NOVA SCOTIA COURT OF APPEAL

Citation: N.J.H. v. Nova Scotia (Community Services), 2006 NSCA 20

Date: 20060214
Docket: CA 254664;
CA 258206;
CA 258437
Registry: Halifax

Between:

NJH, GS and GC

Appellants

v.

The Minister of Community Services

Respondent

Restriction on publication: Pursuant to s. 94(1) **Children and Family Services Act**

Judges: Roscoe, Bateman and Cromwell, JJ.A.

Appeal Heard: February 3, 2006, in Halifax, Nova Scotia

Held: The appeals are dismissed per reasons for judgment of Roscoe, J.A.; concurred in by Bateman and Cromwell, JJ.A.

Counsel: Terrance G. Sheppard, for the appellant, NJH
Burnley A. Jones and Daphne Williamson, Article Clerk, for the appellant GS
Kymberly Franklin, for the appellant GC
Lorne J. MacDowell, Q.C. and Lindsay McDonald for the respondent

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

Background:

[1] The appellant NJH is the mother of four children who have been the subject of three separate proceedings taken by the respondent Minister in his capacity as a child protection agency pursuant to the **Children and Family Services Act**, S.N.S. 1990, c. 5, as amended. By decision dated August 11, 2005 [2005 NSFC 23] Judge James C. Wilson of the Family Court ordered that three of the children be placed in the permanent care of the Agency and the fourth child be placed in the temporary care of his father under the supervision of the Agency. The mother and the fathers of two of the children appeal from the order of Judge Wilson.

[2] Each of the children has a different father. The eldest child, R, is a 12 year old girl. RS is her father. He is not a party to this appeal. The next oldest child is D, an eight year old boy who has been placed in the care of his father, JH, under temporary supervision. Although the mother appeals that order, JH is not participating in the appeal. The third child is M who is a five year old girl. GS is her father and he has appealed the order placing M in the care of the Minister. The youngest child P is a two year boy whose father is GC, one of the appellants.

[3] The trial judge ordered that there be no access to the two youngest children, M and P, so that they could be placed for adoption. The permanent care order respecting R, the oldest child, is subject to the access of her parents, NJH and RS. The mother, NJH, has appealed the orders respecting all four children and asks that the children be returned to her care. The appellant father, GS, supports the mother's appeal, but in the event that she is unsuccessful in her plea to have all the children returned to her care, he seeks an order for the placement of M in his care under temporary supervision. GC does not support the mother's plan. He seeks an order allowing the appeal and placing P in his care.

The decision under appeal:

[4] The trial lasted eight days. In addition the Agency tendered on consent the evidence from the two previous protection proceedings which resulted in findings that the children were in need of protective services in 1998 and 2000. In the present proceeding the children were found to be in need of protective services, pursuant to s. 22(2)(b) and (g) of the **Act** by consent on April 7, 2004. The trial judge summarized the concerns of the Agency as follows:

> [5] This case can best be described as one where the applicant is alleging chronic neglect. The evidence also alleges physical abuse, substantial risk of physical abuse, sexual abuse, emotional abuse and/or substantial risk of emotional abuse of one or more of the children. The allegations of neglect are based on reports with respect to the behaviour of the children, the condition of the home, hygiene of the children, the adequacy of food, the ability to budget, and the capacity of the respondents to set appropriate boundaries and expectations for the children. The home is alleged to be chaotic with the children being physically aggressive among themselves in the home and experiencing social problems outside the home. It is alleged the home provides something of a communal environment with the respondent fathers [JH], [GS] and [RS] not only coming and going to access their children but being supportive of [NJH] and each other. Mr. [GC], who is the last of [NJH]'s partners, does not have a good relationship with the other respondents. It was conflict over the presence of the other respondents in [NJH]'s household while [GC] was attempting to exercise access that precipitated Agency involvement.
>
> [In this decision initials will be substituted for the names of the parties used by the trial judge.]

[5] After summarizing the family history and the Agency's involvement in their lives, the evidence of the parties and the various expert witnesses, the trial judge described each of the children and their respective problems. He quoted from an assessment by a clinical psychologist of the oldest child, R, at ¶ 24:

> The dependent child, [R], is a special needs child. She has significant difficulty with: peer relationships, personal hygiene, anger management, academic performance, impulse control and self-esteem. A parentified child, she played a dominant and often abusive role in her family of origin. [NJH], her mother, and [RS], her father, do not recognize the seriousness of her difficulties, and are observed to not intervene appropriately to assist her with the development of more adaptive skills or to adequately protect her siblings from harm. She is making positive strides in foster care.

[6] Another psychologist who had treated R indicated that R is a control freak and suffers from an adjustment disorder with disturbance of conduct. It was thought that these difficulties are a response to her home environment and that the symptoms are interfering with her normal emotional functioning. As a result of her needs, the experts were of the view that R required a stable home with appropriate discipline and a great deal of remedial work to develop appropriate social skills.

Both psychologists noticed significant improvements in R's behaviour and personal hygiene after she was placed in foster care.

[7] The eight year old boy, D, was described by the clinical psychologist as follows:

> [D] also presents with special needs. He has significant problems with impulse control and anger management, jealousy, communication skills and sibling relationships. He was found to be highly aggressive with all of the adults in his life except his father, Mr. H. It appears that he requires more one on one attention than he receives with his mother.

[8] The psychologist was of the opinion that D's difficulties were a result of living in a chaotic environment where there were few boundaries. It was thought that he would improve if placed in the care of his father who could provide a calm and structured home.

[9] With respect to the younger two children, the trial judge said:

> [30] Mr. Bryson [the psychologist] believes [M] is beginning to follow in the foot steps of her older siblings. He has observed she too is aggressive and beginning to have difficulties in managing her angry impulses. [P], given his age, is not currently exhibiting any significant difficulties. The risk for [P] if he continues in this environment is that he too will likely start exhibiting behaviours similar to the older children.

[10] After a thorough review of the relevant statutory provisions and case law, Judge Wilson summarized the evidence respecting the parents. After noting that NJH had taken some steps to improve her circumstances, he continued:

> [41] Despite the positives, there are at least two concerns which have emerged from the evidence. One concern is the level of [NJH]'s insight into her parenting deficits. While she has participated in services over a number of years (three protection proceedings), she is still having problems as a parent - problems she does not seem to recognize. Problems with the aggressive behaviour of both [R] and [D] are noted by the school, service providers, access facilitators and the assessor. When all children are present in the home at the same time the situation has been described as chaotic. [NJH] seems to have endless patience, not realizing the need to set boundaries and be consistent with both the discipline and expectations of the children. This chaos seems to take its toll at times with the condition of the home. While [NJH] eventually addresses that issue, there is a history of poor housekeeping standards over a period of time.

> [42] More significant however is the aggressive behaviour of the children and the resulting social problems they visit upon themselves in the school setting. [R] particularly has problems of long standing. The school has consistently reported her aggressive behaviour and her inadequate hygiene. Soiling and wetting are not normal for a 10 or 11- year- old. Her inability as noted by both the social worker and the Tim Horton's Camp to properly use eating utensils must be a concern. Her very substantial weight gain (80 pounds in a few months) while in foster care has to be a concern in relation to stress and self-esteem issues. [R]'s recent disclosure of sexual abuse and her expressed concern for the safety of her sister [M] are recent complications to an already difficult situation.
>
> [43] After all the exposure to services over the years, for [NJH] to continue to minimize the problems in the face of such substantial evidence constitutes a major risk to adequate parenting. To suggest that [GC] and the Agency are the only problems simply does not make sense. These problems pre-existed either [GC] or the Agency.
>
> [44] A second, and perhaps related issue is [NJH]'s apparent inability to form stable personal relationships. Mr. Bryson suggested her personal history and personality profile is such that she does not trust people. This has implications for parenting. At the same time her social worker Ms. Ugnat states [NJH] would do anything to be in the company of adults. As a result her children are brought up in this enormously complex situation. It may be possible for some such relationships to be nurturing and without problems for the children. However, when faced with the issues [NJH]'s children present, good parental judgement requires that the parents' personal relationships become secondary to the parenting needs of the children. Despite what I believe is [NJH]'s wish to be a good parent, she simply has not been able to consistently put the needs of the children before her own need for adult companionship. The choices she has made have victimized her personally and put her children at risk. Recent disclosure by [R] of sexual abuse in her own home only complicates the picture. [NJH] does not yet have the parental capacity to offer adequate parenting to these children.

[11] After having decided that it was not in the best interests of any of the children to be placed in the care of their mother, the trial judge examined the plans presented by the fathers. He determined that it was appropriate for D to be placed with his father JH under supervision, since JH had been shown to have the necessary parenting skills to care for his son.

[12] The trial judge concluded that to place M with her father GS would not be in her best interests:

> [48] Having determined that it is not appropriate for [NJH] to have the care of any of the children, given [GS]'s present difficulties with respect to the allegations of sexual assault, the options for [M] are very limited. [GS]'s primary plan is to see [M] placed with her mother. His secondary position is placement with himself. While [GS] has maintained contact on a regular basis since November 2002, he has no experience as a primary care giver. Living with his aged grandmother and a disabled uncle is less than an ideal situation for a child. His personality assessment by Mr. Bryson suggests that he is self-centered and not likely to put the interests of the child first. Whatever challenges these circumstances presented, new outstanding charges of sexual assault against him and the concerns expressed by [R] with regard to [M]'s safety all mitigate against placing [M] in [GS]'s care. In addition the time requirements of the child protection legislation require that a decision be made at this time and we do not have the luxury of waiting to see how the criminal matters might resolve themselves. Even without the criminal charges it is my opinion [M]'s best interests are met by placing her in the permanent care of the Agency for purposes of adoption, preferably with extended family. The evidence is that the adoption prospects for [M] are excellent.

[13] With respect to the possibility that P, the two year old, could be placed with his father, GC, the trial judge concluded:

> [49] Finally, the court must consider the child [P]. [GC]'s circumstances are somewhat different than the other respondents in that he is not part of their complex social structure. He has nevertheless his own issues to overcome. In presenting a plan for primary care, [GC] not only has to overcome the problem of never having been a primary care giver, but he continues to be dogged by concerns about his personality. He is described as an angry and hostile man who sees himself as victimized by the circumstances of this case. I see him as someone who is very rigid in his thinking and has chosen to stand or fall on his assertion that he is not an abusive personality.
>
> [50] There is evidence that [GC] is a good access parent. He maintains regular contact with his daughter [C], appears to engage in appropriate activities, has some community support and his former partner Ms. [F] acknowledges that he has matured over the years.
>
> [51] There is other evidence that he has unrealistic expectations of age appropriate child behaviour, has used inappropriate discipline with respect to [NJH]'s children when they were living together, and has been abusive with his former partners. While [GC] has offered some explanation for the one or two isolated incidents of abuse entered in evidence, the court's biggest concern with [GC] has been his unwillingness to even explore the potential of either physical or emotional abuse. While the court could consider the documented abuse as

> isolated incidents, the concern of the Agency is that [GC]'s propensity to be abusive or controlling should be addressed through therapy. There is evidence to support the Agency's concerns. Instead of engaging in therapy and learning what he can about himself and the dynamic of personal relationships, [GC] simply denied any responsibility for the alleged abuse or the possibility of same and refused to engage in a therapeutic program in any meaningful way. In essence he has taken the position that he is not abusive and therefore does not need a program. I do not believe he ever understood the Agency's main concern was not necessarily with past conduct but the potential for [GC] to be emotionally abusive in future relationships.
>
> [52] The issues noted above with respect to his willingness to engage in services or the issues identified by the access facilitator during visits, might be managed for an access parent. The rigidity of [GC]'s thinking, his expectations with respect to children and his ability to deal with on going safety issues, all become major issues for a primary care parent. Were [P] able to be placed with his biological mother it is possible [GC] might continue with an access regime similar to what he enjoys with his daughter. However, that is not the circumstance of [P]. The evidence before the court is that the Agency has good prospects of [P] being adopted. I therefore order that [P] be placed in the permanent care of the Agency without access.

Issues:

[14] Although each of the three appellants raise several specific grounds of appeal, they can be consolidated and distilled into the following issues:

1. Did the trial judge err by not using the least intrusive means available?

2. Did the trial judge err in determining what was in the best interests of the children?

3. Did the trial judge err in not considering whether the Agency had provided adequate services to the parents?

4. Did the trial judge err in not taking into account that the child M was Aboriginal?

5. Did the trial judge err in giving insufficient weight to the progress that NJH had made?

Analysis:
Standard of Review:

[15] The standard of review on this appeal is as stated by Cromwell, J.A. in **Childrens Aid Society of Cape Breton - Victoria v. A.M.**, [2005] NSCA 58:

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.** , [2003] NSJ No 416 (Q.L.) (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 10 - 16.

1. least intrusive means:

[16] The appellants submit that the trial judge erred by not heeding the principle that the least intrusive alternative consistent with the children's best interests be employed to address the issues presented by the Agency, specifically that the court erred in ordering that M and P be committed to the care of the Agency with a view to adoption instead of ordering that the children be placed in the care of their respective fathers. NJH says the trial judge erred by not considering whether she was capable of looking after the two younger children if two older children were not in her care. GS and GC both say that their children should have been placed with them under supervision when the children were first placed in the temporary care of the Agency and as a final disposition.

[17] The policy requiring the court to consider the least intrusive measures is addressed in various parts of the **Act**, particularly s. 42(2), s. 42(3), and s. 46(4)(c). Those sections state:

> 42 (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.
>
> (3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.
>
> . . .
>
> 46 (4) Before making an order pursuant to subsection (5), the court shall consider
>
> . . .
>
> (c) what is the least intrusive alternative that is in the child's best interests; . . .

[18] In this case the first disposition order, dated June 30, 2004, left the children in the care of the mother under supervision of the Agency. Subsequently the children were taken into the care of the Agency on August 20, 2004. By order dated August 28, 2004 the court granted the Agency temporary care and custody. In making that order, the trial judge found "that the necessary statutory thresholds had been met with respect to the Review Application." No appeal was taken by any party to that order.

[19] By the terms of a further review order dated September 15, 2004 the children remained in the Agency's temporary care and custody. No one appealed that order. This temporary care order was renewed in October and December 2004 and again in January and March 2005. None of these orders was appealed. During all of this time GS and GC remained access parents, with supervision of the access required for GC. Neither appealed any of the temporary care orders, applied for

custody of their child, or presented a less intrusive plan to the court. All those previous orders are taken to have been properly made at the time. **Nova Scotia (Minister of Community Services) v. S.E.L. and L.M.L.** (2000), 184 N.S.R. (2d) 165 (CA), ¶ 20).

[20] Before the conclusion of the final disposition hearing which commenced in June 2005, the time limits had run out for M and P, and there were approximately three months remaining with respect to R and D. The trial judge had previously extended the time so that the evidence could be completed. Section 45 of the **Act** stipulates that the total duration of all temporary disposition orders for the two younger children cannot exceed 12 months from the first disposition. Once the time has expired there are only two possible dispositions, dismissal of the proceeding or permanent care. If the children are still in need of protective services the matter cannot be dismissed. The court had no jurisdiction to order either supervision or temporary care and custody of M and P. Saunders, J.A. for this court in **T.B. v. Children's Aid Society of Halifax and S.M.R.** (2001), 194 N.S.R. (2d) 149, put it as follows, starting at ¶ 24:

> [24] Thus it can be seen that the operative placement provision I have just cited, s.42(1)(c) of the **CFSA**, allows a type of disposition order. But such an order is only available for so long as the court has the jurisdiction to grant it. The extent of the court's jurisdiction is limited by s.45(1) of the **CFSA**, which fixes the maximum time limit for such orders. As the proceeding nears a conclusion, the opportunity to grant disposition orders under s.42(1)(c) diminishes until the maximum time limit is reached, at which point the court is left with only two choices: one or the other of the two "terminal orders". That is to say, either a dismissal order pursuant to s.42(1)(a) or an order for permanent care and custody pursuant to s.42(1)(f).
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> [26] One ought not to lose sight of the relationship between s.42(3) and 42(1)(c). Once the maximum time limit is reached, s.42(3) can no longer be determinative, since temporary placement with a relative, neighbour or other extended family is no longer available. At the end of the time limits, once the agency establishes that the child remains in need of protective services, and subject to the court's authority to extend time in the rare circumstances I have described in paragraph 56 *infra*., the determination for the court becomes one of what final or "terminal" order is in the child's best interests. At that stage during such a proceeding, consideration of family relationships is required only because it is one of several factors which are to form part of the child's best interests as defined by s.3(2) of the **Act**, not because s.42(3) continues to require such consideration.

[21] A careful review of the reasons of Judge Wilson reveal that he was well aware of the requirement to look at the fathers of the children as alternate placements. His decision reveals that he did consider each of them but was of the view that neither GS nor GC presented a viable option. In contrast, he found that JH the father of D did present a plan worthy of trying. In my view, neither GS nor GC presented a plan of care for these young children that was feasible in the circumstances, and I see no reason to interfere with the trial judge's conclusion. There was overwhelming evidence, much of it from the expert assessments, supporting his view that the children would not be safe in the care of either GC or GS. With respect to the suggestion that he ought to have considered whether NJH was capable of properly caring for the two younger children if she were relieved of the burden of the older children, the trial judge did conclude that it was not appropriate for NJH to have the care of "any of the children" (¶ 48). I am satisfied based on a reading of his whole decision that he considered the individual placement options for each child. I am unable to agree that there is even the slightest indication that the trial judge acted on a wrong principle of law or committed a palpable and overriding error in finding the facts.

[22] It is useful to remember that GS's primary position at trial was that the child, M, should remain in the primary care of NJH - a position which in itself puts his parenting capacity in serious doubt given the appalling conditions prevailing in NJH's home. His alternative plan was that the child should reside with him, his grandmother and his uncle. This plan was, with respect, a non-starter. GS had never been a primary care parent for his child. There was serious concern about his grandmother who, according to testimony heard at trial, had in the past physically abused children in her care. There was also evidence that the uncle, who had been seriously injured, was volatile and dangerous. At the time of the hearing, GS stood accused by R of sexual assault. His parental capacity assessment concluded that GS had a narcissistic personality style, was self-centered, resistant to change and unlikely to benefit from instruction. He was seen as someone unlikely to put the needs of his child first. The assessor found that GS would not be an appropriate care giver for the child.

2. <u>best interests of the children:</u>

[23] The appellants all say that the trial judge failed to properly consider the best interests of he children as required by s. 3(2) of the **Act** in arriving at the conclusion that a permanent care order was required. They say that it would have been in the best interests of the children to be in the care of their family and to be

able to maintain contact with their siblings and parents. The relevant sections of the **Act** provide:

> 2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.
>
> 3 (2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
>
> (b) the child's relationships with relatives;
>
> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
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> (d) the bonding that exists between the child and the child's parent or guardian;
>
> (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
>
> (f) the child's physical, mental and emotional level of development;
>
> (g) the child's cultural, racial and linguistic heritage;
>
> (h) the religious faith, if any, in which the child is being raised;
>
> (i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
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> (j) the child's views and wishes, if they can be reasonably ascertained;
>
> (k) the effect on the child of delay in the disposition of the case;

> (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
>
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
>
> (n) any other relevant circumstances.

[24] The trial judge was obviously aware that his role was to discern what was in the best interests of the children. Starting at ¶ 31 of his decision he set out all the above-quoted sections of the **Act** pertaining to the concept of the best interests of the child and then referred to numerous cases emphasizing the nature of the court's obligation in that respect. He addressed the burden of proof required, the serious consequences of the decision, the importance of familial ties, the relevance of evidence of past parenting, the limited time available for the provision of services to the parents to help improve their parenting abilities, and the importance of abiding by the maximum time limits because of their connection to the child's sense of time. There is no doubt that the importance of the best interests of the four individual children was the predominant factor in reaching his ultimate findings. There is absolutely no merit to the proposition that the trial judge failed to consider any relevant evidence bearing on the best interests of the children or applied any wrong principle of law in his analysis.

3. <u>services to the parents</u>:

[25] The appellant GS submits in his factum that the Agency failed in its obligation to assist the family by the provision of services as required by the **Act**, and the trial judge erred by neglecting to recognize and correct this failure. The relevant section of the **Act** provides:

> 13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.
>
> (2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:

(a) improving the family's financial situation;

(b) improving the family's housing situation;

(c) improving parenting skills;

(d) improving child-care and child-rearing capabilities;

(e) improving homemaking skills;

(f) counselling and assessment;

(g) drug or alcohol treatment and rehabilitation;

(h) child care;

(i) mediation of disputes;

(j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;

(k) such matters prescribed by the regulations.

[26] Judge Wilson specifically addressed the requirement to provide services in his review of the relevant sections of the **Act** and at ¶ 36 stated:

> [36] In discussing the use of services, our Court of Appeal has again offered direction in **Nova Scotia (Minister of Community Services) v. L.L.P.,** [2003] N.S.J. No. 1 at paragraphs :
>
> > 25 The goal of "services" is not to address the parents deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the Act. . . . Ultimately, parents must assume responsibility for parenting their children. The Act does not contemplate that the Agency shore up the family indefinitely.
> >
> > ...

38 With the above caution, I would endorse as applicable to the case here under appeal, the comments of Niedermayer, J.F.C. in Nova Scotia (Minister of Community Services) v. L.S. (1994), 130 N.S.R. (2d) 193 (Fam.Ct.):

> [15] I interpret the phrase "provided by the agency or provided by others with the assistance of the agency" as follows. An agency is required to directly provide only those services it is capable of providing. With respect to all other services, the agency is to render assistance to the parent in having the service provided by others. This would include giving the parent the names and locations of these "out of house" services; payment for the cost of transportation to and from the services, if such was necessary; making referrals and setting up initial appointments where appropriate; and, advising the parent of alternatives, when needed. The agency is not expected to step by step "walk the parent through" all the stages of the service. There is a responsibility on the part of the parent to engage the "out of house" services. Not only does this indicate a willingness by the parent to improve, but it also demonstrates to others that the parent is capable of improvement as well as the degree to which positive change can be prognosticated.
>
> ...
>
> [17] Before any meaningful consideration can be given to the duty of an agency to be found wanting with respect to the services as enumerated in Section 13(2) the client has to be willing or be able to engage in such services. The offers for services can be presented. In order for them to be looked at they must be accepted and acted upon by the client.
>
> [18] As counsel for the Minister has pointed out, it is not mandatory for the Minister to provide all of the services enumerated in Section 13 but "shall take reasonable measures" to provide services. "Reasonable measures", in the context, means the agency must identify, provide or refer to the services and there has to be a reasonable probability of success in the provision of service ...
>
> [19] Notwithstanding the failings in the provision of services, the important issue to remember is that the person who is most affected by L.S.'s lack of engagement is her son, who requires a parent who is capable of parenting.

> "The test is not the hopelessness of the mother or the failure of the public agency to place all its resources at the disposition of the mother. This court, as well as others, has often repeated that the only test is what is in the best interests of the children." (Children's Aid Society of Winnipeg v. M. and S. (1980), 13 R.F.L. (2d) 65 (Man.C.A.) at p. 66.)

[27] In the analysis of this issue, it must be remembered that GS was an access parent. The Agency understandably poured more of its resources into providing services for the mother who had been the principal caregiver. There were extensive services provided to NJH almost constantly over a period in excess of ten years. Furthermore, GS was supportive of NJH's plan to regain custody of M. That is the context in which the argument that GS was not provided with services must be examined.

[28] The Agency provided access facilitators to supervise the regular access of GS to M. As well he was provided with a parenting course and a parental assessment. A subsequent parenting course was offered to GS but he did not attend. The agency attempted to place the child in an aboriginal daycare but it would not accept her because she did not have status. It was left to GS to follow up and advise the daycare and the Agency if he was able to obtain the necessary documentation but he did not do so. No other appropriate service for GS was identified by the parental assessment. GS did not apply to the court for an order to provide services to him during the year the children were in the temporary care of the Agency. Indeed GS did not admit that he had any deficits in parenting skills or capacity that could be addressed by additional services. Nor has he specified a particular service that would have been beneficial to him.

[29] The comments of Bateman, J.A. in **Family and Children's Services of King's County v. D.A.B.** 2000 NSCA 38; [2000] N.S.J. No. 61 (QL) are apropos:

> 42 The extent of the Agency's obligation pursuant to s. 13(1) to provide services must be assessed in the context of the circumstances of the parties. ...
>
> 51 The starting point for the Agency's provision of appropriate services is the identification of areas of concern. The assessments by Melissa Keddie and Dr. Hastey were critical to this process. The fact that D.A.B. refused to fully cooperate with Dr. Hastey spoke volumes both as to his commitment to the process and his lack of insight into the difficulties confronting him. It also bore

> upon the likelihood that D.A.B. would avail himself of services if offered. The Agency's obligation to offer services is limited to "reasonable measures". In view of D.A.B.'s refusal to fully cooperate with Dr. Hastey, his failure to accept the areas of concern identified by Melissa Keddie and his revealed inability to recognize himself as contributing to the problem, it is difficult to imagine what further services could reasonably have been offered by the Agency.

[30] GS has not persuaded me that the trial judge committed any error in legal principle or fact justifying appellate interference. Judge Wilson considered and properly applied the provisions of the **Act** which deal with the Agency's duty to provide services and the legal principles set out in **L. L. P.**, *supra*.

4. Aboriginal status of M:

[31] GS submits that the trial judge erred by not taking into account the Aboriginal status of M. He says that the trial judge should have recognized the significance of her native status and ancestry, and her cultural and linguistic identity as a Mi'kmaq, and given appropriate weight to these factors in his reasons for judgment. GS argues that the trial judge should have ordered a placement that would have addressed her Aboriginal status.

[32] GS indicated that he is a registered Indian and a member of the Afton Band although he does not live on the reserve. He testified that during his access visits with M he was teaching her some Mi'kmaq words and introducing her to his culture and beliefs. GS has applied to "Ottawa" to have M registered under the **Indian Act**, and she is currently on a "waiting list".

[33] The **Act** provides in s. 36(3):

> (3) Where the child who is the subject of a proceeding is known to be Indian or may be Indian, the Mikmaq Family and Childrens Services of Nova Scotia shall receive notice in the same manner as a party to the proceedings and may, with its consent, be substituted for the agency that commenced the proceeding.

[34] The Regulations made pursuant to the **Act** define "Indian" as a person who "is registered as an Indian or entitled to be registered as an Indian under the **Indian Act (Canada)**.

[35] In accordance with s. 36(3), by letter dated September 10, 2004, the Agency notified the Mi'kmaq Family and Children's Services that M, the child of a

Caucasian mother and a Native father had been taken into care on August 27, 2004. By letter dated October 19, 2004 legal counsel for the Mi'kmaq Agency acknowledged receipt of the requisite notice and advised that the Mi'kmaq Agency did not wish to be substituted as the applicant at that time. The letter continued:

> In the event an Order for Permanent Care and Custody is granted the Agency would expect that care of the child would then be transferred to Mi'kmaw Family and Children's Services of Nova Scotia and that Mi'kmaw and Family Services would be responsible for development and implementation of an appropriate long-term Plan of Care for the child.

[36] We were advised at the hearing of the appeal that the Agency has provided notice to the Mi'kmaq Agency of the final order made by the trial judge in relation to M. The Agency complied with the notice requirements of s. 36(3) of the **Act**.

[37] The trial judge was aware of and mentioned GS's native status in his decision. (¶ 15 -17) The child's heritage and culture are among the factors the court must take into account when determining her best interests (see s.3(2)g quoted at ¶ 23 above). However, as frequently emphasized by this court, the task of balancing all of the relevant factors is one for which the trial judge is best suited. For example, as stated by Chipman, J.A. in **Family and Children's Services of Kings County v. D.R.** (1992), 118 N.S.R. (2d) 1:

> [50] Overall, the findings of fact by the trial judge were ones that, on the evidence, were reasonable. I emphasize the unique advantage possessed by the trial judge in carrying out the duties mandated by the **Act**. The Family Court judges presiding at trial are best suited to strike the delicate balance between competing claims to the best interests of the child. In the absence of error in law or clearly wrong findings of fact, this Court is neither willing nor able to interfere. See **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 112 N.S.R. (2d).

[38] Similarly, in **Children's Aid Society of Halifax v. S.G.** (2001), 193 N.S.R. (2d) 273 (CA), Cromwell, J.A. wrote:

> [4] In approaching the appeal, it is essential to bear in mind the role of this Court on appeal as compared to the role of the trial judge. The role of this Court is to determine whether there was any error on the part of the trial judge, not to review the written record and substitute our view for hers. As has been said many times, the trial judge's decision in a child protection matter should not be set aside on

> appeal unless a wrong principle of law has been applied or there has been a palpable and overriding error in the appreciation of the evidence: see **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169; 542 A.P.R. 169 (C.A.) at §24. The overriding concern is that the legislation must be applied in accordance with the best interests of the children. This is a multi-faceted endeavour which the trial judge is in a much better position than this Court to undertake. ...

[39] In approaching the task of determining the best interests of M the trial judge considered not only her heritage and culture but also her overall well-being and safety. As noted above in ¶ 12 Judge Wilson considered the option of placing the child with GS but declined for several stated reasons, including concern about his lack of experience as a custodial parent, his living arrangements, the pending criminal charges and his self-centered personality. There was no plan put forward by any other person of Aboriginal heritage for consideration of the trial judge, so he cannot be faulted for not having considered placement in a native family. As noted by Saunders, J.A. in **T.B. v. Children's Aid Society of Halifax,** *supra*:

> 32 The onus of presenting such a reasonable alternative must surely be upon the person or party seeking to have it considered. It is hardly the responsibility of the agency or the court to propose the alternative, provide the resources for its implementation, or shepherd the idea through to completion.

[40] Ensuring M's native heritage is preserved will now be a matter within the jurisdiction of the Mi'kmaq Agency, pursuant to s. 47(5) of the **Act**:

> 47 ...
>
> (5) Where practicable, a child, who is the subject of an order for permanent care and custody, shall be placed with a family of the child's own culture, race or language but, if such placement is not available within a reasonable time, the child may be placed in the most suitable home available with the approval of the Minister.

[41] In my view the trial judge committed no error in fact or law relating to M's Aboriginal heritage. As noted above in the analysis of the first issue, at the final disposition stage with the statutory time limits having expired, the options available were limited to dismissing the Agency's application and ordering the children returned to one of their parents or committing the children to the permanent care of the Agency. Adjourning the matter to investigate the possibility of another placement with a native family, was not an option. The judge cannot be

faulted for not considering plans that were not before the court. In effect, the appellant GS says that the judge ought to have placed the child in a way that was not supported by any plan that was before the court and that no one appeared able or willing to implement. Clearly, the judge did not err by failing to do this. The ultimate placement after making an order for permanent care was not a matter within his jurisdiction and he did not err by failing to give directions in that respect.

5. NJH's progress:

[42] The mother NJH submits that the trial judge erred in failing to give sufficient weight to the "tremendous progress" that she had made in the last few years. It is submitted that the trial judge focussed on "negative facts" while ignoring "positive facts". One example cited is that the trial judge mentioned that NJH had 16 different addresses over a period of eight years but neglects to note that she had lived in the same home for the last three years. It is also submitted that the trial judge gave insufficient weight to the evidence of her therapist, Dr. Tragakis, who noted enormous improvement in her emotional and intellectual functioning over the seven years he has been treating her. As well, she says that the trial judge erred in assuming that M and P would develop the same types of problems that R and D have. Another alleged error is that the trial judge did not consider placing the older two children in permanent care and leaving the younger two in the custody of their mother.

[43] This court has frequently confirmed that the weight of the evidence is a matter that lies with the trial judge, perhaps even more so in custody and child welfare matters and that, absent palpable and overriding error in the appreciation of the evidence, this court should not substitute its opinion. For example, in **Nova Scotia (Minister of Community Services) v. K.A.B.S. ,**[1999] N.S.J. No. 216 (Q.L.), Flinn, J. A quoted from the decision of Freeman, J.A. in **Children's Aid Society of Cape Breton v. S.G.** (1995), 142 N.S.R. (2d) 57, who said:

> [13] ... The weight of evidence is a matter for the trial judge in his assessment of the facts. His decision is entitled to deference by an appeal court, which has not heard nor seen the parties and the witnesses. (See **Family and Children's Services of Kings County v. D.R. et al.** (1992), 118 N.S.R.(2d) 1; 327 A.P.R. 1 (C.A.); **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 112 N.S.R.(2d) 258; 307 A.P.R. 258; 41 R.F.L.(3d) 321 (C.A.); **M.D. v. Children's Aid Society of Halifax** (1994), 130 N.S.R.(2d) 132; 367 A.P.R. 132 (C.A.)). In child welfare matters the deference to be shown the decision of the trial

> judge, and the assessment of errors of law and fact, must be determined in the light of the best interests of the child as defined by the **Children and Family Services Act.**

[44] There is no doubt that NJH has been provided with extensive services starting in 1994, including at least five parenting courses, individual one-on-one in-home assistance with parenting, seven years of personal psychological therapy, regular daycare, respite daycare, and she has attended sessions at at least two other community resource centres. However, the conditions that have required the Agency to be involved with her children have not improved. When the children were taken into care in August 2005 the seven child welfare workers attending a Risk Management Conference concluded that the risk of serious harm to the children was not abating despite the services and assistance that had been in place. Their concerns, found to be valid by the trial judge, were that the children were subject to continuing chronic neglect and at serious risk of emotional and physical harm. The workers had observed the continued serious lack of hygiene of R, that the children were frequently hungry and it was often observed that there was a lack of food in the house, that the baby was suffering from a serious respiratory illness either caused or aggravated by the long-standing presence of pets and the strong smell of urine prevalent in the house and that NJH was generally unable to cope.

[45] The opinion of Dr. Tragakis that NJH had improved was not directed at her parenting ability. Despite all the services provided and notwithstanding progress made by NJH in addressing some of her personal problems, the children were still in danger as a result of NJH's inadequate parenting and inability to address their basic and special needs.

[46] The learned trial judge considered the evidence of NJH's attempts to improve her parenting ability and weighed it with all of the other evidence concerning the welfare of the children. I see absolutely nothing in the decision, or in the extensive record before us, that leads me to conclude that he misconstrued, misinterpreted or overlooked material evidence. The findings of fact made by the trial judge relating to NJH's progress, as quoted at ¶ 10 herein, are amply supported by the evidence and should not be disturbed.

[47] The following statement of Chipman, J.A. in **Nova Scotia (Minister of Community Services) v. J.G.B.** 2002 NSCA 86; [2002] N.S.J. No. 295 (Q.L.) is applicable to the argument on this issue:

¶ 44 In the face of all the evidence of neglect, an experienced trial judge must be permitted to draw the obvious inference of risk of harm as defined in the Act. To require more would require the occurrence of actual harm. These children were very young. Already A.K.G.C.'s vocabulary indicated an exposure to a home environment that was anything but desirable. The Act does not require that the bad parenting go on until the damage is done. The trial judge recognized this.

Conclusion:

[48] In conclusion, the judge considered all the evidence, carefully reviewed the relevant provisions of the **Act**, weighed the various factors which the **Act** requires him to address and properly considered the applicable legal principles. The factors which the judge took into account were the proper ones for him to consider and his view of the evidence is fully justified by the record before him. I would conclude that the judge did not err in legal principle or make any palpable and overriding error of fact in determining that it was in the best interests of the children, R, M and P that they be placed in the permanent care of the Agency and that D be placed in the care of his father, JH, under supervision of the Agency.

[49] I would accordingly dismiss the appeals.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.