NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 119

Date: 20031112
Docket: CA 202056
Registry: Halifax

Between: Minister of Community Services

Appellant

v.

B.F., B.W. and Mi'Kmaq
Family and Children's Services of Nova Scotia

Respondents

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

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

Appeal Heard: October 17, 2003, in Halifax, Nova Scotia

Held: Appeal allowed, and ordered that the respondents' four children be placed in the permanent care and custody of the appellant as provided in the Agency's plan of care, per reasons for judgment of Fichaud, J.A.; Roscoe and Bateman, JJ.A. concurring.

Counsel: Bruce W. Gillis, Q.C. and Peter C. McVey, for the appellant
Andrew Ionson, for the respondents BF and BW
No appearance by the respondent Mi'Kmaq Family and Children's Services of Nova Scotia

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:

[1] This is an appeal by the Minister of Community Services ("Agency") under s. 49(1) of the *Children and Family Services Act* SNS 1990, c. 5 (*"Act").* The appeal is from the order of the Family Court dated May 26, 2003 which, under s. 46 reviewed the terms of an earlier supervision order under s. 42(1)(b) governing the respondents' four children. The Agency seeks permanent care and custody of the children followed by placement for adoption.

[2] At stake is the care and custody of B.W. Jr. age 8, L.W. age 6, R.W. age 5 and A.W. age 4.

Background

[3] The respondent B.W. is the father of the four children. The respondent B.F. is the step-mother of B.W. Jr., and is the natural mother of L.W., R.W. and A.W.. B.W. Jr. was born on June..., 1995, L.W. on August ..., 1997, R.W. on August ..., 1998 and A.W. on June ..., 1999. (*(editorial note- dates removed to protect identity)* B.F. is of aboriginal descent and, under s. 36(3) Mi'Kmaq Family and Children's Services of Nova Scotia was given notice.

[4] The decision of the Family Court, reported as *Nova Scotia (Minister of Community Services) v. B.F.* (2003), N.S.J. No. 157, sets out at length the Agency's dealings with B.W. and B.F., the respondents' parenting deficiencies, their reluctance and lack of cooperation with the Agency's efforts, and the developmental and health problems of the children, at least some of which are attributable to the parents' neglect. The Family Court found that the respondents, particularly B.F., recently had improved certain parenting skills under the close supervision of the Agency, but also found that long term support would remain necessary to address the respondents' parenting deficits.

[5] B.F. and B.W. have a long history of involvement with family services.

[6] In 1994 B.F.'s first child, S., was placed in permanent care and custody of the Agency. B.W. Jr., son of B.W. and his then partner J.H., was born June ..., 1995 (*editorial note- date removed to protect identity*). When B.W., J.H. and B.W. Jr. moved to Digby in September, 1995, the Agency received a referral from Family Services in Saint John, N.B. The Agency investigated. However, the family

had returned to New Brunswick. The family returned to Digby in November, 1996 and the Agency again received a referral from Saint John Family Services. A critically ill younger child, J.W., remained in hospital in Saint John. He was not expected to live and died a short while later. There is no suggestion that his health issues were related to neglect.

[7] Upon investigation, the Digby Agency were concerned that B.W. Jr.'s physical and emotional needs were not being met by his parents. He was exhibiting developmental delays in speech and walking. The Agency began a program of visitation and monitoring.

[8] In early 1997, B.W. and B.F. commenced a common-law relationship. Denise Ennis, the Family Resource Center and Family Skills Worker, provided assistance to the family. The file was closed June 24, 1997. The child L.W. was born August ..., 1997 *(editorial note- date removed to protect identity)*, at which time the Agency received a referral from the hospital. R.W. was born August ..., 1998 *(editorial note- date removed to protect identity)*.

[9] In August, 1998, the Agency received a referral advising of concerns about dental neglect of B.W. Jr. A representative from the Native Council expressed concerns about lack of follow through by the parents on nutritional needs, dental care and general stimulation of the children. The file was re-opened with Denise Ennis again assigned to the family. The agency provided regular services from that time until July, 2002. A.W. was born June ..., 1999 *(editorial note- date removed to protect identity)*. Commencing in June, 2000, Denise AuCoin from Family Life Services began providing parental training.

[10] Concerns continued to be raised by numerous parties including the neighbors and the Fire Marshall. The home was filthy, chaotic and in unsafe physical condition. B.W. Jr.'s school reported concerns with his body movements and motor functions, a lack of heat in the family's residence, and the eventual eviction of the family. Dr. Dominique Couture, a pediatrician, expressed concerns about B.W. Jr.'s incontinence, poor visual motor skills, and lack of developmental progress. She stated that many of these difficulties "related to lack of stimulation and lack of normal parenting."

[11] In early 2001, the Agency made arrangements for L.W. to see a speech therapist and to enroll in a pre-school. Deborah Pick of Boyd & Pick completed a

first parental capacity assessment in April of 2001 with recommendations for intensive in-home support. In that report she noted, in part:

> 1. . . . B.F.'s receptive vocabulary is at approximately equivalent to that of a 7-8 year old and B.[W.]'s is approximately equivalent to that of a 9-10 year old. As is often the case for individuals with such deficits, both parents are able to feed back what they have been told (especially after being told the same thing many times), but lack the depth of understanding, organizational skills, and sense of mastery to actually follow through consistently with instructions. It appears that both B.F. and B.W. believe that they are following through even when the observations of others are that they are not.
>
> . . .
>
> 5. At least two of these children have developmental delays and therefore will likely require quite extensive support for several years. The support from the agency and the community (school, church) has been excellent and I am impressed with the level of caring from all individuals involved. The majority of support for this family has come from the agency thus far, however and it seems unlikely to me that the community could compensate if the agency were not involved. Even if these children were in the care of the agency, it is likely that they would still require additional supports at school and in the form of speech-language therapy, etc.
>
> 6. The results of this assessment suggest that these parents are not capable of meeting the needs of their children without extensive support. The parents do appear to have derived some benefit from services, though this has been limited and has occurred over a long period of time. They have demonstrated difficulties with generalizing information and putting it into practice. Therefore, it is likely that they will require concrete, long-term support.

[12] During this period, B.W. Jr.'s school reported that he continued to show problems of incontinence, unclean odours, food in his hair, tiredness and apparent illness.

[13] In June, 2001, the Agency arranged for psychologist Kevin Graham to provide assistance to B.W. In August, a speech therapy program was designed for L.W. in response to a speech assessment. R.W. was diagnosed with a speech deficit, "aproxia", and referred to a therapist. B.W. Jr. attended at the IWK hospital where it was determined that he suffered from a structural defect in his heart valve causing malfunctioning. In November of 2001, the Agency hired the Conway

Workshop to provide intensive in- home support to the family. Two support workers were placed in the home, daily, from early morning to late evening. This continued until the Spring of 2002.

[14] In a follow-up parental capacity assessment in August of 2002, Deborah Pick noted some areas of improvement. She concluded, however, that it was unlikely that the parents would ever be able to meet the developing needs of the children without a great deal of support. She further opined that the community could not provide the required level of care and support should the Agency withdraw its services. It was the opinion of the supervising Agency worker, Sarah Wallace, that the only way in which the children's needs could be met would be to place the entire family in foster care until the children were independent.

[15] Later in these reasons, in the discussion of the second issue, I will consider in more detail the findings of the Family Court Judge on these topics.

[16] The history of these proceedings is the following.

[17] On December 4, 2001 the Agency applied to the Family Court for a finding that the four children were in need of protective services. On March 1, 2002 the Family Court issued an interim order under s. 39 by consent, providing that the children remain in the care and custody of B.F. and B.W., subject to Agency supervision.

[18] On March 19, 2002 Chief Judge Comeau of the Family Court issued a protection order under s. 40, to which B.F. and B.W. consented, which stated that the four children are "found to be in need of protective services pursuant to s. 22 (2)(g), (j) and (ja) of the *Children and Family Services Act*." The order provided that the children would remain with the respondents, subject to Agency supervision, and scheduled a disposition hearing.

[19] The clauses of s. 22(2) under which these children were found to be in need of protection state that a child is in need of protection if: there is a substantial risk that the child will suffer emotional harm for which the parent does not provide or consent to services and treatment; the child has suffered physical harm caused by chronic and serious neglect to which the parent does not provide or refuses to consent to services and treatment; and there is a substantial risk that the child will again suffer such physical harm.

[20] On May 21, 2002 Judge Black of the Family Court, under ss. 41 to 43, issued a decision which approved a supervision order confirming that these children were in need of protection under clauses (g), (h) and (ja) of s. 22(2) and providing that for four months the children would remain in the care and custody of the respondents, subject to Agency supervision, with a review hearing scheduled for September 17, 2002.

[21] The review hearing was adjourned by consent until heard by Chief Judge Comeau on February 10, 12 and 24, 2003. It is his decision dated May 5, 2003 which is under appeal.

[22] The Chief Judge extended the time for Agency supervision beyond the limits stated in s. 43(4) and rejected the Agency's plan for the children which had proposed permanent care and custody to the Agency followed by placement for adoption.

[23] The Family Court approved the plan submitted by B.F. and B.W. This plan stated its objectives as:

1. To provide a healthy and safe environment for their family;
2. To provide healthy, nutritional meals;
3. To have and maintain personal hygiene;
4. To jointly make decisions;
5. To acquire skills and parenting techniques.

The plan stated that these objectives would be accomplished by a staff person employed full time and funded by the Agency.

[24] The Family Court ordered that the plan would be in effect for six months after which, barring an application for review, the Agency's application for care and custody would be dismissed, supervision would end, and the children would remain with B.F. and B.W.

[25] On June 9, 2003 the Agency filed a notice of appeal to this Court.

[26] On June 24, 2003 Roscoe, J.A. stayed the execution of Chief Judge Comeau's order that the Agency fund additional in-home assistance and

instruction. Otherwise, the supervision order remained in effect, care and custody resting with B.F. and B.W. subject to supervision by the Agency.

Legislation

[27] Section 2 defines the *Act's* foundation:

> **Purpose**
>
> **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.
>
> **Paramount consideration**
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. 1990, c. 5, s. 2.

[28] Section 3(2) defines "best interests of child".

[29] Section 22(2) prescribes when a child is in need of protection. Clause (f), and clauses (g), (j) and (ja) which were invoked here, state:

> **22** (2) A child is in need of protective services where
>
> . . .
>
> (f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> . . .

(j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);

[30] Section 41 governs the disposition hearing. Section 42 prescribes the contents of disposition orders:

Disposition order

42 (1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:

(a) dismiss the matter;

(b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

(c) the child shall remain in or be placed in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

(d) the child shall be placed in the temporary care and custody of the agency for a specified period, in accordance with Sections 44 and 45;

(e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d) for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or (c) for a specified period, in accordance with Sections 43 to 45;

(f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.

Restriction on removal of child

(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.

Placement considerations

(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.

Limitation on clause (1)(f)

(4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 42.

[31] Section 43(4) states the time limits of a supervision order made under clauses (b), (c) or (e) of s. 42(1):

Duration of order

(4) A supervision order made pursuant to clause (b), (c) or (e) of subsection (1) of Section 42 may be for a period less than twelve months, but in no case shall a supervision order or orders extend beyond twelve consecutive months of supervision from the date of the initial supervision order pursuant to Section 42, subject to the maximum time limits set out in subsection (1) of Section 45 where an order is made pursuant to clause (e) of subsection (1) of Section 42. 1990, c. 5, s. 43.

[32] Section 45(1), referenced in s. 43(4) states:

> **Total duration of disposition orders**
>
> **45** (1) Where the court has made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed
>
> (a) where the child was under six years of age at the time of the application commencing the proceedings, twelve months; or
>
> (b) where the child was six years of age or more but under twelve years of age at the time of the application commencing the proceedings, eighteen months,
>
> from the date of the initial disposition order.

[33] Section 46 governs reviews of disposition orders, and was the source of jurisdiction of the Family Court in the decision under appeal. Section 46(5)(c) states:

> **Powers of court on review**
>
> (5) On the hearing of an application for review, the court may, in the child's best interests,
>
> . . .
>
> (c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.

[34] Section 49(6)(c) permits the Court of Appeal to make any order the Family Court could have made.

Preliminary Issue - Late Filings

[35] Three days before the hearing in this Court the respondents filed a "supplementary factum", including submissions based on ss. 7 and 15(1) of the *Charter of Rights and Freedoms*. The appellant objected.

[36] On the morning of the hearing the appellant attempted to submit further evidence - estimates from the Province's Public Accounts for the years ending March 31, 1999 through March 31, 2002. These documents existed at the time of the trial before the Family Court.

[37] At the hearing of the appeal the court declined to accept either the supplementary factum or the further evidence with reasons to follow, as outlined below.

[38] **Respondents' Supplementary Factum:** The respondents did not raise any argument under the *Charter* in the Family Court. Neither did the respondents file a notice of contention which, under *Rule* 62.09 (1), "shall" be filed within 15 days from service of the notice of appeal, if the respondents wish to argue that the decision be sustained on a ground other than that stated by the Family Court. Neither did the respondents mention the *Charter* in their first factum.

[39] There was nothing by which the appellant could have anticipated the *Charter* arguments first raised by the respondents several days before the hearing. To give the appellant an opportunity to respond, it would have been necessary to adjourn the appeal. An adjournment would delay the hearing of this appeal outside the extended time limit prescribed by s. 49(4) of the *Act* - 150 days from the filing of the notice of appeal.

[40] There is no procedure in the *Civil Procedure Rules* for filing a "supplementary factum" without leave of the court. No application for leave was filed.

[41] The respondents did not give notice of constitutional question under the *Constitutional Questions Act* R.S.N.S. 1989 c. 89. Section 10(2)(a) requires notice to the Attorney General where an argument is made as to the "constitutional validity or constitutional applicability" of a law. The respondents proposed argument involved the constitutional applicability of the *Act*.

[42] **Appellant's New Evidence:** The material was not before the Family Court. There was no application to submit fresh evidence under *Civil Procedure Rule* 62.22 or s. 49(5) of the *Act*. There was no attempt to establish the prerequisites for a successful application under that *Rule* or under the broad principles of s. 49(5), [eg. *Children's Aid Society of Halifax v. C.M.* (1995), 145 N.S.R. (2d) 161 (C.A.)].

[43] Neither party has complied with the appropriate procedures for the late submission of evidence or new arguments. The court refused to accept the materials tendered, and has not considered those materials in reaching this decision.

Standard of Review

[44] This Court has stated that a trial judge's decision on a children's protection matter may be set aside on appeal only if the trial judge erred in legal principle or has made a palpable and overriding error in his appreciation of the evidence: *Family and Children's Services of Kings County v. B.D.* (1999), 177 N.S.R. (2d) 169 (C.A.), at 175, *Nova Scotia (Minister of Community Services) v. C.(B.) T. and F.Y.* (2002), 207 N.S.R. (2d) 109 (C.A.), at p. 111 and cases there cited.

[45] In *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, Bastarache J. for the Court made it clear that the standard of review does not change in a custody case involving the best interests of the child. Bastarache J., at ¶ 11, quoted from the reasons of L'Heureux-Dube J. in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (at ¶ 12):

> . . . Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to

overturn a support order simply because it would have made a different decision or balanced the factors differently.

Justice Bastarache then stated at ¶¶ 12, 13 - 15:

12 *Hickey* involved the appellate review of support orders, but the principles related to appellate review discussed therein are equally applicable to orders concerning child custody.

. . .

13 As I have stated, the Court of Appeal was incorrect to imply that *Hickey, supra*, and the narrow scope of appellate review it advocates are not applicable to custodial determinations where the best interests of the child come into play. Its reasoning cannot be accepted. First, finality is not merely a social interest; rather, it is particularly important for the parties and children involved in custodial disputes. A child should not be unsure of his or her home for four years, as in this case. Finality is a significant consideration in child custody cases, maybe more so than in support cases, and reinforces deference to the trial judge's decision. Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts . . .

14 It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal . . . Rather than indicating that appellate review differs when a court must consider the best interests of the child, *Gordon* (*Gordon v. Goertz*, [1996] 2 S.C.R. 27] is consistent with the narrow scope of appellate review discussed later in *Hickey, supra.* The case does not suggest that appellate review is appropriate whenever a trial judge has failed to mention a relevant factor or to discuss a relevant factor in depth.

15 As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian*

> *ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

Issues

[46] The issues are :

1. Did the Family Court err by extending the time limit under s. 43(4)?
2. If the answer to number 1 is "yes", what disposition order is appropriate?
3. Did the Family Court err by ordering the Agency to provide and fund services not approved by the Agency?

[47] Several subsidiary issues were argued and will be considered under issue 2.

First Issue - Extension of Time

[48] The Family Court rendered its supervision decision on May 21, 2002 under s. 42(1)(b), providing that B.F. and B.W. retain care and custody of the children subject to the supervision of the Agency. Section 43(4) states:

> . . . in no case shall a supervision order or orders extend beyond 12 consecutive months of supervision from the date of the initial supervision order pursuant to Section 42, subject to the maximum time limits set out in subsection (1) of Section 45 where an order is made pursuant to clause (e) of subsection (1) of Section 42.

As there was no order for temporary care and custody under s. 42(1)(e), the reference to s. 45(1) is inapplicable.

[49] The maximum limit of a supervision order would be May 21, 2003. The trial judge extended the consecutive supervision into November 2003.

[50] To justify an extension of the maximum period of time, the Family Court referred to the decision of this Court and *Children's Aid Society and Family Services of Colchester County v. H.W.* (1996), 155 N.S.R. (2d) 334 (C.A.).

[51] In *H.W.* the Family Court judge's decision after the disposition hearing occurred more than 90 days after the finding that the children were in need of protection. It was argued that the Family Court judge had lost jurisdiction because of the time limit in s. 41(1):

> (1) Where the court finds the child is in need of protective services, the court shall, no later than ninety days after so finding, hold a disposition hearing and make a disposition order pursuant to Section 42.

This Court ruled that the time limit in s. 41(1) was directory and the Family Court did not lose jurisdiction when the time limit passed.

[52] In the present case, the Family Court referred to *H.W.* and stated at ¶ 76:

> It would follow that this decision is authority for extension of time limits set out in s. 43(4).

The trial judge continued at ¶ 115:

> The court finds as a fact that the time limits as to dispositions set out in s. 45 conflict with the best interests of the children which has been identified as support for the family unit more particularly discussed earlier. The paramount consideration must prevail. Consequently, in the words of Justice Freeman: "in my view jurisdiction is preserved by a finding of fact that proceeding beyond the time limits set out in the act is in the best interests of the children". Once this

> decision is made, the court is not bound by the time limits set out in s. 45 of the *Act* or any statutory deadline."

[53] The trial judge then issued a further supervision order which required the Agency to provide services for six months, well beyond the time limit prescribed by s. 43(4).

[54] In bypassing the limit in s.43(4), the Family Court erred in legal principle.

[55] In *H.W.*, the time limit preceded the disposition order. If, as argued to the court in *H.W.*, the Family Court lost jurisdiction after passage of the time limit, there would be no decision to determine the best interests of the child. The Agency might have to re-apprehend to start the time limits anew.

[56] Similarly, in *Family and Children's Services of Annapolis County v. J.M.M. and L.M.* (1997), 161 N.S.R. (2d) 68 (C.A.), the Family Court delayed its interim decision for more than the five days specified in s. 39(1) of the *Act*. It was argued that the Family Court had lost jurisdiction. This Court, at ¶ 10 disagreed:

> 10. The Family and Children's Services Act must be read in light of its preamble, which contains the following:
>
> > AND WHEREAS the rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law;

In *J.M.M.*, as a fair determination of the issues on the interim hearing required the taking of evidence beyond the five-day limit, it was consistent with the rule of law and the best interests of the child that the five-day limit be treated as directory. The Family Court did not lose jurisdiction after the five days passed.

[57] The *Act* clearly contemplates a judicial determination of the child's best interest. If passage of a time limit which is a milestone toward that trial caused the

court to lose jurisdiction to determine the child's best interest, this would contradict the object of the *Act*.

[58] This principle does not apply to a time limit which governs the contents of the order after the trial.

[59] *Sullivan and Driedger on the Construction of Statutes*, 4th ed. at p. 60 distinguishes "mandatory" and "directory" by whether the statute specifies the consequences of non-compliance.

> When "shall" and "must" are used in legislation to create a prohibition, they leave the persons to which they apply no choice. Furthermore, the consequences of breaching the prohibition are clearly set out in the legislation, either in the Act itself or in a provision like s. 34 of the federal Interpretation Act which makes the provisions of the Criminal Code relating to offences applicable to all offences created by an enactment except to the extent that the enactment otherwise provides.
>
> When "shall" and "must" are used in legislation to impose an obligation or create a prohibition or requirement, they are always imperative. A person who "shall" or "must" do something has no discretion to decide whether or not to do it. A person prohibited from doing something is equally devoid of lawful choice. The issue that arises in connection with "shall" and "must" is not whether they are imperative, but the consequences that flow from a failure to comply. In some legislation, the consequences of failing to do what one is obliged to do (or not do) are clearly set out, but in other contexts the legislation is silent and it is left to the courts to determine whether non-compliance can be cured.
>
> If breaching an obligation or requirement imposed by "shall" entails a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term "directory" is unfortunate in so far as it implies that "shall" is sometimes not imperative, that it sometimes has the force of a mere suggestion. The confusion is compounded when "mandatory" and "imperative" are used interchangeably; that is, when "mandatory" is used to indicate that a provision is binding or "imperative" is used to indicate that nullity is the consequence of the breach. Strictly speaking, "shall" and "must" are always imperative (binding); neither ever confers discretion. The mandatory-directory

> distinction merely reflects the fact that there is more than one way to enforce an obligation.

[60] Section 43(4) unequivocally states the consequence of exceeding the time limit:

> In no case shall a supervision order or orders extend beyond twelve months of supervision from the date of the initial supervision order.

The consequence is - no supervision order shall extend past the limit.

[61] The Supreme Court of Canada repeatedly has approved Driedger's "one principle" of statutory interpretation. For example, in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶ 21, Justice Iacobucci for the Court stated:

> Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed., 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be found on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103.

The Supreme Court has more recently adopted the same principle in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, [2003] S.C.J. No. 42, ¶¶ 41-46 which considered first "the plain and ordinary meaning" of the words followed by the "scheme of the *Act*" and policy factors.

[62] **Plain and ordinary meaning:** Section 43(4) contains the words:

> . . . in no case shall a supervision order or orders extend beyond twelve consecutive months of supervision from the date of the initial supervision order pursuant to Section 42 . . .

[63] The interpretation of the trial judge does not attempt to give these words any "grammatical and ordinary sense" or "plain and ordinary meaning". The Family Court treats the quoted words as if they could be ignored.

[64] **Context and scheme of the *Act*:** As stated by Driedger, the words are to be read in the context of the scheme and object of the *Act* and the intention of the legislature. In *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, Justice Iacobucci for the court stated at ¶ 27:

> 27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings".

[65] In *Nova Scotia (Minister of Community Services) v. L.L.P* (2002), 211 N.S.R. (2d) 47 (C.A.), this Court commented on the contextually determined objectives of the *Children and Family Services Act* at ¶¶ 25, 27 and 31:

> 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 in tact. 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.* If a stable and safe level of parental functioning has not been achieved by the time of final disposition, before returning the children to their parents, the court should generally be satisfied that the parents will voluntarily continue with such services or other arrangements as are necessary for the continued protection of the children, beyond the end of the

> proceeding. Ultimately, parents must assume responsibility for parenting their children. The *Act* does not contemplate that the Agency shore up the family indefinitely.
>
> . . .
>
> 27. The words of Jones, J. in *Children's Aid Society of Metropolitan Toronto v. T.C.*, [1995] O.J. No. 1634 (Quicklaw Ont. C.J.P. Div.), although speaking in the context of a different statutory regime, are applicable here.
>
> > 41. The plan proposed by the parents involves extensive therapeutic monitoring and child care services to be provided to the family by the society for an indefinite period of time. Even if I were satisfied that it would be possible to protect the children and promote their healthy development by the infusion of community resources to this extraordinary extent, I do not agree that the goal of the *Act* would be achieved under such a plan. The *Act* is designed to assist families in performing their role as effective, nurturing parents. In my view, it should not be interpreted in such a way as to require the child welfare authorities to assume the primary parenting role in order to maintain the children in their home at all costs.
>
> . . .
>
> 31. The *Act* does not require a court to defer a decision to order permanent care until the maximum statutory time limits have expired. The direction of s. 46(6) of the statute is to the opposite effect. Where a child is in the temporary care and custody of the Agency, at each further disposition hearing, the court may not make a further order for temporary care and custody if the court is satisfied that the circumstances justifying the earlier order are unlikely to change within a reasonably foreseeable time, not exceeding the remainder of the applicable maximum time period . . .

[66] From these passages, it is clear that the maximum time periods to be written in disposition orders are not "directory" items. They are important components of the scheme and object of the *Act* and the intention of the legislature as discussed in *L.L.P.*

[67] The Family Court quoted from *L.L.P.*, then stated at ¶ 86:

> Again, the difference in the case before the Court is the children have never been removed from their home even though the Agency has essentially withdrawn intensive services.

This is a distinction without a difference. The comments in *L.L.P.* make it clear that the *Act* does not contemplate that the Agency "shore up" or act as a surrogate parent indefinitely. This applies whether there is temporary care and custody [s. 45] or mere supervision [s. 43(4)].

[68] By issuing a continued supervision order which bypassed the time limit under s. 43(4), the Family Court committed an error in law.

Second Issue - The Appropriate Disposition

[69] **The options:** Because of s. 43(4) a continued supervision order for six months was not an option. As of May 5, 2003, the date of the trial decision, what other options did the Family Court have under s. 46(5)?

[70] Under ss. 46(5)(c) and 42(1)(b), the Family Court could have ordered continued supervision for the remainder of the 12 months, up to May 21, 2003. There has been no suggestion that 16 days of continued supervision would have accomplished any material improvement in the respondents' parenting skills.

[71] There was no suggestion by either party that the children could have been placed in the care and custody of persons other than the parent under s. 42(1)(c).

[72] There was no suggestion by either party that the children should have been placed in the temporary care and custody of the Agency under ss. 42(1)(d) or 42(1)(e). For the two younger children, by virtue of s. 45(1)(a), an order for

temporary care and custody could not have continued beyond May 21, 2003, 12 months from the date of the supervision order.

[73] In practical terms, the options under ss. 46(5)(c) and 42(1) were dismissal of the Agency's motion leaving the children with the parents under s. 42(1)(a) or permanent care and custody to the Agency under s. 42(1)(f).

[74] In the decision under appeal, the trial judge did not express a preference between immediate dismissal of the Agency's application and immediate permanent care and custody to the Agency. The dismissal ordered by the trial judge was to occur after completion of the six months of activities recited in the order.

[75] **Remittal:** The respondents submit that this Court should remit the matter to the Family Court for disposition. I disagree. A remittal to the Family Court would, according to estimates of counsel, result in a Family Court hearing approximately four months hence. Almost three months elapsed from the last Family Court hearing to the decision. This could be followed by another appeal to this Court. One year from now this Court could be reviewing that disposition.

[76] One of the purposes of the *Act* is to avoid procedural delays in the determination of the best interests of the child. The preamble states:

> AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time.

[77] The *Act* specifically directs this Court to dispose of the appeal in a timely fashion. Section 49(4) states that the appeal shall be heard by this Court "within ninety days of the filing of the notice of appeal or such longer period of time not to exceed sixty days as the court deems appropriate." The notice of appeal was filed on June 9, and with the best efforts of all parties, has been heard only several weeks before the outside extended date comprising 150 days.

[78] In *Van de Perre*, at ¶ 13 the Supreme Court emphasized the importance of early resolution.

[79] These four children, aged four through eight, should not wait a further six months to a year before the courts finally determine what is in their best interests.

[80] Accordingly, this Court will determine the appropriate disposition.

[81] **The Agency's Plan:** The Agency's plan for care is stated as follows:

> The children are presently residing at their family home with their parents. The Agency proposes that the children be placed in the permanent care and custody of the Agency and be placed for adoption. Mi'Kmaq Family and Children Services has been contacted and are considering placements for the children in a Mi'Kmaq home. It is the Agency's plan that these children be adopted to a permanent home where all of their special needs can be met on an ongoing basis.

[82] Chief Judge Comeau dealt with the Agency's plan for adoption by stating:

> The court is required to look at the merits of the plan for the children's care proposed by the Agency including a proposal that the children be placed for adoption (s. 2(i)). **This cannot be done because there are no details of the adoption** and realistically it can be understood why the Agency cannot provide this information. Judge Levy and *F.C.S. of Kings Co. v. M.S., supra*. very clearly puts the consideration into focus when he says that just because children are placed in the Agency's care does not mean the children will "be adopted and receive [*sic*] optimum affection and superlative care. To just automatically assume, as a matter of law, that this will be the case is not only without foundation, it is an abdication of the responsibility of the court (s. 42(1)) to render its decision in the child (ren's) best interest. (emphasis added)

[83] The weight to be given to the Agency's plan in the assessment of the child's best interests, is for the trial judge, to which this Court will defer, as stated in *Van de Perre*. The trial judge's comment, however, does not weigh evidence. The Family Court states that merely because "there are no details of the adoption", the court "cannot" consider the plan. This is exclusion, not balancing.

[84] Section 70(1) of the *Act* states that if the child is not placed for adoption by a parent, and if one of the applicants is not a parent, then the child may not be placed for adoption unless the child is "in the care of a child-placing agency". Sections 74(3) and 76(1)(c) include similar restrictions for a child whose adoption is not supported by a parent. Given these procedures, it is highly unlikely that the Agency could give details of adoption on a contested application to obtain care.

[85] The *Act* specifically contemplates that a child may be taken in care before being placed for adoption - ie. before details of the adoption are known. To suggest that the absence of these details excludes consideration of the Agency's plan is inconsistent with the scheme of the *Act* and is an error of law.

[86] Under ss. 13 and 42(2) the Agency's responsibility, before seeking permanent care towards adoption, was to provide services which appear to the Agency (or Minister) as reasonably necessary to upgrade the respondents' parenting skills to promote the family's integrity. This was best accomplished, according to the Agency's reasonable assessment in this case, by leaving the children with the respondents benefiting from intensive assistance provided by the Agency under the supervision order. If the Agency had sought earlier temporary care and custody to place the children in a foster home, the Agency might have had "details of the adoption" as required by the Family Court. For instance the foster parents might have indicated a willingness to adopt. But the respondents may have lost the benefit of the Agency's attempts to improve their parenting skills with the object of keeping the family together. The statutory objective of family integrity would have suffered.

[87] There are fixed maximum time limits for the combined periods of supervision and temporary care and custody under s. 45(1).

[88] The Family Court may *weigh* the absence of adoption details with other factors. It is an error for the court to *eliminate* consideration of Agency care and custody towards adoption, merely because the Agency has used the 12 months allotted by the *Act* in an attempt to satisfy the statutory mandate of upgrading the

parenting skills of the respondents, instead of seeking temporary care and custody at an earlier date (which could have generated better details of adoption).

[89] **The Routledge Report and "System Abuse":** The trial judge (¶¶ 103-107) relied extensively on a 1998 document entitled "*Growing Up With Parents Who Have Learning Difficulties"* by L. Routledge. The trial judge (¶ 105) refers to discussion by Routledge of "system abuse", quotes from Routledge a number of items of "system abuse" and concludes by underlining for emphasis Routledge's statement:

> Many people possess the adaptive capacity to absorb or shrug off the kinds of institutional failings listed above. Others have a much thinner protective layer. For people and families operating on the edge of competence, whose coping abilities are stretched, the extra burden imposed by unresponsive services may be enough to push them past [*sic*] breaking point.

[90] Immediately following this quotation the trial judge states:

> In the case before the court, the Agency has emphasized the parent's lack of cooperation and hesitation at times.
>
> There was hesitation on the parents' part in the beginning of Agency intervention and culminating in the termination of intensive home support services because of what the Agency says was the respondent's request. System abuse, unintentional and unrecognised by any of the parties, is a valid explanation of the parents' attitude and responses.

[91] The concept of "system abuse" quoted from Routledge was central to the trial judge's analysis of the key facts - ie. the reasons for the respondents' failure to cooperate with the Agency's initiatives.

[92] The Routledge report was never entered into evidence. It was not referred to by any witness or by counsel at trial. No notice was given to the Agency or its counsel that the Routledge report would be considered by the Family Court in the

court's reasons. Apparently the trial judge located the document independently after the trial.

[93] This report was not a legal text. The trial judge used the report as an expert opinion.

[94] The trial judge did not refer to the doctrine of judicial notice, or attempt to admit the Routledge paper under that doctrine.

[95] In *Dean v. Brown* (2002), 209 N.S.R. (2d) 70 (C.A.), this Court at ¶ 13 stated:

> 13 In *Angelucci v. Dartmouth Cable T.V. Ltd. and Clarke* (1996), 155 N.S.R. (2d) 81, this court said:
>
> > [28] As indicated by this court in *R. v. MacDonald (R.A.)* (1988), 83 N.S.R. (2d) 293; 210 A.P.R. 293 (C.A.), a trial judge cannot take judicial notice of a fact unless:
> >
> > > ... (a) the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy.
> >
> > [29] In *Cross on Evidence* (6th Ed.), the authors say at p. 69:
> >
> > > The general rule is that neither a judge nor a juror may act on his personal knowledge of facts. Nor may the court take steps to acquire such knowledge in private, for example, by applying a scientific instrument to an exhibit in the absence of a party. This rule has reference to particular facts.
> >
> > Caution must be exercised in resorting to the doctrine of judicial notice, particularly where such is done without notice to the parties or their

> counsel. In R. v. Quinn (1975), 27 C.C.C. (2d) 543, MacDonald, J., of the Alberta Supreme Court said (p. 550):
>
> > ... I note that there is a difference between the taking of judicial notice on the basis of information not referred to by counsel at the trial, and doing so on the basis of sources referred to by counsel. Where the former is the case, the trial judge should proceed with the utmost of caution, where the fact which he is tempted to notice is one vital to the resolution of the case...

[96] The contents of the Routledge report, in particular the concept of "system abuse", are not "so notorious as not to be the subject of dispute among reasonable men". Neither is system abuse "capable of immediate, accurate demonstration by resort to readily accessible sources of indisputable accuracy". To the contrary, Chief Judge Comeau stated, at ¶ 105, that the principle of system abuse "has had little research".

[97] The trial judge did not have the benefit of any input from the Agency, its counsel, or witnesses on this topic.

[98] Had notice been given, the Agency could have offered a different perspective on the topic. It is clear from the trial judge's findings that these children have special needs, the parents have significant parenting deficits, the Agency provided intensive services to assist the respondents to upgrade their parenting skills, and on a number of occasions, one or other of the respondents failed to cooperate, refused to cooperate or, because of their acknowledged cognitive weaknesses, failed to understand the reasons for cooperation. The trial judge, at ¶¶ 113 and 115, stated that "long term support of this family is required." If the required intensive support generates resistance from the parents, this could be an indication that the required long-term support would not be successful, and that in the children's best interests, the children should be placed for adoption. This is the opposite of the inference drawn by the trial judge from the Routledge report's comments on system abuse.

[99] I am not commenting on the validity or otherwise of the "system abuse" concept, or its application to the respondents. I am saying that the trial judge

should not have based a central feature of his reasoning on a document which was not entered into evidence, and which the parties had no opportunity to address.

[100] The trial judge quoted extracts from numerous reports filed by professionals who testified at the trial. The trial judge should have limited his sources of expert evidence to these materials adduced at trial.

[101] **The Disposition:** Because of the several errors in principle noted above, there are gaps in the trial judge's reasoning. I will try to fill those gaps. In doing so, as directed by *Van de Perre,* I will respect wherever possible the findings in the trial decision.

[102] The following is a paraphrased recitation from the trial judge's decision of the findings and statement of evidence apparently accepted by the trial judge:

> (a) The respondent B.F. had deficits in parenting skills which in 1995 resulted in another of her children being placed in permanent care because B.F. failed to recognize and protect the child from sexual abuse. (trial decision ¶ 3)
>
> (b) After B.W. Jr. was born, an Agency family skills worker was engaged in 1996 to help B.W. because of B.W.'s low functioning and inability to deal with the baby. B.W. opposed this service. (trial decision ¶ 4)
>
> (c) In 1998 a dentist noticed untreated abscesses in B.W. Jr.'s mouth. The parents resisted Agency involvement. The Native Council of Nova Scotia advised of concern over nutrition, dental care and stimulation. (trial decision ¶ 5)
>
> (d) It was determined that B.W. Jr. was developmentally delayed. In 1999 the respondent refused to place him in preschool. Reluctantly, the respondents accepted Agency help and financial assistance. B.W. spent some of the money inappropriately. (trial decision ¶ 6)

(e) By 2000 the Agency was providing extensive support. Progress was slow because of lack of cooperation by the respondents and their limited cognitive abilities. B.F. cooperated to the best of her ability, but B.W. was belligerent, and as a result, the service ended. (trial decision ¶ 7)

(f) There were concerns throughout about safety hazards in the home, broken windows, debris on the floor, lack of stimulation, lack of affection, parental lack of understanding of the Agency's concerns, lack of dental follow-through, yelling at the children, children harming one another, and children running out of the house into the road. (trial decision ¶ 8)

(g) In December 2000 B.W. Jr. still had toilet training problems, a heart defect was noted and dental hygiene continued to be a concern. (trial decision ¶ 9)

(h) L.W. requires extensive support and follow through for a speech defect. Follow up at home has been a problem. She has been diagnosed with aproxia, and has difficulty planning the necessary movements to produce a particular sound. Extensive and continued support is required. (trial decision ¶ 10)

(i) In 2001 there was concern about the home being kept to housing standards. In 2001 and 2002 there was reluctant participation by the parents in parental capacity assessments. The reports concluded that both parents have very limited cognitive ability and verbal comprehension which made it difficult to follow through with recommendations. Two of the children were developmentally delayed, and extensive home support was recommended. (trial decision ¶ 11)

(j) The parents have to be reminded to cooperate with Agency initiatives. (trial decision ¶ 12)

(k) In November 2001 the Agency contracted with the Conway Workshop Association to assist the parents. Progress was slow because of the respondents' lack of cooperation and distrust of the Agency. (trial decision ¶ 13)

(l) In June 2002, the Agency involvement decreased because the respondents asked for the service to end. (trial decision ¶ 14)

(m) R.W. also has been diagnosed with the speech problem aproxia. The Agency is concerned about follow-up at home. He has difficulty initiating, planning, organizing and monitoring. (trial decision ¶ 16)

(n) The trial judge, (trial decision ¶¶ 17 ff) quoted extensively from professional reports which were entered into evidence by witnesses who testified. The trial judge made no explicit finding rejecting any of these reports, and (trial decision ¶¶ 113 and 115) adopted the conclusions from those reports:

> 113. ... It is clear from the professional reports that long term support of this family is required and this should not mean Agency involvement for the whole period.

(o) Dr. Dominique Couture's report of December 12, 2000 stated that B.W. Jr.'s difficulties "related to lack of stimulation and lack of normal parenting". He may have perceptual difficulties. He has incontinence. He has a systolic click which suggests an abnormal aortic valve. He has otitis media which may require a hearing assessment from an ENT specialist. (trial decision ¶ 18)

(p) Ms. Deborah Pick, a psychologist, wrote a parental capacity assessment for the period February 15 to April 15, 2001. Ms. Pick reported that the home was unclean, the children were often unclean and lacked stimulation. (trial decision ¶¶ 19-20) The report concluded that the respondents had "very limited cognitive ability" with deficits in problem

solving, comprehension, vocabulary, organization skills, attention span and memory. B.F.'s receptive vocabulary is equivalent to that of a 7-8 year old and B.W.'s is equivalent to a 9-10 year old. They lacked the understanding and skills to follow through consistently with instructions. B.F. lacked parenting/home management skills and her ability to acquire those skills was limited. B.W. has not overcome his anger with past experiences and is defensive. The assessment concludes "that these parents are not capable of meeting the needs of their children without extensive support" and "it is likely that they will require concrete, long-term support." The respondents "seem to be very distrustful of having outsiders caring for their children." (trial decision ¶¶ 19-22)

(q) Ms. Sheila Bower-Jacquard, a psychologist, wrote a psychological assessment for the period April 12 to June 28, 2002. The assessment stated that B.W. Jr. has difficulty initiating, planning, organizing and monitoring and appears to have social and attention problems. B.W. Jr. required continuous intervention in the home to benefit from stimulation and motor skill activities. He required monitoring of his heart condition and tutoring. The home required intervention in the areas of safety, hygiene, medical and dental care. (trial decision ¶¶ 23-27)

(r) Deborah Pick, psychologist wrote another parental capacity assessment covering June 3 to August 14, 2002. The report noted that as of August, 2002 there were improvements in certain areas of concern, but many areas of concern remain. The respondents remained very dependant on others to assist them to follow through with appointments. There were concerns about B.W.'s ability to supervise his children. B.F. did not consistently follow through with activities between appointments. Both parents have difficulty giving directions and following through to see that tasks are completed. The report stated:

> B.F. and B.W. seem to respond best to recommendations when they are under pressure (eg. after a visit from the Agency during which there is serious discussion),however, tend to fall into old habits when they perceived the pressure is decreased. They often seem to do thing [*sic*] because they're instructed to and not because they recognize the importance of them.

The respondents still required a great deal of prompting, teaching, modeling and support. There was doubt that the respondents would ever be able to meet the needs of their children independently, and that even with support, the children's emotional needs might not be met. Ms. Pick stated that the respondents do not put the children's needs before their own, and the children do not live a normal existence. (trial decision ¶¶ 28-30)

(s) Dr. Ann Hawkins of the IWK Health Centre - Developmental Clinic wrote a report dated September 24, 2002 respecting B.W. Jr. She concluded that B.W. Jr. has a non-verbal learning disability and cannot work at the grade two level. He requires a great deal more practice on motor skills. He lacks focus and has short attention span. He has a reading problem of a phonetic nature and has difficulty recognizing letters. It is likely that B.W. Jr.'s problems result from a combination of genetics and environment which result in his academic and behavioural difficulties. She stated that B.W. Jr. requires a great deal of one-on-one support, certainly requires an individual program in math and perhaps in reading. A toileting program is essential to deal with his incontinence . The report stated "the children seemed very needy of affection and tend to look to individuals other than their parents for this affection." (trial decision ¶¶ 31-35)

(t) Diane AuCoin, Family Life Counselling Support Worker, wrote a report in October, 2002. The report stated that B.F. missed appointments scheduled to teach parenting skills. B.W. also missed appointments and refused to participate during sessions. B.F. became argumentative and refused suggestions. As a result, the sessions were discontinued. L.W. has difficulty with her expressive language, but can speak in four or five word phrases as opposed to the grunts and gestures which were her mode of communication at the beginning of the sessions. R.W. also has language difficulties but uses speech when another shares attention with him. (trial decision ¶¶ 36-44)

(u) Darlene Lawrence of the Family Resource Centre proposed the respondents' plan. Ms. Lawrence stated that the family will always need some kind of part-time support. She stated that both B.F. and B.W. have impaired cognitive abilities. (trial decision ¶¶ 46-52)

(v) The Conway Workshop Association issued a progress report on October 25, 2002 which noted that the family has made considerable progress.

(w) Kevin Graham is a psychologist who conducted over 30 sessions with B.W. beginning in late spring, 2001. Mr. Graham stated that the children will continue to be in need of outside support to provide for their needs. (trial decision ¶¶ 55-56)

(x) The trial judge (trial decision ¶ 99) noted that there had been recent improvements with some of the concerns but (trial decision ¶ 100) acknowledged:

> ... there remained a risk of emotional harm to the children given their diagnosed difficulties and the Respondent's [*sic*] cognitive deficits.

(y) The trial judge stated, (trial decision ¶¶ 113, 115):

> It is clear from the professional reports that long-term support of this family is required and this should not mean Agency involvement for the whole period.
>
> That this family needs long term support all professionals concurs [*sic*].

[103] From this recitation, it is apparent that the children have special needs. Their health and safety, behavioral well being and development are seriously at risk. At least some of the children's deficits are a product of their deprived environment.

[104] It is clear that to respond to these special needs the parents or care givers must be able to understand the problem and the need for response, must have the ability to stimulate and care for the children, must be willing and able to cooperate with the professionals (in home and external) upon whose services the children will

depend and must be able and willing to follow through with regimes for treatment and amelioration.

[105] It is also clear the respondents have cognitive deficits and parenting deficiencies which significantly impair their ability to recognize or satisfy their children's special needs. The respondents have made some improvements with the assistance of the intense initiatives provided by the Agency. Nonetheless, as Ms. Pick stated: (quoted in trial decision ¶ 30)

> B.F. and B.W. seem to respond best to recommendations when they are under pressure (e.g., after a visit from the agency during which there is serious discussion), however, tend to fall into old habits when they perceived the pressure is decreased. They often seem to do thing [*sic*] because they're instructed to and not because they recognize the importance of them.

[106] The trial judge ordered the Agency to provide the continued intensive support under the supervision order for six months. The trial judge, at ¶ 118, stated as one of the terms of the order:

> That all parties shall plan for the period at the end of the six months so that all necessary and available external services will continue and/or be in place to provide for the family in the long term without Agency intervention.

The trial decision, at ¶ 111, made general comments about access to "nannies, child minders, neighbours, friends, peers, teachers, religious" advisors and stated:

> With this in mind there are people and experiences in the community other than formal services that impact on children's lives. Therefore if they can be brought up in a loving, caring, and risk reduced (physical and emotional) home it should not be a concern that their parents have disabilities.

[107] These wishful thoughts are not findings that the specific services required by these children exist externally and will be accessed by the respondents as needed for the children. It is apparent from the trial judge's findings that in the past, the respondents have not, on their own initiative, sought out services for their children.

[108] The Agency provided intensive services in an effort to maintain family integrity within the statutory time frame. Notwithstanding the high level of services, the parental deficiencies could not be adequately remedied. This was sufficient to meet the requirements of s. 42(2).

[109] There is no suggestion or finding that the children could be placed with a relative, neighbour or other member of the community under s. 42(3).

[110] The findings make it clear that the circumstances did not and would not materially change within the time limits contemplated by s. 42(4).

[111] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at ¶¶ 26 - 37, Justices Iacobucci and Major for the majority, discussed the appellate function to review an error of law contained in a mixed issue of law and fact. If the findings of the trial judge are accepted, but the conclusion is erroneous because the trial judge has misdefined the standard against which those facts are measured, it is the function of the Court of Appeal to correct the error in the definition of the legal standard.

[112] Accepting the findings of the trial judge, which I have set out at length earlier in these reasons, the trial judge applied those facts to a parent-centered standard. The trial judge's exclusion of the Agency's plan and use of the Routledge report reflect this parent-centered approach. The child-centered standard of s. 2(2) courses through the *Act*. Applying the facts as found by the trial judge to the child-centered standard required by the *Act*, it is clear that the best interests of these four children would only be served by an order which places the children in the permanent care and custody of the Agency.

[113] Section 49(6)(c) entitles this Court to make any order that the Family Court could have made. I would direct that the children be placed in the permanent care and custody of the Agency subject to the Agency's plan of care which was filed with the Family Court.

Third Issue - Power to Order Services by Agency

[114] The trial judge ordered that the Agency provide and fund services during a six-month period of continuing supervision. Those services were specified in the plan which was filed on behalf of B.F and B.W. The Agency objected to the provision and funding of those services.

[115] In this Court, the Agency took the position that the Family Court is without jurisdiction to order the Agency to provide and fund services which are not approved by the Agency or contained in a plan submitted to the court by the Agency.

[116] Given my comments on the first and second issues, it is unnecessary to deal with this issue. As discussed above, once it is determined that the time limit under s. 43(4) is mandatory, after its expiry the continued and uninterrupted supervision order was no longer an option. So it is unnecessary to determine the extent to which the court may order the Agency to perform supervisory services under either s. 42(1)(b) or s. 46(5).

Conclusion

[117] I would allow the appeal. Under ss. 49(6)(c) and 42(1)(f), I would substitute an order that the four children of the respondents be placed in the permanent care and custody of the Agency as provided in the Agency's plan of care which was filed with the Family Court. The Agency should make appropriate transitional arrangements for the children.

[118] There should be no costs.

Fichaud, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.