NOVA SCOTIA COURT OF APPEAL

Citation: Family & Children's Services of Annapolis County v. J.D. , 2004 NSCA 97

Date: 20040806
Docket: CA 214492
Registry: Halifax

Between:

Family and Children's Services of Annapolis County

Appellant

v.

J.D. and R.R.

Respondents

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

Judges: Glube, C.J.N.S.; Oland and Fichaud, JJ.A.

Appeal Heard: June 7, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Glube, C.J.N.S.; Oland and Fichaud, JJ.A. concurring.

Counsel: Donald MacMillan, for the appellant
Oliver Janson, for the respondent J.D.
Respondent R.R. not appearing

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

SECTION 94(1) PROVIDES:

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

Reasons for judgment:

[1] This is an appeal by Family and Children's Services of Annapolis County from a decision of Provincial Family Court Chief Judge John D. Comeau (the trial judge) dated January 12, 2004, following a disposition hearing under s. 41(1) of the **Children and Family Services Act**, S.N.S. 1990, c. 5, as amended. The trial judge returned the infant daughter, M.J.J.D. (referred to as M.D.), born August (*editorial note- date removed to protect identity*) , 2001, to her mother, Ms. J.D., subject to the supervision of the Agency for a period of 12 months. The supervision order included the following terms:

> ...
>
> 2. The terms and conditions of the child's care and supervision shall be the following:
>
> (a) The child shall not be removed from the Province of Nova Scotia without the consent of the Court.
>
> (b) The Respondent mother shall refrain from the use of alcohol and non-prescribed drugs. If drugs are prescribed for the mother, a copy of the prescription shall be filed with the Agency and each time it is refilled, a copy of the refill label shall be delivered to the Agency.
>
> (c) That the Respondent - father shall have reasonable access to the child arranged through an access facilitator and arranged by the Agency. That access shall be refused when it is determined the Respondent - father is using or under the influence of alcohol or drugs.
>
> (d) The Respondent mother shall submit to random urine and blood tests to be conducted in a manner satisfactory to the Agency.
>
> (e) That the Respondent mother shall continue to attend AA meetings as well as counselling sessions with Jean Morrison and Dr. MacKlin as arranged.

(f) That the Agency shall be at liberty to visit any resident or place where the child might be at any particular time to further ensure the child's best interest.

(g) That the Respondent father shall have no contact with the Respondent mother, either personally or by telephone for any reason including access. Any contact with the mother respecting the child shall be in writing delivered by ordinary mail or third party.

(h) A breach of the above conditions shall be considered as contempt in the face of the Court and will be dealt with accordingly.

3. Non-compliance with any condition of this order shall entitle the Applicant Agency to take the children [sic] into its care and custody forthwith and not later than five (5) working days thereafter, bring the matter before the Court for review;

IT IS FURTHER ORDERED: that all Sheriffs, Deputy Sheriffs, Constables & Peace Officers shall do all such acts as may be necessary to enforce any custody or access provision of this order for such purposes they, and each of them are hereby given full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this order.

[2] The trial judge's decision is reported at [2004] N.S.J. 142; 2004 E-Carswell NS 135; 2004 NSFC 1.

[3] Although the father, Mr. R. R., participated at several hearings including the disposition hearing and was notified of this appeal, he neither appeared nor made any written submissions.

Background

[4] The respondents, Ms. J.D. and Mr. R.R., lived together for a period of time in a common-law relationship. Ms. D. has a long history of substance abuse and becoming involved in abusive relationships. Doctors and several witnesses described Mr. R. as an alcoholic; he goes on what he calls "binges". The respondents had a son born in December 1999, who was apprehended by the Agency and placed in the permanent care and custody of the Agency by a decision

of Judge James Wilson of the Family Court dated June 12, 2000 ("Judge Wilson's decision") after a full hearing, including evidence from both parents and expert and other witnesses.

[5] In 2001, the Agency became aware that Ms. D. was pregnant. Because of the previous court decision, shortly after M.D. was born, the Agency brought a protection application dated September 17, 2001, alleging the child was in need of protective services pursuant to s. 22(2)(b), (g) and (ja) of the **Act**. On March 5, 2002, by agreement, the protection application was dismissed and Ms. D. obtained an order for sole care and custody of M.D. under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160. The order included reasonable access to Mr. R. upon reasonable notice and a provision requiring notification to, and the right of the Agency to participate as a party in, any application to vary. At that time, the Agency was satisfied that Ms. D. had been substance free for a period of time and she had severed her relationship with Mr. R.

[6] On January 17, 2003, Mr. R. made a complaint to the RCMP expressing concern about M.D.'s safety, claiming Ms. D. was in an abusive relationship and was abusing drugs and alcohol. The Agency became involved again and wanted to initiate urine testing of Ms. D., to which she agreed. After several unsuccessful attempts by the Agency to get samples for testing, on March 6, 2003, she refused to take part in voluntary drug testing claiming she did not trust the Agency. On March 11, 2003, the police were called to the home of Mr. R. where Ms. D. had gone with M.D. after allegedly being assaulted by her then common law husband. The police found both Ms. D. and Mr. R. had been drinking with the baby asleep upstairs. The Agency took the child into temporary care on the basis that although Ms. D. was for the most part caring for her daughter properly and had a sincere desire to care for her, the mother's history of substance abuse and her tendency to be involved in abusive relationships required the apprehension. On March 18, 2003, the trial judge granted an interim order on a without prejudice basis maintaining care and custody of M.D. with the Agency and access by the parents on terms agreeable to the Agency.

[7] On April 8, 2003, the trial judge granted the 30-day stage order confirming the grounds and continuing the access, but the order was no longer on a without prejudice basis. The interim order also provided:

> Evidence from Proceedings, pursuant to the **Children and Family Services Act**, or any similar legislation, respecting the child that is the subject of this hearing, or respecting another child that was in the care or custody of a parent or guardian of the child that is the subject of this hearing, shall be admitted as evidence in this proceeding.

[8] On July 8, 2003, the trial judge found M.D. to be in need of protective services. By the time the disposition hearing was held on August 28 and September 23, 2003 with all parties participating, M.D., who was then 25 months old, had spent 5 and 3/4 months under Agency supervision and 6 and ½ months in the interim care and custody of the Agency.

[9] At the disposition hearing, the expert reports from the 2000 hearing which dealt with Ms. D.'s son were made part of the evidence, but were not updated. Although the trial judge had said the evidence of that earlier hearing "shall be admitted as evidence in this proceeding," the transcript of that proceeding was not filed. In his decision, the trial judge not only reviewed the evidence of the numerous witnesses in detail, he also quoted from Judge Wilson's decision relating to the apprehension of Ms. D.'s son.

[10] Several lay witnesses testified that Ms. D. was drinking during the summer of 2003. At the time of the disposition hearing for M.D., Ms. D. was involved in a new relationship with Mr. R.H. The appellant adduced evidence from several bartenders and the manager of a pub, that Ms. D. was drinking hard liquor and wine with Mr. H., usually out of a coffee mug. There was also evidence of Ms. D. being inebriated at a party and falling down as well as consuming wine at several of the witnesses' homes. It was acknowledged by Mr. H. that Ms. D. did drink wine out of a coffee mug at the pub on three or four occasions but denied she was drunk at the party, saying she fell over wires. At the time he was unaware that drinking any alcohol was not good for her. Mr. H. testified he has given up alcohol, and cares for her and the child.

[11] Ms. D. says since commencing therapy, she has gone from being a total drug addict and weak with no self-esteem to being a more assertive person who has not returned to drugs or alcohol. At the time of the disposition hearing she was on antibuse which makes her sick if she drinks. She too denied being drunk at the party where she fell. Ms. D. called a number of witnesses including three professionals involved with her ongoing support and care who all felt she had

come a long way in her recovery and attitude acknowledging that she would have "slips" from time to time.

[12] The Agency filed a plan for permanent care and custody saying it cannot offer any further services than have already been provided. The plan proposed no access by the parents as that would interfere with the long-term plan of adoption. The mother's plan was to have the child returned to her care and control under supervision with a 6 month review. The father's plan was to return the child to Ms. D. under supervision, with access to him.

[13] After citing several sections of the **Act**, the trial judge referred to various legal principles taken from the authorities dealing with protection applications which I have summarized from his decision as follows:

- The protection of the best interests and welfare of children is the top priority (**C.A.S. (Halifax) v. Fairn** (not reported) 1992, **F.H. (CSA/CAS)** (Daley, J.F.C.) citing **Re: Sarty** (1974), 15 N.S.R. (2d) 93 (T.D.) and **Children's Aid Society of Halifax v. Lake** (1987), 45 N.S.R. (2d) 361 (A.D.).

- Promotion of the integrity of the family, but only if the circumstances are adequate to protect the child (**C.A.S. (Halifax) v. Emmerson** (1991), **F.H. CFSA/CAS**, (Levy, J.F.C.) (unreported)).

- Services are provided to allow a family to remain intact while effecting acceptable change within the statutory time limits **(Nova Scotia Minister of Community Services) v. L.L.P. et al** (2002), 211 N.S.R. (2d) 47 (C.A.) (para. 25)).

- " ... The **Act** does not contemplate that the Agency shore up the family indefinitely" (**L.L.P.**, ¶25).

- As each case is different the decision for further services depends upon its particular facts and circumstances (**L.L.P.** ¶29 citing from **Nova Scotia (Minister of Community Services) v. S.Z. et al.** (1999), 179 N.S.R. (2d) 240 (Fam. Div.), aff'd. (1999), 181 N.S.R. (2d) 99 (C.A.)).

- Consider the reasonableness of the family plan (**T.B. v. Children's Aid Society of Halifax et al** (2001), 194 N.S.R. (2d) 149 (C.A.)).

[14] In his conclusion the trial judge said:

> [62] The Court has reviewed the evidence at the interim and protection hearings. A family history of dealing with the Agency and past Court proceedings resulting in a permanent care and custody order forms part of the evidence under s. 96 and has been considered.
>
> [63] Judge Wilson's conclusions in his decision dated June 12, 2000 committing the Respondent's first child into permanent care are particularly relevant where he concludes, **" because of the complex psychological profiles that lie behind their substance abuse, the Agency's position is that even if the Respondents continue to make progress over the next number of months, it will only be a matter of time before one of them slips again."**
>
> [64] He [Judge Wilson] further goes on to say that **" Their pattern is that when one slips the other is at great risk of following. They have no support network to assist in the event of a slip.**"
>
> [65] The child, [M.D.], was born to these same Respondents on August 14, 2001 and the same Agency referred to in Judge Wilson's decision concluded in it's wisdom that the child, [M.D.], should no longer be subject to a protection proceeding which they had commenced on September 17, 2001. Consequently on March 5, 2002 the Agency agreed to a dismissal subject to the Respondent - mother being granted custody under the **Maintenance and Custody Act** as between the parents with access to the Respondent - father. It was not until March 11, 2003 that apprehension took place for the reasons discussed earlier.
>
> [66] The court is mindful of the duty on the Agency and the Court to take the least intrusive method. In the face of Judge Wilson's conclusions of chronic substance abuse and complex psychological profiles the Agency concluded the child was safe with her mother from September 17, 2001 (protection proceeding commenced but child not apprehended) until apprehension on March 11, 2003. This was so given Judge Wilson's concern about slips, " with no support network to assist in the event of a slip."
>
> [67] In Minister of Community Services v. B.F. 2003, NSCA 119 the Nova Scotia Court of Appeal reminded this Court that the **Children and Family Services Act** is child centered, not parent centered. This is so even in the face of preamble to the Act as follows:

> 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;
>
> [Underlining and bold in original.]

[15] The trial judge acknowledged there had been a "slip" by Ms. D. However, he recognized she had entered into a relationship with Mr. H. who was supportive in her fight against substance abuse and was non-abusive; she was no longer in the turbulent relationship with Mr. R. The trial judge found Ms. D. had community supports in place to help with the "slips", "and consequently provide for protection of the child and her best interests". He also stated:

> [70] ... If the Agency, dedicated and responsible for the protection of children saw fit to agree to leaving the child with her mother in light of the evidence of chronic substance abuse without supports following the September 17, 2001 protection hearing why would the Court now order permanent care and custody when there are those community supports in place.
>
> . . .
>
> [73] In conclusion the Court is mindful of the paramount consideration of what is in the child's best interest. Given the progress the Respondent - mother has made and considering the **Children and Family Services Act** is child centered [M.D.]'s welfare would be better served if she were returned to her mother under friendly supervision by the Agency for a period of 12 months upon the following conditions in accordance with s. 43 (1):
>
> [Emphasis in original.]

[16] The supervision order returning M.D. to her mother, previously set out above in ¶1, was issued on January 27, 2004 following the written decision of the trial judge on January 12, 2004. The Agency appealed and also applied for a stay. The stay application was dismissed and M.D. was returned to her mother on January 29, 2004.

Fresh Evidence

[17] Both the Agency and Ms. D. made submissions regarding fresh evidence.

[18] The appellant applied to introduce four documents (which will be referred to *infra*), pursuant to s. 49(5) of the **Act** which reads:

> (5) On an appeal pursuant to this Section, the Appeal Division of the Supreme Court may in its discretion receive further evidence relating to events after the appealed order.

[19] Ms. D. submitted that the evidence of the hearing before Judge Wilson in 2000, dealing with the son of Ms. D. and Mr. R. is also fresh evidence which was not before the trial judge and therefore should not be admitted.

(i) Fresh evidence of the appellant:

[20] The appellant's application consists of four matters: 1) the affidavit of Tanya Billard, child protection worker for the appellant, sworn January 26, 2004; 2) the affidavit of Tanya Billard sworn May 18, 2004, with a letter from Dr. Albert D. Fraser, clinical and forensic toxicologist, Queen Elizabeth ll Health Sciences Centre, dated May 01, 2004 and a cumulative urine screening report of J.D. up to May 01, 2004, attached; 3) Dr. Fraser's C.V., and; 4) his letter dated June 07, 2004 answering a series of questions and comments put to him by appellant's counsel. These have all been filed by consent.

[21] The first affidavit of Ms. Billard was provided at the unsuccessful stay application brought by the appellant. It deals with matters prior to M.D. being returned to her mother and in large part, deals with the child's father, Mr. R., and Mr. H. (Ms. D.'s new partner). That affidavit is of minimal assistance on this appeal.

[22] The urine screening report attached to Ms. Billard's May 18, 2004 affidavit shows that in 41 random tests (roughly 3 times per week) from January 20 to April 19, 2004, the classification of prescription drugs called Benzodiazepine was detected on 9 occasions. At the time Ms. D. was prescribed Alprazolam which falls within that classification. Dr. Fraser's letter indicated that the testing only identifies the class of drug; it does not identify the amount or whether it was from a legitimate prescription. In effect, the material from Dr. Fraser shows the use by Ms. D. of some prescribed drugs but no alcohol, opiate, cocaine or

marijuana/hashish. The appellant acknowledges this evidence is inconclusive. I would agree with that conclusion. I am unable to determine from the urine testing whether or not Ms. D. has been complying with the condition in the trial judge's order requiring her to refrain from the use of non-prescription drugs.

[23] In her second affidavit, Ms. Billard refers to information provided to her by Ms. D. and Mr. H.; namely, that Ms. D. had used Valium, Xanax and Tylenol 1 for panic attacks and stress. The child protection worker also checked on AA attendance which Ms. D. did not start until late March. Ms. Billard spoke to Dr. Barkwell, the family doctor for Ms. D., and as of April 29, 2004, he remarked that Ms. D. and M.D. both looked well and he had no concerns.

[24] Ms. Billard's May 18, 2004 affidavit summarizes by saying,

> ... there continue to be concerns in regard to drug use and the potential risk posed to ... [M.D.] as a result ... [Ms. D.] has been very open to taking part in urinalysis there is no way to determine that prescription abuse has ceased. In fact, the pattern of test results from Bayshore gives cause for concern.

[25] As a result of medication changes for Ms. D., her doctor's directions to take as needed and Ms. Billard's inability to reach Dr. Barkwell, Ms. Billard feels she is "unable to provide effective/adequate supervision". She concludes,

> [27] Based on the foregoing, it is respectfully submitted that the $4,000.00 per month costs for random urinalysis and other conditions of supervision, with the exception of random home visits, (if mother and child are at home for an unannounced visit 26 miles from the agency) are inadequate to protect the child - leaving aside the fact that the conditions (Order) must terminate in approximately seven months.

[26] The four documents submitted by the appellant are admissible as assistance to the court. This case deals with the welfare of a child and such evidence could be relevant to the best interests of the child. (See: **Children's Aid Society of Halifax v. C.M. et al** (1996), 145 N.S.R. (2d) 161(C.A.) at ¶ 13-38.)

[27] In my opinion, the fresh evidence documents are significant more for what they do not say rather than what they say. They do not contain evidence of any harm being caused to M.D. Ms. D. has care and custody of the child under

conditions which if breached, allow the Agency to take M.D. into care forthwith and expose Ms. D. to a charge of contempt. No review application has been made by the appellant nor does it appear there is an evidentiary basis from this fresh evidence on which to make such an application.

(ii) Whether evidence of 2000 disposition hearing for a different child is admissible:

[28] As referred to in ¶ 7 above, the April, 2003, interim order stated "Evidence from Proceedings ... respecting another child that was in the care and custody of a parent or guardian of the child that is the subject of this hearing, shall be admitted as evidence in this proceeding." Ms. D. submits that all the evidence from the 2000 case dealing with the male child which was filed on this appeal is also fresh evidence and should not be admitted since it was not before the trial judge.

[29] In his decision dated January 12, 2004, the trial judge stated:

> The Court has allowed evidence of previous proceedings conducted pursuant to this Act (Section 96 (1) (a)).

What he had before him from that proceeding were Judge Wilson's decision and various affidavits and reports from the earlier case which had not been updated. He did not have the transcript of the hearing before Judge Wilson, having clearly rejected Mr. R.'s request to be provided with a copy. Even without a transcribed copy, the Agency, throughout the disposition hearing, referred extensively to the earlier evidence.

[30] The trial judge relied on Judge Wilson's decision and some paper exhibits. He quoted extensively from that decision which contained considerable background information about Ms. D. and Mr. R. The transcript of the hearing before Judge Wilson cannot be admitted under the general authority of s. 49(5) of the **Act** as it is not evidence subsequent to the disposition hearing. Also, it does not meet the test of fresh evidence as set out in **R. v. Palmer**, [1980] 1 S.C.R. 759, as it would fail the first requirement, namely, that the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial (**Palmer**, ¶ 24).

[31] The evidence is admissible as assistance to the Court in determining the best interests of the child (see **C.M., supra**). Throughout the hearing, there was extensive reference to the earlier evidence by the appellant without any objection by the respondent. In my opinion, the filing of the actual evidence as part of the appeal was permissible. I shall deal with the use of this evidence more fully under the issues.

Standard of Review

[32] To set aside the decision in a child protection case, the Court of Appeal would have to find that the trial judge made an error in law or a material error, a serious misapprehension of the evidence or a palpable and overriding error in his appreciation of the evidence. (**Minister of Community Services v. B.F.** [2003] N.S.J. No. 405 (N.S.C.A.) leave to appeal denied February 26, 2004 (SCC #30075) ¶ 44-45 and cases there cited.) If the appeal court finds there is an error of law then the court may review the trial evidence "to determine if the trial judge ignored or misdirected himself with respect to relevant evidence." (**Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, ¶ 15.) If the Court of Appeal admits new evidence under s. 49(5) of the **Act**, then this standard of review may be adjusted. It is unnecessary to consider such an adjustment in this case because, as will be discussed, the new evidence does not affect the disposition of this appeal.

Grounds of Appeal

[33] Initially, the appellant raised nine grounds of appeal. It has withdrawn three grounds. The remaining grounds are as follows:

> [1] That the learned trial judge failed to consider all the evidence before the Court, failed to weigh the evidence that was considered and failed to make findings of fact;
>
> [2] Where the learned trial judge did make findings of fact, such are inconsistent with the preponderance of evidence and as a consequence the proper law could not be applied;
>
> [3] The learned trial judge fails to apply the proper test under the Children and Family Services Act, s. 2(2) in the second half of paragraph 70 at page 35 of the disposition decision and elsewhere, and is oblivious to, ignores or fails to weigh germane evidence on point, to an extent that the proper law could not be applied;

> [4] The learned trial judge erred in failing to apply Children and Family Services Act, s. 2(2) in view of the evidence presented at trial;
>
> [5] The learned trial judge erred in his interpretation of the obligation on the Agency with reference to the Court of Appeal decision sited (sic) in paragraph 68 on page 34 of the disposition decision;
>
> [6] That the learned trial judge erred at paragraph 68 of page 34 in considering the portion of the preamble to the Children and Family Services Act, cited as mandatory, where it is advisory and in any case, there existed no evidence on the record that the Appellant Agency had or would fail to act in accordance with the part of the preamble cited. The contrary will be evident from the transcript;

[34] I propose to combine grounds one and two, three and four and five and six together.

Ground [1]: That the learned trial judge failed to consider all the evidence before the Court, failed to weigh the evidence that was considered and failed to make findings of fact;

Ground [2]: Where the learned trial judge did make findings of fact, such are inconsistent with the preponderance of evidence and as a consequence the proper law could not be applied;

[35] When the appellant submits that the trial judge failed to consider all the evidence, it is essentially referring to the evidence of the earlier hearing of the apprehension of Ms. D.'s first child in 2000.

[36] The trial judge made it very clear during one of the hearings that he was not ordering transcripts of that earlier hearing. It was equally clear that he had read Judge Wilson's decision and the various earlier reports filed as exhibits in the current hearing.

[37] The earlier hearing was held in May 2000. The disposition hearing dealing with M.D. was held in August, September and October of 2003, over three years after the earlier hearing. The reports were not updated to 2003. The evidence from the 2000 hearing, which I have read in full, contains both positive and negative evidence relating to Ms. D. The 2003 evidence involved different witnesses, again,

some positive and some negative. The effect of the evidence contained in the four documents forming the subject of the Agency's application for fresh evidence and admitted into evidence is, in my opinion, neutral.

[38] In my opinion, the trial judge considered what was necessary of the previous trial, namely, the decision of Judge Wilson from which he quoted extensively. That decision included the reasons for the apprehension of the first child and the background of Ms. D. and Mr. R., as well as reference to the expert reports. The trial judge also reviewed the earlier hearings relating to M.D. and in his decision, he detailed the evidence of every witness who testified at the disposition hearing. He found that circumstances for Ms. D. had changed - she was in a new and supportive relationship, she had community support and although she had some "slips", those were not enough, in his opinion, to take M.D. away from Ms. D. on a permanent basis.

[39] Although it would have been preferable for the trial judge to make specific findings of fact after he recited the evidence in great detail, in this case, he obviously drew his conclusions from the facts he recited. In particular, I refer to the passages cited previously in ¶14, *supra*, leading up to his statement that in spite of Judge Wilson's conclusions of "chronic substance abuse and complex psychological profiles, the Agency concluded the child (M.D.) was safe with her mother from September 17, 2001 ... until apprehension on March 11, 2003." He then went on to state:

> [69] It is clear there has been a "slip" so-called. There is a very turbulent consequence when the Respondent parents are together. This is no longer the case. The Respondent - mother is with a non-abusive man who is prepared to support her in the fight against substance abuse. ... It is very apparent that at the beginning of their relationship he was unaware of the potential problem of taking her to a tavern and promoting her use of alcohol. She cannot be a user of alcohol or drugs.
>
> [70] Expert evidence given at trial indicates that part of the recovery process concludes that there will be slips. What is different now than when the Agency agreed to the protection application being dismissed is that there are community supports to help with "slips" and consequently provide for protection of the child and her best interests . If the Agency, dedicated and responsible for the protection of children saw fit to agree to leaving the child with her mother in light of the evidence of chronic substance abuse without supports following the September

> 17, 2001 protection hearing why would the Court now order permanent care and custody when there are those community supports in place .

[40] In my opinion, in these paragraphs and statements, the trial judge makes findings which are not inconsistent with the preponderance of the evidence. It must be remembered that Judge Wilson made findings on the facts he heard. Chief Judge Comeau referred to those facts and had he tried to change the earlier findings, he might have been in error. He had three days of hearings on current facts and although he knew the earlier background, he decided that certain material facts had changed since Judge Wilson's decision and he came to his own conclusion.

[41] I am unable to find that by not having read the 2000 transcript, the trial judge failed to consider all the evidence. Judge Wilson's decision, the exhibits and the references to the earlier trial by the Agency provided the necessary information to him.

[42] In my opinion these findings do not exhibit a material error of fact, a serious misapprehension of the evidence, nor a palpable and overriding error in his appreciation of the evidence which would lead me to reverse his findings.

[43] I would find he applied the proper law and, therefore, I would dismiss grounds one and two.

Ground [3]: The learned trial judge fails to apply the proper test under the Children and Family Services Act, s. 2(2) in the second half of paragraph 70 at page 35 of the disposition decision and elsewhere, and is oblivious to, ignores or fails to weigh germane evidence on point, to an extent that the proper law could not be applied;

Ground [4]: The learned trial judge erred in failing to apply Children and Family Services Act, s. 2(2) in view of the evidence presented at trial;

[44] Paragraph 70 of the trial judge's decision is cited in ¶ 39, *supra*. Section 2(2) of the **Act** says "... the paramount consideration is the best interests of the child."

[45] The appellant would have the court rely on and make findings from witnesses who testified in the 2000 trial; however, the trial judge found that the circumstances of Ms. D. had changed. I do not disagree with the view that Ms. D. had supports and resources available to her in 2000, both by the Agency and from the community. Acknowledging that she did not use or rely on those supports in the past, there was now evidence that along with the conditions set out by the trial judge, Ms. D. has regular community supports, including Ms. Morrison, her addiction counsellor, Dr. Macklin, a marriage and family therapist who she speaks with and sees from time to time, and Doctor Barkwell, the family doctor for Ms. D. and M.D. In addition, there are urine tests, visits by the Agency and attending AA meetings.

[46] The appellant suggests the evidence of Ms. Morrison, Dr. Macklin and Dr. Barkwell is based on self-reporting by Ms. D. and that her own evidence about not drinking was at odds with other evidence from independent witnesses. Although that may be the case, the trial judge found that there had been changes in Ms. D.'s life — she was no longer in an abusive relationship, she had and was using community supports. He imposed conditions and the fresh evidence does not indicate any breach of those conditions, nor would the court expect that the Agency would ignore any breaches of the conditions if they had occurred since January.

[47] The current evidence leads me to conclude that the trial judge did apply the proper test to the evidence. He stated in ¶ 73 (see ¶ 15, supra) that the paramount consideration is the best interests of the child. He considered that Ms. D. could have 'slips' but that the child's best interest was to place her with her mother for 12 months under stringent conditions.

[48] It is not for this court to retry this case. We are at a disadvantage in not having seen and heard the witnesses. I am unable to find a misapprehension of the evidence.

[49] I would dismiss these grounds of appeal.

Ground [5]: The learned trial judge erred in his interpretation of the obligation on the Agency with reference to the Court of Appeal decision sited (sic) in paragraph 68 on page 34 of the disposition decision;

Ground [6]: That the learned trial judge erred at paragraph 68 of page 34 in considering the portion of the preamble to the Children and Family Services Act, cited as mandatory, where it is advisory and in any case, there existed no evidence on the record that the Appellant Agency had or would fail to act in accordance with the part of the preamble cited. The contrary will be evident from the transcript;

[50] The trial judge referred to **B.F.,** *supra*, where he stated:

> [68] The Nova Scotia Court of Appeal (Fichaud, J.A.) in **B.F. supra** also admonishes this court for pointing out that any Agency plan that included a reference to its long term plan for adoption without specifics as being incomplete. With respect, Agencies should be able to give the court a general accounting of whether it would be a placement with a relative or out of the local community. Also whether adoption would take a long time. Such evidence is necessary in light of a further preamble set out in the **Children and Family Services Act**:
>
> > AND WHEREAS when it is necessary to remove children from the care and supervision of their parents or guardians, they should be provided for, as nearly as possible, as if they were under the care and protection of wise and conscientious parents;

[51] Section 41(3) of the **Act** states:

> 41 (3) The court shall before making a disposition order, obtain and consider a plan for the child's care, prepared in writing by the agency ...
>
> ...
>
> > (e) where the agency proposes to remove the child permanently from the care or custody of the parent or guardian, a description of the arrangements made or being made for the childs long-term stable placement.
>
> (Emphasis added)

[52] A refusal to consider an agency plan which contains the information required by s. 41(3) is an error in law. On the other hand, as noted in **B.F.**, when the trial judge does consider the plan, it is for the trial judge to assess whether the plan's vagueness or specificity affect the weight to be accorded to the agency plan.

The appeal court is to defer to that assessment within the limits of the standard of review.

[53] The trial judge stated that certain information was "necessary" in the Plan because of the preamble of the **Act**. He did not refer to s. 41(3) or to the actual wording of the written agency plan; he did not express in his decision whether, in his view, the agency plan failed to provide the information which he found to be necessary; and he did not state whether or not he declined to consider the agency plan because of this perceived deficiency. The remainder of the trial judge's reasons omit any reference to the agency plan.

[54] In many cases, at the time of the disposition hearing it is impossible to know the specifics of the future adoption. In those circumstances, the agency's written plan to the court should give the particulars of which the agency is aware and which the agency may reasonably predict. The written agency plan in this case satisfies this standard.

[55] Although the trial judge's treatment of the agency plan is not entirely clear from his reasons, it appears that he declined to consider the plan in his analysis. This is not a question of weighing the evidence. This is an error of law.

[56] Unlike the decision in **B.F.**, in my opinion, in this case, the error in law does not affect the outcome.

[57] Having found an error of law, it is necessary to review the Agency Plan as required by s. 41(3). In doing so I have also reviewed all the evidence, including the evidence from the trial in 2000. The Agency Plan proposes the permanent care and custody of M.D. and to place her for adoption. As this is a viable option given the history of the parents, I have given it serious consideration. However, on balance and after considering the findings of the trial judge, in my opinion, his disposition, including his conditions, are in the best interests of M.D. They are better than the Agency proposal for the reasons already stated and summarized as follows:

> (1) J.D. appears to have made significant changes to her lifestyle and, if J.D. persists with this course, the potential for a constructive mother-daughter relationship is in M.D.'s best interests. J.D. appears to have connected with community supports of which she did not

> avail herself before. If J.D. learns to control her substance abuse, then the trial judge could reasonably conclude that the salvaged or regenerated relationship with M.D.'s natural mother is in M.D.'s best interests and better than an adoption.
>
> (2) Based on the trial judge's findings and the evidence since the Order, there appears to be a realistic, though by no means certain, chance that J.D. may achieve the goals set by the conditions of the Order. This differs from **B.F.**, where this court described the conditions as "wishful thoughts" which had little support in the trial judge's findings.
>
> (3) The conditions of the trial judge's order limit M.D.'s contact with her father in a manner which should minimize the impact of his inappropriate behaviour.
>
> (4) Failure to observe the conditions would trigger Agency intervention and a court review to reconsider the appropriate disposition of M.D.'s best interests.

[58] I would dismiss these grounds of the appeal.

Conclusion:

[59] In conclusion, I would dismiss the appeal.

Glube, C.J.N.S.

Concurred in:

Oland, J.A.

Fichaud, J.A.