NOVA SCOTIA COURT OF APPEAL

Citation: *G. D. v. Family and Children's Services of Lunenburg County*, 2003 NSCA 123

Date: 20031119
Docket: CA 201921
Registry: Halifax

Between:

G. D.

Appellant

v.

Family and Children's Services of Lunenburg County

Respondent

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

Judges: Cromwell, Freeman and Fichaud, JJ.A.

Appeal Heard: October 27, 2003, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Fichaud, JJ.A. concurring.

Counsel: Brian S. Norton, Q.C., for the appellant
Wayne Allen, Q.C., for the respondent

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:

I. Introduction:

[1] The appellant is the mother of two boys, aged 6 and 7. Nearly three years ago, they were taken into care by the respondent agency acting under the **Children and Family Services Act**, S.N.S. 1990, c. 5 (the "**Act**"). Dyer, J.F.C., in the Family Court, found them to be in need of protective services and, after a disposition hearing, ordered that they be placed in the permanent care and custody of the respondent agency without access. The judge concluded that the appellant could not provide proper care for her children and that any less intrusive orders, including the provision of services to promote the integrity of the family, had been attempted and failed and would be inadequate to protect the children.

[2] The appellant appeals the permanent care and custody order. Her main argument is that the judge erred in finding that nothing short of permanent removal of the children from her care would be adequate to protect them or serve their best interests. She says that the respondent agency did not provide sufficient services and that the judge was wrong to conclude that such services had been attempted and failed or that they would be inadequate to protect the children if left in her care.

[3] For the reasons which follow, I would dismiss the appeal. The judge applied the correct legal principles and the record supports all of his findings of fact. He did not commit reversible error in concluding that the permanent care order was necessary and in the children's best interests.

II. Overview of the Facts:

[4] The respondent agency first became involved with the appellant in late 1995 and early 1996. Concerns came to the agency's attention about criminal paedophilic activity on the part of the appellant's partner, Mr. F.H. (He subsequently pleaded guilty to the long term sexual abuse of a boy while acting as his hockey coach.) At the time the agency was first contacted, the appellant was pregnant, by Mr. F.H., with her older son, J. who was born in December of 1995. J. was taken into care by the agency when he was 9 months old and remained in foster care for about a year and a half.

[5] A parenting assessment prepared during this period identified parenting deficits and risk concerns that prompted the agency to seek permanent care of the child. The appellant, who had counsel, apparently consented to the permanent care order and it was issued in Family Court in March of 1997. However, the appellant appealed the order alleging that she had not truly consented to it.

[6] This Court allowed the appeal in June of 1997 on the basis that the judge had not complied with his duty under s. 41(4)(c) of the **Act** to satisfy himself that the appellant understood the nature and consequences of her consent and that her consent was voluntary: see **Family and Children's Services of Lunenburg County v. G.D.** (1997), 160 N.S.R.(2d) 270 at para. 50. The Court remitted the permanent care issue to the Family Court and directed that, in the interim, the child should remain in the temporary care and custody of the agency.

[7] The appellant's younger son, C., was born in July of 1997, shortly after the decision of this Court. He too was apprehended by the agency. However, after additional parenting capacity assessments and the provision of various support services, the agency and the appellant consented to the return of both children to the care of the appellant subject to a nine month supervision order. That order expired in December of 1998.

[8] The agency became involved again in the year 2000 and, in November, apprehended the children after J. suffered abrasions and swelling on his face, allegedly at the appellant's hands. Both children were found to be in need of protective services: J. on the basis of physical harm inflicted by the appellant and the risk of physical harm and C. on the basis of the risk of physical harm. Those findings are not under appeal. Among the evidence accepted and relied on by the judge was that of C.J., a young person living in the household.

[9] At the subsequent disposition hearing, the children were also found to be in need of protective services on the basis of emotional harm, risk of emotional harm and the failure of their parent to provide services to remedy or alleviate their mental, emotional or developmental conditions that, if not remedied, could seriously impair their development. The judge ordered both children into the permanent care of the agency with no access by the appellant.

III. Overview of the Family Court Disposition Decision:

[10] Dyer, F.C.J., reserved his decision at the conclusion of the disposition hearing and subsequently delivered comprehensive written reasons of some 58 pages. I will briefly summarize his key conclusions.

[11] The judge found that it was necessary to remove the children from the appellant's care. He relied on considerable evidence including, but not limited to, a February 2002 parenting capacity assessment by Dr. Susan Hastey. Dr. Hastey had assessed the appellant's parenting capacity twice before. She was firmly of the view that it was unrealistic to expect the appellant to parent successfully, that it was difficult to recommend any services that would ameliorate her parenting and that the appellant's parents were no longer able to provide meaningful support. The appellant was found to have significantly elevated scores on the Child Abuse Potential Inventory (CAPI) and this, in conjunction with other testing, led Dr. Hastey to conclude that the children would be at substantial risk if returned to the care and custody of the appellant.

[12] The judge also found that less intrusive alternatives, including services to promote the integrity of the family, had been attempted but failed and that further offerings would be inadequate to protect the family. He relied on the evidence of Dr. Hastey in this regard as well as considerable other evidence about the appellant's apparent inability to follow through with offered services or to make long-term change in her parenting ability as a result of them.

[13] The judge considered whether it would be possible to place the children with a relative, neighbour or other member of the community or extended family. He specifically directed his mind to the appellant's parents. He concluded that while they had done what they could to help care for the children — the appellant and the children had lived with them for most of the time the children had been in the appellant's care — they had shown themselves unable to protect the children from harm.

[14] The judge found that the circumstances underlying his conclusions were unlikely to change within a reasonable foreseeable time not exceeding the maximum prescribed time limits based on the children's ages so that they could be returned to their parent. He found that it would be contrary to the children's best interests to return them to the appellant.

IV. Issues and Position of the Parties:

[15] The appellant challenges the judge's decision on three points. First, it is submitted that the agency failed in its duty under s. 13 of the **Act** to take reasonable measures to provide services to families and children that promote the integrity of the family. Second, it is argued that as a result of the agency's failure to provide services, the judge erred in being satisfied (as required by s. 42 of the **Act**) that less intrusive measures than removal of the children from the care of a parent had been attempted and failed or would be inadequate to protect the children. Finally (and in the alternative) the appellant claims that the judge erred in refusing to order access by her to the children following the permanent care order.

[16] The respondent agency says that the judge made no error in law or fact in reaching his decision and that it should be upheld.

[17] In my opinion, the heart of this appeal is found in the issue addressed by the appellant's second submission: Was the judge wrong to find that he was satisfied, as required by s. 42(2) of the **Act**, that less intrusive measures, including services to promote the integrity of the family, had been tried and failed or would be inadequate to protect the children? If he was wrong about that, it does not matter to the result of the appeal that his error originated in the failure of the agency to provide such services. On the other hand, if the judge properly concluded that no less intrusive measures would be adequate to protect the children and that the permanent care order was in their best interests, there is no justification for appellate intervention in his decision. I will, therefore, concentrate my analysis on the issue of whether the judge erred in his determination under s. 42(2) of the **Act**.

V. Standard of Review:

[18] The Court of Appeal is not to retry the case or substitute its discretion for that of the judge at first instance. Rather, the role of this Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in his or her appreciation of the evidence: see, for example, **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.(B.)T. and F.Y.** (2002), 207 N.S.R. (2d) 109 (C.A.). The advantages of the trial judge in weighing the many dimensions of the relevant statutory considerations and in appreciating the nuances of the evidence in relation to them require considerable appellate deference except

in the presence of clear and material error. This standard of appellate review does not change where the best interests of the child are in issue: **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 10 - 16.

VI. Analysis:

[19] Underpinning the appellant's submissions on appeal is her overall characterization of the facts. From her perspective, the agency's intervention in November of 2000, after nearly two years of independent parenting, was prompted by a single and relatively minor assault against J. Thereafter, the agency removed the children from the appellant's care and wrongly refused to provide services to assist her in being able to care for the children. The result, from the appellant's perspective, is that she lost her children permanently because of a minor incident and the agency's refusal to provide services. As the appellant's counsel put it in oral argument, the case, from the appellant's perspective, is about a mother who slipped up once and lost her children.

[20] With great respect, this characterization of the facts is simply untenable. As I shall demonstrate by reference to the judge's findings and the evidence before him, it cannot be said that the children were removed and placed in agency care because of a single, minor assault. Moreover, the evidence relating to the appellant's independent parenting between the expiry of the supervision order in December of 1998 and the taking into care in November of 2000 does not take away from, but rather, supports the judge's conclusion that further services or other orders short of permanent care would be inadequate to protect the children.

[21] As for the suggestion that the appellant's physical abuse consisted of one relatively minor incident, a similar submission was made to the judge at first instance. He flatly rejected it. In this, he was supported by the record. The judge noted that the witness C.J. had testified to multiple other incidents of violence by the appellant and that he had found the witness generally credible. This is not consistent with the suggestion that the agency's decision to seek permanent care was based on one slip.

[22] Moreover, the judge's findings relating to the children being in need of protection belie any such characterization. While the judge at the protection hearing found the children in need of protection solely on the basis of actual physical harm or the risk of it (s. 22(2)(a) and (b)), he expanded the grounds upon

which he found them in need of protection at the disposition hearing, concluding that they were also in need of protection on the basis of emotional harm, the risk of emotional harm and mental, emotional or developmental conditions for which the parent does not provide services to remedy or alleviate: see s. 22(2)(f), (g) and (h). These additional findings are not challenged on appeal and, of course, are completely contrary to the suggestion by the appellant that the one incident of physical abuse was what justified agency intervention.

[23] I turn next to the agency's allegedly wrong refusal to provide services directed to keeping mother and children together after they were taken into care in November, 2000.

[24] Shortly after the children were taken into care in November, the agency decided that it would offer no further services directed to keeping the family together. As described in the evidence, the rationale for the agency's decision was straightforward: services are offered to reduce risk but if the agency believes that those services would not be effective, they will not be offered. The agency concluded that it "... had no other services to offer that [were] going to reduce the risk because we had already been there and had done that."

[25] As a matter of legal principle, the agency was right. The purpose of services is to serve the children's best interests, not to address the parent's deficiencies in isolation. As Bateman, J.A. put it on behalf of this Court in **Nova Scotia (Minister of Community Services) v. L.L.P.** (2003), 211 N.S.R. (2d) 47; N.S.J. No. 1 (Q.L.); 2003 NSCA 1:

> [25] The goal of "services" is not to address the parents' deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the **Act**. If a stable and safe level of parental functioning has not been achieved by the time of final disposition, before returning the children to the parents, the court must be confident that the parents will voluntarily continue with such services as are necessary for the 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.

[26] The question is, therefore, whether the facts supported the agency's position. The judge concluded they did and that the agency did not breach any obligation it had under s. 13 of the **Act** to provide services to the appellant.

[27] To understand the agency's position and the judge's acceptance of it, it is necessary to review some of the evidence before the court on the disposition hearing. I will do this in more or less chronological order, turning first to the period of agency involvement in late 1995 up to the making of the permanent care order in March of 1997, then to the period from the setting aside of that order by this Court in June of 1997 until the expiry of the supervision order in December of 1998 and finally to the period from early 1999 to the time shortly after the taking into care in November of 2000 when the agency decided no further services would be directed to restoring the children to their mother's care.

(i) Late 1995 - March 1997:

[28] Even before J. was born in December of 1995, the agency received expressions of concern about the appellant's ability to parent him. There were also concerns about the risk to the child from his father, Mr. F.H. He had been charged with sexual abuse of a child over a period of approximately six years. In January of 1996, shortly after J.'s birth, the agency opened a file and monitored this situation. In March, the agency offered the possibility of a family skills worker but the appellant rejected these services. Up to this time, the appellant and her son had been living with her parents. When it was learned that she was looking for separate accommodations for herself and her son, the agency sought and obtained (in August of 1996) a supervision order limiting Mr. F.H. to access to the child supervised by the appellant or her parents.

[29] By the fall of 1996, the appellant was no longer living with her parents but was subject to this supervision order. Contrary to the order, she allowed Mr. F.H., alone, to take the child to his mother's in Queensland. When confronted with this by the agency, the appellant first explained that the child was going to be with Mr. F.H.'s mother and sister. Later, she maintained that she had a "court paper" barring her parents from being around the child, even though she had been told previously that her parents were approved access supervisors. The appellant was unable to produce a copy of this "court paper". The agency thereafter limited Mr. F.H. to access supervised by an agency access facilitator. When questioned about this incident at the disposition hearing, the appellant acknowledged that she had

been concerned that something might happen to the child at Mr. F.H.'s hands, but allowed him to take the child because she "didn't feel well that day."

[30] In October of 1996, the agency received and reviewed with the appellant a report concerning Mr. F.H. from the Nova Scotia Sexual Behaviour Clinic. He had admitted to engaging in sex with a child. The appellant informed the agency that she did not think she could comply with the agency's condition that F.H. was to keep away from the baby except during supervised access and that she was not prepared to leave her own residence and live with her parents or to go to Harbour House, a shelter. The agency advised that it did not think she was able to protect the child from Mr. F.H. and that it would take the child into care if the appellant was not prepared to move to a place of safety. The appellant responded that she would feel the baby was safer if he were taken into care and put in foster care. The agency acted accordingly. In late October, Mr. F.H. was charged with assaulting the appellant. By late fall, the appellant was expecting her second child.

[31] Dr. Susan Hastey filed an interim report concerning the parenting capacity of the appellant and Mr. F.H. in October of 1996. This was followed by a further report in January of 1997. (By this time, Mr. F.H. had pleaded guilty to the sexual molestation of a boy in the late 70's and up to the mid-80's while Mr. F.H. had been the child's hockey coach.) Dr. Hastey concluded that there were many factors implying that a child in the care of the appellant and Mr. F.H. would be at risk. She recommended that the child remain in the care of the agency.

[32] With respect to the appellant's recognition of the need for and acceptance of services, Dr. Hastey wrote this in her January, 1997 report:

> 2. ... [The appellant] appears to work poorly with Agency Caseworkers and other professionals such as Municipal Benefit Works and the Single Parent Family Worker. Her attitude toward helping professionals appears to be one of interference and invasion of her privacy. Her ability to work appropriately and with the needs of a child in mind with her own physician has been limited. Her ability to follow-through on appropriate medical advice given to her by both her Physician and the Public Health Nurse has also been limited. Her present ability to provide for the physical needs of herself and her child is also limited. At this time, subsequent to an approximate three month period of independent living, she is in a position of financial liability and appears to have no plans on how to appropriately deal with financial concerns and future budgeting.

. . .

> 4. In discussing the possibility how future interventions by the Family and Children's Services of Lunenburg County may assist [the appellant] and [F.H.] in successfully parenting their child, one must closely evaluate the history these parents' utilization of such services in the past. There are several indicators that help was not sought in the past by either parent. Evidence that alliance with the professionals and agencies who did intervene in the situation was achieved is questionable. While [the appellant] was given assistance through the services of a Public Health Nurse as well as a Single Parent Family Worker, she did not respond with appropriate follow-through or utilize these individuals inputs at an appropriate level. Her motivation and cooperation appear to be lacking and her openness in these helping relationships and the helping relationship between herself and Agency Caseworkers was observed to be poor. Evidence of follow-through on tasks and suggestions was poor and evidence of her acceptance of responsibility for reading materials and gaining significant insight into the situation at hand was also poor. ...
> (Emphasis added)

[33] Dr. Hastey also flagged attachment issues between the appellant and J., noting that the results of some of the tests administered were "... indicative of poor bonding " with J.

[34] From January until March of 1997, the agency provided 10 hours per week of in home counselling to assist the appellant with her personal issues and to assist her in developing skills that might support the return of J. (26/14 par 11). The counsellor, Sherrie Bushen, prepared a report in February of 1997.

[35] Ms. Bushen noted that the appellant had opened up to her over the preceding month, but pointed to a number of serious difficulties with respect to the appellant's ability to parent J. She observed that the appellant's own health was a concern and that the appellant had stopped taking care of herself when Mr. F.H. went to prison, that J. showed very little attachment to her and that, for her part, the appellant showed "very little affection and interaction with [J.]". The appellant was adamant in her determination not to break up with Mr. F.H. while, at the same time, incongruously maintaining that she would do "anything" to protect J.

[36] The report concluded that the appellant did not then have the full capabilities of caring for J., that she did not recognize the dangers for her son and that she was

not, at the time of the report "... doing a great deal to improve her situation or better herself."

[37] A permanent care order was made in mid-March of 1997 with the apparent consent of the appellant. However, as noted earlier, this order was set aside by this court in June of that year and the permanent care issue was remitted to the Family Court. In the interim, the child remained in the temporary care and custody of the agency.

[38] The picture that emerges to this point is that of a parent who is not interacting effectively with her child, who is reluctant to engage with the services available to help her improve her parenting and who cannot make choices about her personal life that will put the safety of her child first.

(ii) June 1997 - December 1998

[39] The appellant's second son, C., was born on July (*editorial note- date removed to protect identity*), 1997 and was almost immediately taken into care. In August, he was returned to the day-to-day care and control of the appellant under the supervision of the agency and access was restored to J. Although the record is not very clear on this point, it appears that J. also was ultimately returned to the day-to-day care of the appellant in the late summer or early fall of 1997.

[40] Numerous services were again provided by the agency following C.'s birth in July of 1997 and throughout 1998. Family support worker Colleen Parker worked with the appellant twice a week and the agency worker, Fred Squarey, conducted home visits of about the same frequency. Individual counselling was provided to the appellant and family counselling to her parents.

[41] All of this was consistent with the recommendations of Dr. Hastey, who performed another parental capacity assessment in late 1997. In a preliminary report of December 9, 1997, Dr. Hastey noted the following:

> 1. Test results indicate that [the appellant] has significantly lower levels of parenting stress than were originally assessed in 1996. Results of the **Child Abuse Potential Inventory** indicate acceptable parenting attitudes and beliefs in regards to the perception of the child and perception of self as parent.

> 2. [The appellant]'s acceptance and receptivity to services as they are presently being provided by the Family and Children's Services of Lunenburg County are positive and open. Family Support Worker Colleen Parker has indicated to this assessor that [the appellant] is broadening her support network in the community and has worked consistently and diligently toward acquiring the skills which Ms. Parker is teaching her. [The appellant] has followed through on assignments and seems to be applying the knowledge she is gaining from her work with Ms. Parker in her day to day parenting of [C.] as well as with [J.].
>
> 3. Observations of the family unit made by this assessor as well as those reported to this assessor by Access Facilitator Marion Oickle indicate that [the appellant] is taking on the role of Primary Caregiver in the family unit. The grandparents, Mr. & Mrs. [F.D.], have been able to step back from the primary parenting role. This has been a problem noted in the earlier assessment and it appears that it is being addressed in an appropriate manner at this time. There are still significant safety issues in regards to [the appellant]'s continuing to acquire a knowledge about the needs of a two year old as well as an infant. However, given her improvements as noted by Family Support Worker Colleen Parker and the general observations made by Ms. Oickle, it does appear that [the appellant] will be able to learn and adapt her home environment in a safety conscious manner.
>
> 4. There appears at this time to be adequate reciprocity in mother-child attachment behaviours. However, this is also an area which needs ongoing instruction, modelling and reinforcement by support staff.

[42] In her final report of December, 1997, Dr. Hastey recommended that J. and C. be returned to the appellant's care under supervision of the agency. She concluded at this time that there appeared to be potential for long term positive change in the appellant's ability to be a loving and caring parent, but that a lengthy period of supervision and ongoing intervention would be required. She recommended that the services of a family support worker be continued, that the appellant take a group parenting program and individual counselling, that her parents take family counselling and that J. be assessed by a speech/language pathologist.

[43] In March of 1998, Judge Buchan ordered that the children be in the sole care and custody of the appellant subject to a nine month supervision order.

[44] As mentioned, Dr. Hastey, in her December, 1997 assessment noted significant concerns about J.'s speech and language development. She said:

> ... It is strongly recommended that a speech/language assessment be conducted with [J.] as soon as possible. This is an area where [the appellant] should be intimately involved. The teaching of language and reinforcement of speech and language in a young child strongly enhances the bond between mother and child. These are areas in which Colleen Parker, Family Support Worker, can continue her work with [the appellant] and [J.].

[45] A referral was made to the Hearing and Speech Centres in the spring of 1998. There was a long delay in getting J. started, due to the numerous attempts over several months made by the Centres to contact the appellant. The appellant was contacted in September and offered an appointment but the appellant claimed that the agency case worker was supposed to be getting J. private speech lessons and therefore declined the offered appointment.

[46] The agency contacted the clinic directly and an appointment was scheduled. In October, 1998, J. was assessed and found to have a moderate expressive language delay. Weekly or bi-weekly therapy with his mother, enrolment in daycare and referral to the First Steps Early Intervention Program were recommended.

(iii) January 1999 - December 2000

[47] Unfortunately, the appellant allowed all of these recommended programs to fall by the wayside once the supervision order expired at the end of 1998.

[48] The Early Intervention Program tried but was unable to contact the appellant and so J. was removed from their waiting list. The judge found, and it is not challenged on appeal, that J.'s enrolment in this program did not occur "...because of [the appellant's] disinterest."

[49] The appellant also withdrew J. from day care even though this, too, was part of the recommended therapy for his language delay. Until the expiry of the supervision order in late 1998, the cost of day care was covered by the agency. The appellant explained in her evidence that the withdrawal from the recommended day care was because of her inability to pay for it herself after the expiry of the supervision order. However, she conceded in cross-examination that the agency had told her that help could be available to pay the cost of daycare, but that she never made an inquiry or tried to get such financial help.

[50] As for the speech therapy, six sessions were held from October of 1998 until April of 1999 but three were missed. This was, as noted, after a very late start because of the difficulty in getting the appellant to make an appointment in the first place.

[51] J.'s progress was assessed and reported in June of 1999. He had made no progress and, in fact, appeared to have regressed, something which, according to the therapist, almost never happens. While the appellant appeared motivated to help, she was unable to put the suggestions of the therapist into practice and appeared to have great difficulty playing with J. The therapy required her to interact with J. during the therapy sessions and then to take those suggestions home and to do them at home. The therapist noted that by June of 1999, J.'s expressive language was severely impaired and that generally this sort of regression is seen in children who have received no intervention or inconsistent follow-up at home. Some additional sessions took place. Further appointments were set up but not kept and J. was ultimately dropped from the program.

[52] When confronted with the difficulties the clinic had contacting her at trial, the appellant testified as follows:

> Q. O.K. And do you remember the, the actual therapy sessions at the clinic?
>
> A. Some of them I do.
>
> Q. Yeah, you went to some of them?
>
> A. Yes.
>
> Q. But you missed a lot of them, didn't you?
>
> A. Yeah, but I called them and I told them the reason why, and I told them to make another appointment for [J].
>
> Q. Hum. Well, Ms. Alexander-Arab said that you missed so many appointments that they eventually took [J.] off the caseload. Do you agree with that?

A. See. She never told me the right, like how can I put this (pause) directly to me about any of this. All, all her secretary did was call up for to make the appointments. I wasn't talking to her, I was talking to her secretary.

Q. Well, were you aware that the clinic tried a very great many times to get a hold of you ...

A. Nobody, nobody, ah ...

Q. ... about, about appointments and re-scheduling appointments - what's that?

A. Ah, most of the messages were not given to me.

Q. Mostly messages that were given to you?

A. Were not given to me.

Q. Not given to you? Not given to you by whom?

A. My parents.

Q. So you're saying the messages weren't being passed on.

A. That's right.

Q. Did you ever discuss that with your parents?

A. Yes, I did.

. . .

Q. O.K. But in the end they did cut [J.] off, didn't they?

A. I never received any more phone calls.

Q. You never got anymore phone calls? Did you get any of those calls, personally, directly?

A. Some of them I did, some of them I didn't.

[53] During the supervision order, the agency paid transportation costs, but when the order ended, the appellant said she was unable to fund the travel to the clinic for appointments. She conceded in cross-examination that she never asked for help for this from the agency although she knew she could and, in fact, she did request that the agency pay for the construction of an addition to her parent's home so it would better accommodate the children. She claimed that her parents were not able to transport her because their vehicle was not working very well at that time. The appellant's father testified that he did not know that J. had been dropped from speech therapy for non-attendance, but added that he didn't "... agree with that kind of stuff [i.e. speech therapy]...".

[54] In summary, during the period after the expiration of the supervision order when the appellant was parenting the children independently, the appellant allowed all of the programs recommended for J. to fall by the wayside and failed to request assistance of the agency to allow them to continue even though she knew she could do so. At trial, she unconvincingly attempted to blame others for this — her parents failed to give her the messages, she had no transportation, she could not afford it — and showed no real insight into the nature of J.'s needs or her own responsibility to do her best to meet them.

[55] The poor judgment about her personal relationships and their impact on the children which she had demonstrated with respect to Mr. F.H. continued. In the spring of 1998, the appellant had a relationship of a couple of months duration with an individual about whom the agency had grave concerns. He had an extensive criminal record including a sexual offence against a child. The agency warned her about this and the relationship did not continue.

[56] Following that relationship, and apparently after the supervision order expired in December of 1998 (although once again the record is not very clear on the chronology on this point), the appellant, who was by now almost 30, began a relationship of about six months duration with an 18 year old boy. For some of this time, they lived together in a tent in her parent's yard. Apparently, her parents did not approve of this person and the children stayed in the house with their grandparents.

[57] As noted, the supervision order expired by the end of 1998 and there was no further agency intervention, so far as the record discloses, until the year 2000. However, there was in the record considerable evidence bearing on the question of

how the children fared during the time they were in the appellant's care following the expiration of the supervision order in December of 1998 and the apprehension of the children in November of 2000.

[58] With respect to the suggestion that the appellant parented successfully for a considerable period prior to the November 2000 apprehension, I have already reviewed the evidence which showed the appellant's serious limitations as a parent even after the provision of intensive services, of her inability to follow up on important services required by her children, of her inability to make choices that put the safety of her children first and her inability to seek out help.

[59] In addition to all of this, other important evidence about the level of parenting these children received in the two years prior to the November 2000 taking into care came from the foster mother, D.L. J. had stayed with her for about a year from the age of nine months during his first time in care and returned to the D.L. home after he was again taken into care in November of 2000. He remained there at the time of the disposition hearing in November of 2002. C. also came into Ms. L.'s care at that time and remained with her at the time of the disposition hearing. Ms. L. was therefore able to offer an in depth "before and after" picture of J. and provide insights into C.'s development in his mother's care.

[60] When J. first came into her care at age nine months, he seemed to Ms. L. to be extraordinarily passive and tended not to show affection. With nurturing and attention from the foster family, both conditions improved: he learned to make demands and to show affection. By the time he left a year and half later, Ms. D.L. described him as "up to par" except that his speech seemed to her to be considerably delayed. When he was returned to the appellant, Ms. D.L. asked the agency to monitor his speech difficulties.

[61] When he returned to the D.L. home in late 2000, J. was very nervous and timid and very deferential to his younger brother, C. (This last observation is consistent with the view of others and her own admission that the appellant considerably favoured the younger child.) J. was very "clingy", constantly wanting to be picked up and held. He would go into his room and take his teddy bear or his duck and, as Ms. L. put it, "hit and hit and hit it." He lacked confidence and would not even go to play with his friends next door. He was very nervous at the table and if something spilled, he (and C.) would take their clothes and rub it off and look around to make sure that they were not going to get into trouble.

[62] J.'s speech was not up to age level, in Ms. L.'s view. (This is consistent with the evidence that he was notably behind and relates to the apparent inability of the appellant to follow through on the required therapy and other remedial actions mentioned earlier.) Although he had known several colours when he had left nearly two years before, he did not know them when he returned. He lacked the skills to start school and had to repeat grade primary.

[63] While Ms. L. could not provide this sort of "before and after" picture of C., she did report that he was very immature when he came to her at age three, acting like a baby and exhibiting little independence. He had poor head control and posture and his speech was delayed. He did not appear to be ready for school. Exercise and play addressed his physical problems while therapy and an in-home school readiness program are addressing his speech and school-readiness issues.

[64] In light of all of this evidence in the record, I cannot accept the appellant's characterization of the facts of this case. The children were not removed simply because of a minor assault. The agency provided numerous services and had good reason to think that additional services could not adequately reduce the risk to the children of being in their mother's care. There were good grounds to believe that the appellant's parenting had not been adequate following the expiry of the supervision order in December of 1998.

[65] Dr. Hastey's third parenting assessment of the appellant, completed in February of 2002, strongly supports the judge's conclusions that the appellant could not parent her children and that services would not be effective to allow her to do so within a time frame permitted under the **Act**. I have referred to Dr. Hastey's assessment earlier, but it will be helpful to touch on it in somewhat more detail now.

[66] With respect to the appellant's parenting and the possibility of services assisting her with parenting, Dr. Hastey made the following comments:

> The above assessment results appear to indicate that [the appellant], at the time of her children's apprehension and for several months following this apprehension was being overwhelmed with day-to-day routine. She was clearly being overwhelmed with the parenting of her son, [J.] and perhaps being overwhelmed with the parenting role in general. [The appellant] appears to have had significant

> decline in her general ability to ask for help from professional sources. She appears to have had been increasingly developing a hostile attitude toward the Applicant Agency and perhaps toward Service Providers in general. She had stopped taking [J.] to Day Care and stated that he was picking up bad habits from Day Care. However, these are behavioural habits that have not been observed by other professionals working with [J.].
>
> Results of the **CAPI** in conjunction with results of the **PSI** indicate that [the appellant] has a great deal of difficulty in the parenting role. While she is being assisted by her mother and father to a great extent she was also relegating a great deal of her parenting authority to the grandparents over the latter months of 1999. Even with this significant amount of help, [the appellant] is reporting feelings of being overwhelmed in the parenting role. ...
>
> It is difficult to recommend any services be put in place in regard to assisting [the appellant] in her parenting that have not already been put in place in the past, for a considerable duration. While [the appellant] did respond well to services put in place following the reintegration of her son, [J.] to her home; she nonetheless, over time, stopped applying much of the material to her day-to-day parenting. She shows a clear preference for the child [C.] and yet there were obviously difficulties in her parenting with both children. [The appellant] took virtually no responsibility for any of the problems she reported either in her children's behaviour or in the home environment she and her children lived in. She was repeatedly asked if she ever engaged in any of the activities or observed events reported to the Applicant Agency by community referrals. [The appellant] consistently stated she had never been emotionally or physically abusive to either of her children. Individuals who achieved Abuse factor scores elevated to the extend that [the appellant]'s **CAPI** scores were frequently are physically abusive of children. They certainly are individuals who are reporting a significant amount of difficulty in their own parenting. While [the appellant] does indicate on the **PSI** that she was experiencing difficulty and felt that she lacked competence in parenting; in clinical interviews, she was not taking responsibility for this lack of competence or feelings of inadequacy as a parent. [The appellant] presented in a defensive manner in assessment. Given the significant elevations on several assessment tests, one must assume therefore that her level of competence and her levels of stress may have been significantly higher had she not been responding defensively. [The appellant] seems to have a great deal of difficulty critiquing her own behaviour and therefore putting services in place that are meant to improve problem areas would be very difficult.
> (Emphasis added)

[67] In leading up to her opinion that the children should be placed in permanent care, Dr. Hastey said this:

> This Assessor has clearly reviewed the issues in regard to the attachment problems in the [appellant/J.] relationship. It is possible that behaviours arising out of anxious attachment on both the child and mother's part have caused this mother-child relationship to be difficult. One might therefore assume that the abuse suffered by [J.] could be addressed through intervention intended to address anxious attachment. However, given the rigid stance of [the appellant] in regard to her taking any responsibility for events precipitating the apprehension of her children, this Assessor feels it is unlikely that any intervention would be successful. While [the appellant]'s relationship with her son [C.] seems to be more appropriate; there were concerns noted throughout Case Events notes and noted in community referrals stating [the appellant] had slapped [C.]. One may assume that if J. were perhaps not present in the home, [the appellant] could vent frustration and anger on other members of the household, including [C.]. It is the opinion of this Assessor that [J.] and most likely [C.] did experience physical abuse by their mother [the appellant]. It is also the opinion of this Assessor that these children would be at substantial risk were they returned to the Care and Custody of their mother, [the appellant].
>
> Interview and Assessment results indicate there is a return of dysfunctional patterns of parenting, decision-making, inability to take responsibility for her actions and an inappropriate response style to Agency concerns in [the appellant] at the present time. All these patterns were noted as issues of concern in the 1996 assessment of her parenting capacity.
> (Emphasis added)

[68] In her testimony, Dr. Hastey expressed her conclusions as follows:

> A. She, [the appellant] stated that she was aware that she had responded positively and did work cooperatively with support workers and access workers. And yet, you know, there was the significant decrease starting in 19 - latter 1998, '99, that ended in the apprehension of the children, and so given the level and the extent of the intervention and the extent of the supervision of the intervention of the applicant agency, I do not believe professionally that I would recommend a repeat of those services or the addition of more services in order to address the problems. I feel that there has been a long enough time where intensive services have been involved that if change, and change did take place but could not be maintained without ongoing, that ongoing level of services and that ongoing level of supervision, and, therefore, there comes a point whether under the Act or in the eyes of the applicant agency when this parent has to fly on their own and having been given that opportunity, [the appellant] clearly indicated that she returned to negative parenting practices, a lack of receptiveness to any comment in regard to parenting, any recommendations, and a refusal to change parenting behaviours

that were detrimental to her children. And, therefore, I believe that further services aren't warranted.

Q. Indeed you state at the bottom of that paragraph,

"[The appellant] does not appear able to subordinate her own needs to those of her children."

A. It would appear so.

...

Q. O.K. Your conclusions follow. Perhaps you could summarize your conclusions, Doctor?

A. Well, I feel that there are significant attachment issues between [J.] and his mother. I believe that the intervention put in place by the applicant agency throughout '97, '98, part of '99, if those issues could be successfully addressed would have been successfully addressed. There was significant change. It was positive change. It could not be maintained without ongoing intervention and supervision. And I believe that that in part may address the abusive attitude of, or abusive behaviour of [the appellant]. I believe that there may be other elements, that there may be combinations of difficult relationships, poor decision making, an inability to tolerate non-compliance in [J.], and a clear resentment of this child by the mother at times and I feel that no services at this point in time given the age of the child, given the, all the issues that have come forward in court, no services could successfully address that relationship at this point. So returning [J.] or the children to their mother's primary care would be placing the children at risk.

Q. Would you take a moment, please, and reflect upon [C.]'s situation. Most of the, the evidence and, indeed, the assessing has been done on [J.]. There is some indication of [C.] having experienced some negative parenting, but you'd probably agree that [C.,]'s situation is not as dire as [J.]'s and when we're speaking in terms of returning one or both children home, how do you rationalize your position on [C.]?

A. Well, I think there's a number of factors that would indicate [C.] would still be at risk if he were returned home by himself to his mother. The possibility of another child coming into the family and the oldest child then becoming a scape goat in somewhat of the way [J.] has been from time-to-time by his mother. An inability to tolerate the day-to-day frustration of perhaps parenting more than one child. So there would be numerous scenarios by which another child could

> enter the home after [C.] was sent home by himself. I feel that an abusive attitude toward blaming a child for behaviour which is certainly appropriate to his age could certainly generalize to [C.] or [the appellant] to be placed once again in relationship difficulties or in parenting as a single parent rather than with the assistance of her parents, or if her parents are unable as, as they seem at this point in time to be as helpful to her as they have been in the past. So by placing her in a situation again where she has any number of environmental and community stressors upon her, she may well develop a more negative attitude toward [C.] or generally be overwhelmed with parenting of even one child.
> (Emphasis added)

[69] The appellant's main complaint is that the judge ought not to have been satisfied that less intrusive measures had been tried and failed or would be inadequate to protect the children given that the agency had not offered services to support the integrity of the family after the November 2000 apprehension.

[70] In reaching the decision he did, the judge considered many elements. He reviewed the whole history of agency intervention with the appellant and its failure to achieve long-term changes in her parenting ability. He accepted the expert opinion of Dr. Hastey, supported by the appellant's response to services offered in the past, that provision of additional services was unlikely to be effective. He was alive to the apparent inability of the appellant to recognize or protect against the risks to the children resulting from her actions, the considerable risk of physical abuse by the appellant, the problems created by lack of attachment between the appellant and the older child and the apparent inability of the grandparents to protect the children when their interests and the protection of their own daughter came into conflict.

[71] Taking all of the evidence into account, the judge found that the appellant had not and cannot address her own problems in a time frame that is sensitive to the children's demonstrated special needs and that it was simply too much to expect her to be able to do so within the foreseeable future.

[72] The judge also carefully reviewed the relevant provisions of the **Act** and properly directed himself concerning the applicable legal principles. He weighed the various factors which the **Act** requires him to address and applied the evidence to his consideration of those factors. He recognized that the provision of services should not be considered in isolation from the question of whether they would be

adequate to protect the children and serve their best interests: **L.L.P., supra**, at para. 25. I see no error of law in the judge's extensive reasons.

[73] The factors which the judge took into account were the proper ones for him to consider and his view of the evidence is fully justified by the record before him. I would conclude that the judge did not err in legal principle or make any palpable and overriding error of fact in reaching the conclusion he did.

[74] The appellant submits in her factum that the judge erred in terminating access. On the facts of this case, he was obliged by s. 47(2) of the **Act** to make this order unless satisfied that permanent placement in a family setting had not been planned or was not possible or that some other special circumstance justified making an access order. He found that placement in a family setting was possible and indeed planned and that the appellant had not provided evidence to support a finding that some other special circumstance justified making the order. I see no error in these conclusions.

[75] I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Fichaud, J.A.