justice and procedural fairness.

Challenge to decisions made in a s.144 review is by way of an application for judicial review.

**j) s. 68 Complaint Procedure:** Children's aid societies must establish a written review procedure for hearing and dealing with complaints by any person regarding services sought or received from the society, and must make the procedure available to any person on request. The review procedure must include an opportunity for the person making the complaint to be heard by the by the society's board of directors. In the event the person making the complaint is not satisfied with the response by the board of directors, he/she may have the matter reviewed by the Ministry overseeing children's aid societies.

The CFSA does not prescribe a procedure for s.68 reviews and my comments in relation to s.144 reviews apply. The availability of a s.68 review to foster parents in the context of a Protection Application or Status Review Application varies, depending on the children's aid society. The form of the review procedure also varies as does its availability to foster parents.

## III. DISTINCTION BETWEEN PROTECTION PROCEEDINGS AND STATUS REVIEW PROCEEDINGS:

The statutory pathway to be followed by a court hearing an application under the *Child and Family Services Act* depends on whether it is a Protection Application or a Status Review Application. The cases most often relied upon in identifying the statutory pathway are *L. (R.) v. Children's Aid Society of Metropolitan Toronto* 21 O.R. (3d) 724 for child protection proceedings and *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.* [1994] 2 S.C.R. 165 for status review proceedings. Both cases were decided prior to the most recent amendments to the legislation and attempts have been made to distinguish cases on that basis. However, with a few exceptions there have been no fundamental changes to the CFSA and the overall legislative scheme has not changed. There has further been no change to the provisions regarding the role of foster parents.

The Courts have held that there are also differences in its consideration of foster placements between child protection proceedings and status review proceeding. It is important to remember that a plan for a child to remain in foster care is advanced by the children's aid society not individual foster parents as they are not parties to the proceeding and the court does not have jurisdiction under the *Child and Family Services Act* to place a child in their care. In other words, the court is considering the plan advanced by 'the state' that a child remain in its care as against the plan by a parent or other family member who either falls within the definition of parent or is an added party.

In *Children's Aid Society of Metropolitan Toronto v. S.(D.)* (1991) O.J. No. 1384, The Honourable Justice Nasmith held that, at a hearing of a Protection Application, any plan by the foster parents is "absolutely irrelevant and any comparison between the advantages to the child in the foster home and in the biological home is impertinent".

> It is anathema to the role of foster parents at this preliminary stage of protection intervention to be setting them up as permanent caretakers and to have them staking their own custodial claims on the child. They should be preparing the child for a return to the family. Until it has been determined that there are grounds for removing the child from the family, and that there is no one in the family who is acceptable as a substitute caretaker, the foster parents cannot be putting forward their own resources as being 'better' than the family's or calling for a comparative analysis of plans as between themselves and the family (p.3)

Justice Nasmith expressed concern that, if a best interest comparison between the foster home and the original home was introduced from the beginning of the protection proceedings, there would be no substance to the principles of family integrity, rehabilitation or to priorities for family placements as set out in s.57(4). There would, he stated, be a "conflict of interest" for foster parents from the outset.

It was Justice Nasmith's conclusion that best interests comparisons between foster parents and families do not operate from the outset. At that initial stage, the family priorities supercede the best interests comparison and these legislated priorities do not melt into a 'best interests' mixture.

Justice Nasmith laid some of the blame for the ongoing misconceptions about the rold of foster parents in child protection proceedings on the fundamental misunderstanding of those referring and leading clinicians astray who were conducting assessments in these matters. He stated that clinicians should not be asked to compare the foster home and family home but instead be asked about the viability of the family placement and an opinion regarding the necessity of removing the child from the family and whether the means for helping the children within the family or extended family were adequate.

Regarding the priority of extended family as opposed to the person having charge at the time of intervention, it was Justice Nasmith's opinion that, even assuming extended family is lower in priority than the person having charge, that would not materially affect the futility of the foster parents' position.

Justice Nasmith's judgment in *Children's Aid Society of Metropolitan Toronto v. S.(D.),* supra was followed in *L. (R.) v. Children's Aid Society of Metropolitan Toronto* 21 O.R. (3d) 724 which also articulated the 'statutory pathway' for Protection Applications. The 'pathway' has been modified by amendments to the CFSA however appears to fundamentally remain the same.

The Ontario Court of Appeal considered the role of foster parents in child protection proceedings in *R.L. and T.L. v. Children's Aid Society of the Niagara Region, R.K. and C. K. and C.M.* 34 R.F.L. (5th) 62. It held that the role of foster parents is more limited in

the context of child proceedings than in status review proceedings. In relation to child protection proceedings, the Court stated that:

> Foster parents are meant to provide temporary care for children pending their return to their family or transfer to a more permanent placement. They are not intended to provide a comparative basis for the determination of the child's best interests from the outset. A best interests comparison between the foster home and the original family at this stage would run contrary to the entire scheme of state intervention in cases where there is reason to believe that a child is in need of protection (para. 38)
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> ....
>
> It is also clear from reading the Act as a whole, including the specific provision contained in s.57(4) referred to earlier, that consideration of the family may go beyond the natural parents and others who had charge of the child immediately before apprehension and may extend to relatives and other members of the child's community. (para. 39).

The Court of Appeal held that the role of foster parents is quite different in the context of a status review proceeding. The Court referred to its judgment in *Children's Aid Society of Peel (Region) v. W. (M.J.)* 23 O.R. (3d) 174 (Ont. CA), 14 R.F.L. (4th) 196. In that case the Ontario Court of Appeal considered whether a family plan had priority over the plan by CAS to place a child for adoption in the context of a status review application. The Court of Appeal noted the distinction between protection proceedings where a familial plan has elevated status, and status review proceedings where they had no such status. As stated by Osborne J.A. on behalf of the Court in *Children's Aid Society of Peel (Region) v. W. (M.J.) at p. 189*, supra:

> On a status review hearing under s.65, once it is established that the child is in continued need of protection and court intervention continues to be necessary, the court is required to consider the least restrictive alternatives consistent with the child's best interests. I do not think that on a status review hearing, a plan proposed by "extended family" (s.57(4)) is to be given a prima facie elevated status.

The 'test' to be applied in status review proceedings was established by the Supreme Court of Canada in *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.* [1994] 2 S.C.R. 165. The test is twofold and requires the court to determine, firstly, whether the child continues to be 'in need of protection' and, secondly consideration of best interests. The need for continued protection may arise from the existence or absence of circumstances that triggered the first order for protection or from circumstances which have since arisen. Madam Justice L'Heureux-Dube quotes with approval from the judgment of the Court of Appeal in their statement:

> We do not agree, however, that this means, in the absence of proof of some deficiency in the present parenting capacity on the part of the natural parent, that the child must be returned to the care of the natural parent. A court order may also be necessary to protect the child from emotional harm, which would result in the future, if the emotional tie to the caregivers, whom the child regards as her psychological parents, is severed. Such a factor is a well recognized consideration in determining the best interests of the child which, in our opinion are not limited by the statute on a status review hearing. (p.16).

Madam Justice L'Heureux further states that the wide focus of the best interests test encompasses an examination of the entirety of the situation and thus includes concerns

arising from emotional harm, psychological bonding and the child's wishes, which the Act contemplates as well.

## IV. STRATEGIES:

### 1.Party Status:

s. 39(3) of the CFSA provides a foster parent who has cared for a child continuously during the six months immediately before the hearing with certain entitlements. Not included, is the opportunity to call evidence or cross-examine witnesses called by the parties.

There are numerous cases addressing the issue of foster parents being added as parties to proceedings under the CFSA. In all the cases reviewed, these motions were not successful. The one exception is *C.M. v. Children's Aid Society of the Regional Municipality of Ottawa-Carlton* [1994] O.J. No. 1570 which was decided in the Ontario Court of Justice. However, that decision was questioned and not followed by the Superior Court of Justice in *L. (R.) v. Children's Aid Society of Metropolitan Toronto,* supra. There was also a ruling by The Honourable Justice G. Edward in The Children's Aid Society of Haldimand-Norfolk v. H.V. providing that former foster parents would have participatory rights at trial as determined by the trial judge. There were no written reasons. The parties agreed to the specifics of the former foster parents' participatory rights prior to the commencement of trial. That case was further complicated by an application under the *Children's Law Reform Act*.

In *Children's Aid Society of London and Middlesex v. J.P.* [2000] O.J. No. 745, The Honourable Madam Justice Marshman held that a person should not be added as a party to CFSA proceedings unless they had a legal interest in the proceedings, ie. an order could be made in their favour or against them. Justice Marshman further held that the foster parents were merely agents of the children's aid society and stated that "it would be dangerous to give foster parents status in circumstances where a child is not yet a Crown ward".

In *The Children's Aid Society of the Niagara Region v. W.D. and A.M.* dated November 16, 2001, Court File No. 109/98, The Honourable Mr. Justice B. Matheson stated that the case law and legislation had clearly outlined the status of foster parents and only in exceptional circumstances would they be allowed to be added as parties (p.11). See also *Children's Aid Society of the Niagara Region v. K.K.* [2003] O.J. No. 837.

**2. Judicial Review**

Superior Courts have an inherent power to review the legality of administrative action and, in Ontario, this power falls under the *Judicial Review Procecures Act* and is exercised by the Divisional Court (see *Bezaire v. Windsor Roman Catholic School Board* (1992) O.R. (3d) 737). An application for judicial review may be made to the Superior Court of Justice with leave of that Court where it is made to appear to the judge that the case is one of urgency and the delay required for an application to Divisional Court is likely to involved a failure of justice.

The making of an order for judicial review is discretionary and is generally not available where there is a specific alternate remedy by way of appeal or other process designated by statute. It is limited to a review of a statutory power, meaning a power or right conferred by or under a statute.

In *R.L. v. Children's Aid Society of the Niagara Region* [2002] O.J. No. 4481 foster parents sought an injunction to prohibit the children's aid society from removing foster children from their home and a declaration that the children's best interests were served by having the children remain there. Although framed as an application for judicial review, the foster parents took the position that a society's decision regarding placement of children in its care prior to a 'finding' that the children were not in need of protection was not an exercise of a statutory power by the society. They argued that, should the court find the matter should properly proceed as a judicial review, he should treat it as such. Henderson J. held that a decision by a society as to the residence of children prior to a finding that they are in need of protection is not one in which the society is exercising a statutory power within the meaning of the *Judicial Review Procedures Act* and therefore cannot be the subject of judicial review.

The foster parents appealed the decision by Justice Henderson in *R.L. v. Children's Aid Society of the Niagara Region supra* dismissing their application to the Ontario Court of Appeal. However, the appeal did not deal with the question of judicial review as the foster parents conceded that there was no basis for judicial review on the facts of the case.

In *G. (S.) v. Children's Aid Society of Hamilton* 2002 CarswellOnt 5930, foster parents sought, on an urgent basis, judicial review of a decision by the society to place Crown wards with a family other than them for adoption or an order preventing the children's removal from their care pending completion of a review under s.68 or s.144 of the CFSA. A society cannot remove a child from a foster parent when the child is a Crown ward and has been I their continuous care for a period of two years without first giving the foster parent ten days notice of the removal and their right to a review under s.68. The children in this case had been in their foster placement slightly under two years and no review under s.68 or s.144 had been completed. The position of the society was that the foster parents had no right to seek judicial review as there was no remedy available to them and they could not seek custody or relief outside of any rights they had under the CFSA. The Honourable Mr. Justice G. Czutrin held that the society's decision to remove the children prior to completion of a review was "unfair, incorrect and unreasonable" and subject to judicial review.

**3. <u>Parens Patriae:</u>**

There have been several attempts by foster parents to increase their role in relation to proceedings under the CFSA through invocation of the court's *parens patriae* jurisdiction with limited success.

The seminal case addressing the court's *parens patriae* jurisdiction in this context is *Beson v. Newfoundland (Director of Child Welfare)* [1982] 2 S.C.R. 716. (See also *Re* Eve [1986] 2 S.C.R. 388). In *Beson* the Director of Child Welfare for Newfoundland

removed a child from an adoptive home seven days before expiration of the adoption probation which was six months. Had the probationary period been completed, the adoptive parent would have had a right of appeal. However, the legislation provided no recourse for the adoptive parents from unfair administrative action by the Director during the six month probationary period. In other words, the adoptive parents in *Beson* had no statutory remedy. The Supreme Court of Canada in *Beson* found that exercise of the court's *parens patriae* jurisdiction is confined to 'gaps' in the legislation and to judicial review. Wilson J. referred to *A. v. Liverpool City Council,* [1981] 2 All E.R. 385 (H.L.) with approval in that Court's statement that:

> The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority.

In *G.(C. ) v. Catholic Children's Aid Society of Hamilton-Wentworth,* supra the Ontario Court of Appeal reviewed *Beson* and confirmed that *parens patriae* jurisdiction was only available where there is a 'gap' in the legislation or by way of judicial review. In *G.(C. )* foster parents sought to challenge the removal of Crown wards from their home by a children's aid society. The children had been in their care for approximately ten years. The foster parents commenced an application for custody under the *Children's Law Reform Act*. The children's aid society brought a motion to dismiss the CLRA application. The motions judge dismissed the society's motion. The society appealed the decision of the motions judge to the Ontario Court of Appeal. The appeal was granted on the basis that the procedure under the *Child and Family Services Act* is paramount and

precludes foster parents from obtaining custody of a Crown ward pursuant to the *Children's Law Reform Act.*

The Court of Appeal in G.(C. ) held that there were no "gaps' in the CFSA and that Part III of the legislation provided a comprehensive and exhaustive code for the custody of Crown wards (p.7). Rosenberg J. stated that the foster parents were not deprived of their 'day in court' in that they had a meaningful avenue of review through s.68 of the CFSA. Rosenberg J. noted that accessing the s.68 review procedure would not have led to custodial rights over the children but as foster parents they did not have that right. (p.9)

In *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C. ),* supra, L'Heureux-Dube J. stated that the Child and Family Services Act "governs every aspect of child protection proceedings in Ontario" including "the procedure to be followed".

In *R.L. v. Children's Aid Society of the Niagara Region* [2002] O.J. No.4481, after concluding that judicial review did not apply to the facts of the case, The Honourable Mr. Justice J. Henderson stated that the Court could only use *parens patriae* if there was a gap in the CFSA. The foster parents argued that there was a 'gap' as the children's aid society had a wide discretion to determine the residence of children pending the child protection hearing, yet the foster parents had no ability to challenge that decision by the society. Justice Henderson concluded that the CFSA is a complete code for all child protection proceedings in the Province, defines the procedures to be followed in child protection cases, and specifically defines the rights of all interested parties to participate

in child protection proceedings (p.7). As the Act is a complete and exhaustive code for child protection proceedings, Henderson J. concluded that it followed there was no gap in the legislation and dismissed the Application by the foster parents.

The foster parents appealed Justice Henderson's decision to the Ontario Court of Appeal. The foster parents argued that *parens patriae* was not limited to gaps in the legislation or to judicial review. They argued that the Superior Court has a residual and overriding jurisdiction to supervise all matters concerning the interests of children, but the exercise of that discretion should be limited to situations not contemplated by the legislation where it became necessary for the court to intervene to protect children. The foster parents took the position that the situation before the Court had not been contemplated by the CFSA as more than two years had passed without a protection hearing. When timelines in the legislation are exceeded, the children's strong primary attachments to their foster parents should be the paramount factor in the determination of their best interests. The Court of Appeal rejected the foster parents' argument and dismissed the appeal. It held that the delay in the case did not bring it outside the ambit of the legislation and that the CFSA continued to be a complete code notwithstanding that timelines were exceeded. (p.13).

However, in *R. (C. ) v. Children's Aid Society of Hamilton* 2004 CarswellOnt 3278 at p. 30, the Honourable Mr. Justice G. Czutrin held that it would be far too narrow a reading of the Ontario Court of Appeal decisions to suggest that the only method by which *parens patriae* jurisdiction can be exercised is by way of legislative gap. Further, that the

Ontario Court of Appeal did not absolutely foreclose the exercise of *parens patriae* jurisdiction by a Superior Court, particularly if it is the only way to meet the paramount objective of the CFSA. In *R. (C. ) v. Children's Aid Society of Hamilton supra.* the Society was proposing to place Crown wards for adoption in accordance with a plan proposed by their Indian Band. The plan was contested by the children's foster parents. The children had been in their foster homes for approximately two years at the commencement of litigation.

Justice Czutrin held that *parens patriae* should be discouraged and be a remedy of last resort in most cases. However, where a children's aid society has not acted fairly or otherwise met the needs of children, the Court's inherent *parens patriae* jurisdiction should not be ousted automatically. Czutrin J. went on to suggest there may be gaps in the CFSA related to various timelines in respect of Crown wards. He further held that there were several examples of unfairness by the society in relation to the foster parents. Justice Czutrin exercised his *parens patriae* jurisdiction to make an adoption order.

Like Justice Czutrin, in Reasons for Judgment delivered orally in *Children's Aid Society of Haldimand-Norfolk v. H. V* on January 28, 2000, the Honourable Madam Justice P. H. Wallace held that *parens patriae* is not limited to gaps in legislation but also agreed that it should be used sparingly and the governing statute should be relied upon first. Justice Wallace stated that the court should not substitute its discretion by way of *parens patriae* for a process contemplated by legislation that is contemplated by the Legislature to be a complete code. Wallace J. further held that the *Child and Family Services Act* is intended

to be a complete code and should be respected to the extent that was possible. Therefore, Justice Wallace held *parens patriae* was not an available remedy to effect a return of the children to the Applicant foster parents.

In *Children's Aid Society of Haldimand-Norfold v. H. V. supra.,* Justice Wallace found that the society's removal of the subject children from their foster home had been unfair to the Applicant foster parents. However, Wallace J. held that best interests of the child is the only relevant test for the Court and the Court could not look to unfairness towards the foster parents to arrive at its decision. This finding is contrary to the subsequent decision of Czutrin J. in *R. (C. ) v. Children's Aid Society of Hamilton.*

Interestingly, after finding that the CFSA is a complete code and that *parens patriae* is not appropriate in the circumstances, Justice Wallace made an order granting the foster parents interim access applying *parens patriae.*

These last two cases represent an opening through which this debate and confusion will continue.

**4. Charter:**

Not surprisingly, many pleadings by foster parents include claims that their rights have been violated under the Charter of Rights and Freedoms and/or that portions of the CFSA pertaining to foster parents are in contravention of the Charter. Thus far, there do not appear to be any reported cases where there has been significant success by foster

parents. In *M. (S.B.) v. Children's Aid Society of London & Middlesex* [1996] O.J. No. 983, former foster parents challenged that s.37(1) of the CFSA was unconstitutional as it prevented long term foster parents from applying for a status review hearing and contravened the rights of that class of persons covered by ss. 7 and 15 of the Charter. Justice Aston held that adjudication of constitutional issues ought to be made after all the evidence has been lead and the factual foundation established. The constitutional arguments in the case would be determined by a trial judge after hearing all the evidence and not in advance by preliminary determination. There is no subsequent reported decision in the matter.

Having regard to creative use of *parens patriae* by some courts, it may be a matter of time before a Charter claim is successful. However, thus far biological parents have been unsuccessful in their challenges of the CFSA under the Charter including in relation to warrantless apprehensions, delay in bringing proceedings to trial and termination of access to birth parents upon placement for adoption.

**4. Children's Law Reform Act**

There does not appear to be anything in the *Children's Law Reform Act* ("CLRA") that precludes an application for custody by a former foster parent and is a potential remedy for foster parents when a child is removed from their care. The most significant factor is likely the child's legal status. If the child is in the care of a children's aid society, the process may be more difficult having regard to the fact that proceedings under the CFSA are paramount over CLRA proceedings. Also, the inclination of most courts is to stay

CLRA proceedings pending the CFSA proceeding concluded. The general exception is when a child is placed in a person's care subject to a supervision order. In these circumstances, court appear to be more inclined to permit a concurrent proceeding under the CLRA and, in appropriate circumstances, an order that the proceedings be heard together. This has the indirect result of placing the former foster parent 'at the table' for the CFSA hearing.

**CONCLUSION:**

The role courts will permit foster parents to play in future proceedings under the *Child and Family Services Act* is unclear. It appears evident that there will be further applications for judicial review, attempts to extend even further the scope of *parens patriae* to obtain relief not available under the legislation, arguments under the Charter and applications under the *Children's Law Reform Act* with motions to consolidate it with CFSA proceedings.

Unfortunately for biological parents, they do not fare well in the media or public opinion against foster parents. This reflects a fundamental misunderstanding of the role of foster parents in the legislative scheme of the *Child and Family Services Act.* Thus far, the appellate courts appear to be adhering to the limits placed by the Legislature on the role of foster parents. It remains to be seen whether this continues and the extent to which non-appellate courts continue to expand the scope of foster parent involvement through use of mechanisms such as *parens patriae* jurisdiction.