NOVA SCOTIA COURT OF APPEAL

Citation: *T.W. v. Children's Aid Society of Halifax*, 2006 NSCA 15

Date: 20060209
Docket: CA 253037
Registry: Halifax

Between:

T.W. and R.J.

Appellants

v.

The Children's Aid Society of Halifax

Respondent

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

Judges:	MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.
Appeal Heard:	December 9, 2005, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Bianca C. Krueger and Gary E. G. Manthorne, for the appellant T.W. Susan J. Young for the appellant R.J. Pamela J. MacKeigan for the respondent Children's Aid Society of Halifax

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:

[1] In June of 2005, Justice Kevin Coady of the Supreme Court placed three young children in the permanent care of the respondent Children's Aid Society with adoption as the goal. He took this extreme measure because, tragically, their mother, "T. W.", and father, "R.J.", are addicted to crack cocaine.

[2] Citing several alleged errors by the judge, the parents have now appealed to this court. After carefully reviewing the record and the submissions of counsel, I see no reason to interfere with the judge's decision. While the judge, in his decision, did not refer to certain evidence, this omission was inconsequential to the ultimate outcome. It does not constitute reversible error. I would dismiss the appeal.

BACKGROUND

Overview

[3] The children are now nine, six and four years of age. The oldest is K.M.L.A.W., (K.), a female, born September (*editor's note- date removed to protect identity)*, 1996. Next is R.T.S.W.W., (R.T.), a male, born November (*ed.- date removed to protect identity)*, 1999. The youngest is R.D.M.C.W., (R.D.), another male, born September (*ed.- date removed to protect identity)*, 2001. K. is T.W.'s child from an earlier relationship. Her natural father played no part in these proceedings. The two boys are from T.W.'s relationship with R.J.

[4] This has been a challenging case for all involved. Both parents have had a difficult life, each becoming addicted to drugs at a young age. Yet their love for the children has never been questioned. When "clean" they appear to be competent and caring parents. When "using" they are essentially out of control and unable to care for themselves, let alone anyone else. The judge observed:

> ¶ 2 [T.W.] and [R.J.] grew up in Halifax throughout the 1970's and 1980's. They both had parental backgrounds rooted in substance abuse. They faced many challenges. Their early lives were made more difficult as they themselves became involved with drugs. They experienced little advancement in the areas of education and career. Life has been a struggle for both.

> ¶ 3 [T.W.] and [R.J.] are both intelligent and articulate. They both know what is required to maintain a stable and loving family life. Unfortunately, the use of drugs, especially cocaine, has prevented them from lifting themselves and their children out of their cycle of life. Consequently, they have a long history with the applicant and the police. Criminal charges have resulted in incarceration. These events have further limited their recovery.

[5] In fact, in his direct evidence, R.J. candidly acknowledged the ugly effects of crack cocaine:

> A. ... when you're doing cocaine, it's like you don't accept what's going on. It just runs you - - you're just on a one way track, and your mind's just going in one direction. You ain't thinking about - - you ain't thinking about the response - - or the situation it may cause. You're not worried about what affects other people. It's just all about, you know, you and you getting the drug and just going on that path. It's just like you're on a - - myself, it's like I'm just on a roller coaster, and it's one - - it's hard to get off.

[6] Sadly, this drug controlled the mother right from the birth of the eldest child. Thus began a history of almost continuous Agency involvement, initially with K., then with R.T. and later with R.D. There emerged a troubling pattern. T.W. was "using". This would prompt Agency involvement either by way of supervision or temporary care. T.W. would fight hard to control her addiction and the Agency would reduce or eliminate its involvement. T.W. would then "slip" and the process would start over again with the Agency increasing its involvement.

[7] Superimposed on all this was T.W.'s relationship with R.J. It was volatile with the children witnessing numerous incidents of domestic violence.

[8] Now, after almost ten years, time has become very much of the essence. The children have already spent a great deal of their lives in care and the prospects of having all three adopted together become more challenging with each passing day.

The Earlier Proceedings

[9] This is the fifth proceeding involving this family. The judge succinctly summarized the first four applications:

> ¶ 9 The first proceeding began in 1996 when [K.W.] was born. She remained in care for 18 months. The basis for intervention was [T.W.]'s abuse of drugs, especially cocaine. She had drug addiction issues that predated [K.]'s birth. [T.W.] worked hard at recovery. She availed herself of various life and drug programs and random urinalysis. After staying clean for 15 months, the Agency decided not to proceed with a scheduled permanent care hearing.
>
> ¶ 10 A "roll-over" second proceeding was initiated in April, 1998 and [K.] was returned to [T.W.], subject to supervision. The "roll-over" proceeding was continued until October 1998 when the Agency dismissed. The dismissal was based on [T.W.]'s success with programs and her well-established record of not using drugs. [T.W.] was showing that she could put [K.] ahead of her addictions. There was no question that when "clean" [T.W.] was fully capable of providing a loving and stable environment for her daughter. All reports indicated that when sober [T.W.] was an excellent parent.
>
> ¶ 11 The third proceeding was commenced in April, 2000 after 18 months without Agency involvement. It involved [K.] and [R.T.]. The Court granted a supervision order which addressed problems of drug use, supervision and housing. The Agency received evidence that drug use was once again sapping [T.W.]'s ability to properly care for her children. Once again, [T.W.] made the most of Agency programs and services to achieve sobriety. The supervision order was terminated in June 2001 after 14 months.
>
> ¶ 12 The fourth proceeding was commenced on September 5, 2001 when the children, [K.] and [R.T.], were taken into care. [R.D.] was born on September (*editor's note- date removed to protect identity)*, 2001 and was immediately taken into care. ...

[10] The Agency first sought an order for permanent care during the fourth proceeding. At that time, in addition to the ongoing drug use and domestic violence, the Agency was very concerned about serious unexplained burns to K.'s feet.

[11] Justice Douglas Campbell of the Family Division heard that matter in January of 2003 and rejected the Agency's request for permanent care. In doing so, he observed that T.W. had been "clean" for several months leading up to that hearing. Furthermore, Justice Campbell accepted T.W.'s evidence that K.'s burns resulted not from abuse, but from an unfortunate accident. He ordered the children returned to T.W. under Agency supervision.

[12] In reaching this conclusion, Justice Campbell had hope for T.W. He stated:

> ¶ 26 ... This is not over yet and that I have put a lot of stock in [T.W.]. I believe in her, but I am also counting on her and I hope that she does not let me down.

[13] He ordered strict conditions including the cessation of all non-prescription drug use coupled with random drug testing.

[14] In the ensuing months, T.W. continued to be "clean" and therefore in June of 2003, the parties agreed to have the matter dismissed. The dismissal order incorporated a letter of understanding whereby, among other things, the parents agreed to refrain from using non-prescription drugs or alcohol.

The Advent of the Fifth Proceeding

[15] Unfortunately by October of 2003, the Agency had received a report from the Halifax Regional Police. It detailed an alleged incident of serious domestic violence in the presence of all three children. The Agency investigated but opted to treat this as an "isolated incident." It took no further action at that time.

[16] However by April of 2004, it became apparent that T.W. was "using" again. The Agency had received two calls from an unidentified male (undoubtedly R.J.) reporting that T.W. had been using crack cocaine for the preceding month and that the children were being neglected. As part of its ensuing investigation, the Agency approached the children's day care supervisor. She too expressed concerns over T.W.'s recent erratic behavior. In fact, by coincidence, this supervisor had, at that time, planned to contact the Agency with her concerns.

[17] Then, when Agency representatives visited T.W.'s apartment, a young unknown female, apparently intoxicated, answered. T.W. was found hiding in a closet. The following record of that incident from the Agency case worker confirms the Agency's fear that T.W. was again "using":

> ¶ 13 ... Ms. Picard's recording states [T.W.] was extremely agitated, presented as dishevelled and had faded white line around her mouth. [T.W.] spoke rapidly stating this was all [R.J.]'s fault that she could not protect her children. Ms. Picard, who was familiar with [T.W.] from past involvement with the family, documented in her recording that [T.W.] had lost a significant amount of weight since their last meeting and it was difficult to get [T.W.] to focus and engage in conversation. Ms. Picard's recording notes that the home was in terrible condition, which was again a marked departure from the clean and well decorated

> home [T.W.] generally kept. [Affidavit of Agency Supervisor Wanda Smith dated July 19, 2004.]

[18] Further reports of domestic abuse followed and ultimately it was confirmed that T.W. had unquestionably been using crack cocaine. Thus in July of 2004, the Agency applied for a supervision order.

[19] An incident that occurred a few weeks later prompted the Agency to seek more drastic relief. A passer-by called the Agency after discovering the two boys (one of them nude) playing unsupervised near a busy highway. The Agency then took the children into care and, for a second time, sought an order for permanent care. Following several interim hearings and corresponding orders, Coady, J., in May of 2005, began the hearing which forms the subject of this appeal.

[20] This hearing differed from all the others in two important ways. The first distinction involved T.W.'s perception of the Agency. On earlier occasions, while not necessarily embracing the Agency, T.W. at least accepted its support as she fought her way back from cocaine use. This time she viewed the Agency with contempt and saw it as the enemy. The second difference is related to the first. On earlier occasions, T.W. was able to rebound and remain "clean" in the weeks and months running up to important court hearings. This time she appeared to be "using" throughout.

THE SUBJECT HEARING

[21] Justice Coady heard ten days of evidence throughout May and June of 2005. The record of all previous proceedings dating back to 1996 was also tendered pursuant to s. 96(1) of the **Children and Family Services Act**, S.N.S. 1990, c 5 (the **Act**).

[22] The judge rendered his decision on June 29, 2005. From this large body of evidence, he reached the following important findings of fact, all damaging to the appellants' case:

> ¶ 17 ... I do make the following findings of fact respecting events post June, 2003:
>
> - The applicant's decision to act in 2004 was not as a result of the February, 2003 outcome [Justice Campbell's decision]. I reject [T.W.]'s position this action amounted to revenge.

- The incident of domestic violence in September, 2003 was severe. [K.] was exposed to the violence first-hand, and [R.T.] and [R.D.] were in the home. [K.] called 911 before [R.J.] pulled the phone out of the wall. I find responsibility for this violence lies predominantly with [R.J.].

- [T.W.] was using cocaine and other drugs as of December, 2003. I conclude the observations of Ms. Bishop, the Daycare Manager, support this finding. I find the children were being neglected during this period of time as a direct result of cocaine use.

- I find when the workers and police attended [T.W.]'s home in April, 2004, she was using cocaine and other drugs. I conclude that the hiding in the closet was an effort to avoid detection, it was not to hide from [R.J.].

- I find between April and June, 2004, [T.W.] continued using drugs on a regular basis. This impacted on her ability to provide a stable life and home for the children. The drug testing supports this conclusion. I also find [T.W.] failed to provide samples because she realized they would test positive for cocaine.

- In 2003/2004, [T.W.] refused to accept services provided and paid for by the Agency, and stated a preference for community-based services. She did not follow-up with those services to an extent that would benefit her children. I reject [T.W.]'s position her plight is the result of the Agency not providing support. Throughout this proceeding, [T.W.] has gone "head-to-head" with the Agency, rather than partnering with them as she has done successfully in prior proceedings.

- I find all three children have serious developmental problems which require long-term support and therapy. I conclude their behaviours are the result of their exposure to domestic violence and the many breaks in their attachment to their parents and foster parents. [K.] has become reserved and quiet for a child with much maturity, intelligence and talent. [K.] and the boys display sexualized behaviour beyond mere curiosity. The boys are very aggressive and agitated, often swearing, spitting, biting and otherwise assaulting their foster parents. I accept the conclusion the boys are "out of control".

- I also accept Shanda Woodin's conclusions set forth in her March 10, 2005 report (Exhibit 13, Tab 7):

> All three children have experienced considerable breaks in their attachment to their significant attachment figure both with their birth mother and father (stepfather) and with Ms. [S.] who cared

> for them after they were taken into care initially. These attachment injuries have precipitated extensive issues for these children to cope with, including learning to trust in building attachments once again. This journey of developing healthy attachments and overcoming the undesirable behaviours used as defence mechanisms to ensure their security will be a challenging one for all three and will require ongoing therapeutic intervention.

- I accept her opinion these children have been "wounded deeply".

- I have reviewed all of the evidence concerning locating the boys on the highway on August 12, 2004. I conclude they were being neglected and left unsupervised by [T.W.]. There is not sufficient evidence to conclude [T.W.] put them outside so she could engage in prostitution. I do not accept [T.W.]'s explanation they slipped away while she was occupied with household chores. I find this incident is most serious and a direct result of [T.W.]'s addictions.

- I find [T.W.] was very inconsistent when exercising access throughout this proceeding. She was often a no-show, consistently late and in conflict with the access facilitators. I find these behaviours were the result of her addictions.

- I conclude [T.W.] does not accept any responsibility for the events of the past eight years. She always finds someone else at fault. She views herself as persecuted and an eternal victim. I reject her stated position that her drug use follows intervention and there is no drug use when she is not the subject of a proceeding. The evidence clearly establishes the opposite is the case.

- I find [T.W.] and [R.J.] love their children and the children have some attachment to their parents.

[23] Then applying these findings to the applicable law (as set out in the **Act**), the judge granted the order for permanent care:

> ¶ 18 I have considered the entirety of the evidence in making the above findings of fact. I have considered the goals and objectives of the *Children and Family Services Act*. It is the decision of this Court that the Agency's application for permanent care be granted. I have applied the civil standard in arriving at this conclusion.

[24] In reaching this difficult conclusion, the judge specifically addressed the plans presented by the parents and why each failed. Regarding T.W., he concluded that the children could no longer wait for her to become and remain "clean".

> ¶ 19 This decision is a recognition these three children need the stability of a permanent home immediately. I have no confidence [T.W.] can achieve long-term recovery from her very entrenched addictions. She is unable to protect her children from violence and neglect as long as she is using cocaine and other substances.
>
> ¶ 20 She has not shown the ability to sustain sobriety over a lengthy period of time. *These children cannot wait for [T.W.] any longer.* The factors which led to temporary recovery in prior proceedings are absent in this proceeding. These temporary recoveries that allowed for the return of the children in past proceedings. [T.W.]'s failure to commit to programs, to cooperate with Agency personnel, to take access seriously and to cooperate with random urinalysis tell the Court there is presently no commitment to getting clean, let alone staying clean. Throughout this action [T.W.] has been doing nothing more than going through the motions. These shortcomings speak volumes about the power of cocaine addiction. [Emphasis added]

[25] Turning to R.J., the judge acknowledged his recent attempts at recovery but his plan was essentially too precarious and too late for these children:

> ¶ 21 There are a number of reasons why [R.J.] cannot provide the children with the stability they require. Some are historical and some are current. He has exposed his children to a degree of domestic violence which has harmed them and will no doubt affect their future lives. He has spent much of the children's lives incarcerated. While his sentences are for property offences, they are the product of his cocaine addiction. [R.J.] will not be free of his present sentence until at least the end of this year. He will not be in a position to parent for some time.
>
> ¶ 22 I acknowledge and commend [R.J.] for the progress he has made while serving his present sentence. However, those strides have not been tested in the reality of the community. He has a cocaine addiction just as severe as [T.W.]'s. He requires a sustained period of recovery in the community before the Court could have any confidence in long-term sobriety.
>
> ¶ 23 [R.J.] has limited parenting experience. He has been an absent parent for much of the children's lives. While the children recognize him as their father, there is very little evidence of real attachment to him. ...

THE GROUNDS OF APPEAL

[26] T.W.'s notice of appeal sets out the following grounds:

> 1. THAT the Honourable Justice erred in law in failing to properly apply Section 42(3) of the *Children and Family Services Act*, in that he did not acknowledge several family members of the Appellant that were advanced with the possibility of placement for the children.
>
> 2. THAT the Honourable Justice erred in law in applying section 42(2) of the *Children and Family Services Act*, in that he did not consider less intrusive means and services as an alternative to Permanent Care for the [W.] children, to promote the integrity of the family unit.
>
> 3. THAT the Honourable Justice erred in not interviewing the eldest child, whose evidence was given great weight for the Children's Aid Society through hearsay.
>
> 4. THAT the Honourable Justice committed a palpable and overriding material error in ignoring, misapplying or misapprehending the evidence in concluding that [T.W.] had been offered services that were aimed at preserving her family unit.
>
> 5. SUCH further grounds as may appear upon full review of the transcript and a review of the exhibits

[27] R.J. in his notice sets out the following grounds:

> 1. That the Learned Trial Judge erred in law by failing to properly consider a family placement as required by s. 42(3) of the *Children and Family Services Act.*
>
> 2. That the Learned Trial Judge committed a palpable and overriding material error in ignoring, misapplying or misapprehending the evidence in finding that no family placement was advanced and the evidence did not disclose any such individuals.
>
> 3. That the Learned Trial Judge committed a palpable and overriding material error in ignoring, misapplying or misapprehending the evidence in finding the Respondents lacked any family support by way of attendance or contribution.

[28] From these grounds emerge four issues:

1. Both parents assert that T.W.'s brother Mr. R.W. presented a viable family plan as an alternative to permanent care and that the judge essentially ignored this evidence. They submit that as a matter of law,

the judge was compelled to at least consider if not act on this option. This issue is key to both appellants. It essentially represents R.J.'s entire case on appeal. It is also reflected in T.W.'s first two grounds of appeal.

2. In her second ground of appeal T.W. suggests that the judge, aside from her brother's offer, also ignored other less intrusive alternatives. For example, she asserts that had a temporary or even a permanent care order been required, at least the judge should have afforded her ongoing access.

3. In her third ground, T.W. suggests that the judge erred by not interviewing the oldest child, K., with a view of directly ascertaining her wishes.

4. T.W.'s fourth ground involves the services the Agency was obliged to provide. She insists that they were inadequate and that the judge erred by concluding otherwise.

ANALYSIS

[29] I will now address each issue in order, after I initially consider the appropriate standard of review.

Standard of Review

[30] In child protection cases, an appeal court should interfere only if faced with an error in legal principle or a palpable and overriding factual error.

[31] In **Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58, Cromwell, J.A. confirmed:

> ¶ 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.

[32] In the present case, as noted, the appellants assert that the judge, in his decision, ignored certain evidence. In such circumstances our ability to interfere is nonetheless limited. We should do so only if the purported omission reasonably appears to have affected the judge's conclusions. See **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at ¶ 10-16. I will discuss this standard in more detail later in my judgment. Now to the grounds of appeal.

1. Mr. R.W.'s Offer

[33] I begin by briefly considering the statutory framework. The **Act** emphasizes the importance of preserving the family unit. While the children's best interests are paramount, the preservation of the family unit is identified as a major factor for achieving this objective. The **Act,** beginning with its preamble, is replete with references to this effect:

> WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being; ...
> AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate; ...
> AND WHEREAS the preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the child: ...
>
> 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.
>
> . . .
>
> *Services to promote integrity of family*
>
> 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.
>
> . . .
>
> *Placement considerations*
>
> 20 Where the Minister or an agency enters into an agreement pursuant to Section 17, 18 or 19, the Minister or the agency shall, where practicable, in order to ensure the child's best interests are served, take into account
>
> (a) the maintenance of regular contact between the child and the parent or guardian;

(b) the desirability of keeping brothers and sisters in the same family unit;

(c) the child's need to maintain contact with the child's relatives and friends;

(d) the preservation of the child's cultural, racial and linguistic heritage. ...

[34] Of particular relevance to this case, a trial judge must give due consideration to all possible placement offers from family members:

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.

42 (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.

[35] With this backdrop, I now turn to Mr. R.W.'s offer to take these children.

[36] R.W. testified on his sister's behalf and primarily supported her plan for custody. However, on direct examination, he volunteered to take the children in the event his sister's plan was deemed unacceptable:

Q. You've indicated that you have looked after the children, and you mentioned, as my colleague said, you were thinking about long term. What did you mean by - - can you expand on that, please?

A. Well, you know, have them - - have them come and live with me and my sons.

Q. A week, a month, a year?

A. *No, forever if possible.*

. . .

> Q. Okay. All right. And your position is you'd like to see the children stay with -- with or ...
>
> A. With me and my children.
>
> Q. Okay.
>
> A. Because it would make them very happy.
>
> Q. Or be returned to ...
>
> A. Or be returned to [T.W.]. If not [T.W.], myself.
>
> [Emphasis added]

[37] The judge made no mention of this evidence in his decision. In fact, while recognizing his obligation to consider any such offers, he inaccurately observed that no family proposals had come forward:

> ¶ 32 In arriving at my decision I have considered s. 42(1) of the *Act*. The following options were available to the Court:
>
> . . .
>
> (c) Remain in care and custody of a person other than a parent or guardian subject to Agency supervision - The evidence did not disclose such a placement possibility.
>
> . . .
>
> ¶ 34 Section 42(3) requires me to consider whether there is any possibility of placement with a "relative, neighbour or other member of the child's community or extended family". No such placement was advanced and the evidence did not disclose any such individuals. In fact, the respondents lacked any family support by way of attendance or contribution. [Emphasis added]

[38] Yet as earlier noted, this omission does not necessarily represent reversible error. A Court of Appeal should interfere only if there is a reasonable basis to conclude that this omission affected the Court's disposition. In **Van de Perre,** *supra***,** Bastarache, J. for a unanimous Supreme Court explained:

> ¶ 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. [Emphasis added]

[39] See also **Family and Children's Services of Queen's County v. L.C.** (1996), 151 N.S.R. (2d) 49 (C.A).

[40] Having carefully reviewed the record, I see no reasonable basis to conclude that this omission in any way affected the judge's conclusion. R.W.'s offer in the circumstances simply could not be seen as being in the best interests of the children. Let me explain.

[41] Firstly R.W.'s offer must be placed in context. He was called primarily to support his sister's plan for custody. He filed no supporting documentation in advance of the hearing; nor did he ever apply to be added as a party.

[42] I acknowledge that in the fall of 2004, R.W. did offer to become a restricted foster parent. However, that was in the context of short term as opposed to permanent care. Agency representative Wanda Smith testified:

> Q. Okay. Thank you. Did any long-term possibilities get discussed with [R.W.]? Did you discuss any with him?
>
> A. If - - the possibility of it being long term?
>
> Q. Yes.
>
> A. Yes, and he talked about not wanting [T.W.]'s issues to interfere with his issues. He was under the understanding that it was just going to be for a little period of time. He said he'd do it for a short while for the kids. He never indicated that he would be willing to do it long term.

[43] Thus, when placed in context, R.W.'s offer, while testifying, to take the children "forever if possible" appears to have been an after-thought in the event his sister's plan for custody failed. Furthermore, in their closing arguments, neither appellant urged the judge to consider this option. Perhaps this is why he omitted any reference to this evidence in his decision.

[44] Furthermore, it is equally clear from the record that R.W.'s offer for long term care, however well intentioned, was simply not feasible. In fact, when R.W. initially offered to become a restricted foster parent in 2004, the Agency completed a home study. At that time, it concluded that with several children of his own, R.W.'s plan simply could not work. In fact, R.W. appeared to understand and accept the Agency's reasoning. I refer to the uncontested affidavit evidence of Wanda Smith on behalf of the Agency:

> ¶ 13 THAT, this Worker assessed [T.W.]'s brother, [R.W.], as a restricted foster home placement for the [W.] children. This Agency was unable to approve [R.W.] as a placement for [K.], [R.T.] and [R.D.]. Unfortunately, [T.W.] advised the children at access visits on at least two occasions that they would be going to live with their uncle [R.W.]. [T.W.] made these statements to the children without the assessment being complete.
>
> ¶ 14 THAT, this Worker spoke with [T.W.] and [R.W.] on the 11th of November, 2004 to advise both why the Agency could not approve [R.W.] as a restricted foster placement for the children. This Worker discussed practical issues with [R.W.] including his limited accommodations (two-bedroom apartment); his attempt to secure custody of his three daughters in addition to the two children he already had in his care; and the high needs of [T.W.]'s children. [R.W.] advised this Worker he would be applying for housing to obtain larger accommodations. This Worker asked [R.W.] if he was aware that the wait period for housing could be in excess of a year. [R.W.] stated that his understanding was that [T.W.]'s children would only be with him for a short period of time and then they would be going back to [T.W.]. This Worker clarified with [R.W.] that this may not in fact be the case and asked [R.W.] what his level of commitment would be if the children were not able to return to [T.W.] within a short period of time. [R.W.] stated that he had not thought of this as a possibility. [R.W.] stated that he was very aware that his sister has a problem with drugs and that she had slipped several times. [R.W.] stated that he was trying to stay on the right path with his life and care for his children and did not want [T.W.]'s issues to interfere with what he had accomplished in his own life and home. This Worker also discussed some of the behaviours that [T.W.]'s children were exhibiting. [R.W.] stated that he had [T.W.]'s children at his home on many occasions and was aware of their behaviours. This Worker was clear with [R.W.] that the Agency's decision was not a reflection of his abilities as a parent to

> his own children, but rather the complex nature of the needs of [T.W.]'s children, the level of [T.W.]'s involvement and boundary issues in addition to the practical aspects of potentially having one adult and eight children residing in limited accommodation. *[R.W.] advised this Worker that he understood the Agency's position and he just wanted what would be best for the children.* [Emphasis added]

[45] As noted in this passage, R.W. was at that time attempting to secure custody of his own three children in addition to the two he has from his present relationship. At trial, R.W. confirmed that he had abandoned this plan. Regardless, it is clear that R.W. had his hands full. It would not be feasible for him to accept this added burden. After all, these children, according to the record, understandably had significant behavioural problems given the challenges they faced since birth. More importantly, R.W. would have to care for these children while at the same time attempting to facilitate his sister's and R.J.'s obvious interests in maintaining contact with these children. This would be particularly challenging given T.W.'s and R.J.'s unfortunate addictions. The past proceedings and Justice Coady's analysis of the current situation made it clear that the parents' incorrigible addictions were destructive to the children's interests. Placement with R.W., who had regular contact with his sister, would continue the children's connection to these parental addictions. Basic to Justice Coady's analysis is the premise that the children must escape the perpetual circle of family drug addiction. Otherwise the children would face a significantly heightened risk of generationally imprinted addiction.

[46] In summary, the record supports only one conclusion on this issue. R.W.'s offer of long term care was not in the children's best interests. It would have had no effect on the judge's inescapable conclusion that permanent care was the only reasonable option for these children. Thus I see no reversible error. As noted, while the judge fully understood his obligation to find the least intrusive option, he could nonetheless see no other feasible remedy:

> ¶ 26 The *Act* also requires me to take the least intrusive action. The Agency started this proceeding by way of a supervision order. I find that decision to be the least intrusive response to [T.W.]'s drug use and associated consequences. [T.W.] refused to cooperate with this approach and as a result permanent care is warranted at this time. This decision is extreme, but necessary to protect these children presently and to ensure a better future. There is no other appropriate measure to achieve these objectives. In the past, many have been tried but have not met with sustained success.

[47] For all of these reasons, I would dismiss this ground of appeal.

2. Other Less Intrusive Options

[48] T.W. asserts that, aside from her brother's offer, the judge ignored still other less intrusive options. Specifically, T.W. maintains that she should have at least been awarded access, even if the children had to be taken from her. This she asserts would have been less intrusive and in the children's interests. Respectfully, I disagree.

[49] As noted, the judge was well aware of his obligation to consider less intrusive options. Yet access was denied because the judge accepted the Agency's plan for adoption and feared that access may jeopardize this plan. He reasoned:

> ¶ 33 Section 42(2) requires me to inquire into whether, before ordering permanent care and custody, less intrusive alternatives and services are available to promote the integrity of the family. I have made this inquiry and find these efforts have been tried unsuccessfully. Since September, 2005, [T.W.] has refused to accept these offers. Presently less intrusive services and alternatives would not provide adequate protection for these children.
>
> . . .
>
> ¶ 36 I have considered s. 47(2) of the *Act* respecting access within the framework of a permanent care order. I will not order access. I find access would impair the children's placement in a new family setting. In fact, [T.W.] has already destroyed the feasibility of permanently placing all three children in their present foster home. She has disclosed knowledge of their location and threatened to attend. These children are under 12 years of age. The Agency supports adoption. I find no circumstances that would indicate value to the children of continued contact with their parents. The Agency will require maximum flexibility and minimal parental interference in order to place children of these ages together in adoptive arrangement.

[50] It is clear that the judge had a solid evidentiary basis for this factual conclusion. He felt that adoption represented the best goal for these children and that access to the parents would risk this plan. He committed no palpable and overriding error in reaching this determination.

3. The Judge's Decision not to Interview K.

[51] T.W. asked the judge to interview K. so as to directly ascertain her wishes. The judge refused, explaining:

> ... I think generally the practice, it varies in different jurisdictions. I was on a course here a few weeks ago in the U.S. where it's a practice that seems to be, you know, evolving. I didn't get the impression that very many jurisdictions in Canada encourage it except in the most exceptional of circumstances. The general tendency seems to think that it really puts the child in an unfair spot of having to, you know, carry the weight that they're - - that they can - - you know, that the outcome is going to impact on them and - - and it's going to further traumatize them if they have trauma in their lives. But I don't mean - - but I am prepared to keep an open mind, and if you do have anything that you want to put to me in argument to persuade me, I'm certainly prepared to listen. I don't want - - I have an open mind and it's - - I - - but generally speaking, it's not something that I'm very attracted to, okay, for the reasons I've given. [Appeal book pages 5548/5549]

[52] It is clear from this passage that the judge carefully considered T.W.'s request and opted not to interview the child. This was completely within his discretion. In exercising it as he did, the judge committed no reversible error.

4. Were the appellants offered appropriate services?

[53] The appellant T.W. submits that, despite its statutory obligation, the Agency provided inadequate services. The judge concluded otherwise and in fact noted that T.W. refused support in the months leading up to the hearing.

[54] The record more than amply supports the judge's conclusions in this regard. It is clear that the Agency, for approximately 9 years, supported the parents, particularly T.W., with a wide variety of services designed to protect the family unit. The main thrust of these services understandably related to their addictions. This makes good sense. After all, everyone agreed that had T.W. been able to stay "clean", these interventions would never have been required.

[55] The parents further suggest that the Agency should have done more to assist R.W. in formulating his plan to take the children and that the judge erred by not recognizing this. Again, I disagree. As noted, R.W. understood the Agency's reasons for initially rejecting his plan. He made no further proposals or inquiries. In these circumstances, it was not up to the Agency to do more. Ms. Smith, on behalf of the Agency, explained the Agency's position:

> A. If children are brought into care and family members are aware of that, the onus is on the family members to come forward and say, "I will take this child." I'm not going to go out on a hunt looking for people to take the child. [T.W.] said that she has someone who's going to take the children, who was her brother. I said, "Yes, tell him to contact me. We'll do everything we can. We'll do the home study," and that's what we did. That's the only person that she brought to me. None of the other family members have contacted me or come forward on either side to say that they would put forth a plan for these children.
>
> Q. So under - - you're saying under the act, the onus is on the parents to take - - you put the children in your custody, and then they're supposed to act in accordance with provisions of the Act. As it stands, you're not ...
>
> A. No. No, what I'm saying is that if [T.W.]'s aware of - - or [T.W.] or [R.J.] is aware of other family members that might possibly come forth, then they would provide that - - they should provide that information to me, and then I can follow up with that. But if I'm not provided with that information or no family members come forward, I don't have anywhere to go with that.

[56] I accept the Agency's position. In other words, it is not up to the Agency to explore every conceivable option. The parents or other family members must at least come forward with suggested alternatives. This approach is consistent with that suggested by this court in **T.B. v. Children's Aid Society of Halifax et al.** (2001), 194 N.S.R. (2d) 149:

> ¶ 48 ... There is no obligation, statutory or otherwise, upon an agency "to explore any possible extended family placement option". The agency's responsibility is no greater than the **Act** requires. In the circumstances of this case, it was not obliged to lend its resources to ascertain or improve the viability of Trina Briand's offer. At best, her willingness to assist as expressed to the agency was no more than that, a simple offer to help. She had done nothing on her own to demonstrate to agency staff any serious commitment to provide a lasting and permanent home for this child. The agency was hardly compelled to arrange for legal counsel or such other expertise as would embellish or solidify her prospects.
>
> . . .
>
> ¶ 51 The agency has a statutory duty to take reasonable measures to provide services to families and children that promote the integrity of the family (s. 13 CFSA). The court has its own responsibility to take into account such measures and alternatives as are applicable in the circumstances of the case, before removing the child from the care of a parent or guardian (s. 42(2) CFSA). Thus the court and the agency share a responsibility to see that *reasonable* family or community options are considered. But the burden of establishing the merits of the alternative

> proposed are squarely upon the proponent. It is the proponent who must satisfy what I would term a burden of persuasion. Only when specific arrangements have been conceived and put in place by the proponent can the viability of that proposal be assessed.

[57] Finally, the appellants seem to suggest that they were prematurely abandoned by the Agency. In other words, by seeking an order for permanent care, the Agency gave up on both appellants as they continued to struggle with their addictions. Respectfully, this criticism misses the mark. The evidence suggests otherwise. This is not a case where the Agency concluded that time was up for the parents. Instead the Agency concluded, and the judge agreed, that time was running out for these children. The Agency had worked with the parents for many years until it became clear that further delays would risk the opportunity to have these children adopted together. Ms. Smith summed it up this way:

> A. Well, given the history that these children have - - I mean, this is - - this will be [K.]'s third time in care, and this will be the two boys' second time in care, and given the history of the children continuing to go back home, [T.W.] does well, she cleans up very well, and then there's a period of time she'll lapse, and then the children are back at risk again. And then this particular incident, I don't even believe that [T.W.] has been able to even clean up. I haven't had one test that I did get that said that she was clean. So if she's actively using at this time, I don't think it would be in the children's best interest to be placed in - - at that type of risk.
>
> . . .
>
> A. [R.J.] is currently incarcerated, and when he is released into a halfway house, there's a period of six months or however along it is that he would be there, and then you need at least another six months to a year to establish that he has, you know, changed, that he has made an effort to stay away from that lifestyle and to not go back into prison again. And I don't know that those children have another whole year to kind of hang in the air waiting to see what's going to happen to them or where they're going to be at.

[58] I reiterate that time was of the essence for these children and the judge understood this:

> ¶ 19 This decision is a recognition these three children need the stability of a permanent home immediately. I have no confidence [T.W.] can achieve long-term recovery from her very entrenched addictions. She is unable to protect her children from violence and neglect as long as she is using cocaine and other substances.

[59] In this light, the Agency's decision to seek permanent care with a view to adoption is reflective of the children's best interests.

[60] The judge committed no error in finding that the Agency offered proper services.

CONCLUSION

[61] For all these reasons, I would dismiss the appeal but in the circumstances without costs.

MacDonald, C.J.N.S.

Concurred in:

Oland, J.A.

Fichaud, J.A.