NOVA SCOTIA COURT OF APPEAL

Citation: ***Children's Aid Society and Family Services of Colchester County v. E.Z.***, 2007 NSCA 99

Date: 20071017
Docket: CA No. 280192
Registry: Halifax

Between:

The Children's Aid Society and Family Services of Colchester County

Appellant

v.

E.Z. and J.M.

Respondent

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

Revised Decision: The text of this decision has been revised according to the erratum dated October 18, 2007

Judges: MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A.

Appeal Heard: September 11, 2007, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.

Counsel: S. Raymond Morse, Q.C. and Paul Morris, for the appellant
Andrew Pavey, for the respondent E.Z.
respondent, J.M. 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] In finding three siblings in need of protection and ordering them into the permanent care of the Children's Aid Society and Family Services of Colchester County (the "Agency"), Hubley, J.F.C., directed continuing access by their mother. The Agency appeals, saying the judge erred in ordering access.

BACKGROUND

[2] The current protection application was commenced a little over two years ago (July 2005) in relation to three children, who are now ages 10, 8 and 5 years old. The Agency's principal concern at that time was the physical and emotional safety of the children arising from the alleged neglect by their mother, E.Z., and father, J.M. Both E.Z. and J.M. were represented by counsel at trial. J.M. is not participating in this appeal.

[3] E.Z. had a history of involvement with child welfare agencies dating back to 1993. At that time the concern was in relation to E.Z.'s interaction with two and one half year old R.P., who was E.Z.'s child with a different father. E.Z. and that child's father were separated with the father having custody and E.Z. exercising access. It is unnecessary to elaborate on the details of the Agency's dealings with E.Z. in relation to R.P.

[4] Since that time, Agency records chronicle ongoing contact between E.Z., her new partner J.M. and the Agency. Visits by Agency workers revealed the couple and their first baby (Y.M., who is one of the children ordered into permanent care) living in filthy conditions. There were multiple, ongoing allegations that J.M. was physically abusing the child and was physically and emotionally abusive of E.Z. Agency involvement continued through 2003 by which time E.Z. and J.M. had three children. Their domestic relationship was violent and chaotic, their living arrangements continually in flux and community referrals expressing concern about the welfare of the children kept the Agency involved. Interviewed while staying at a transition house with their mother in 2003, the older children reported violence both between their parents and directed at the children.

[5] These events culminated in a protection application in 2003. Matters proceeded on consent with the children in temporary care while services were provided to the parents and parental assessments completed. In an assessment report in July of 2003 it was recommended that E.Z.'s access with the children be

supervised until it could be demonstrated that she was learning and applying basic parenting skills. The assessment report in November of that year recommended that the supervision of access continue. Reports filed between November 2003 and October 2004 reveal that E.Z. was unable to acquire the necessary parenting skills largely due to her unwillingness to cooperate with the family support worker assigned to assist her. Notwithstanding those reports, in October 2004, the court ordered that the children be returned to E.Z.'s day-to-day care under the supervision of the Agency. J.M. and E.Z. were no longer together and J.M.'s access to the children was by supervision only.

[6] That protection application was discontinued in March 2005 when the time lines expired. In the following months the Agency's contact with the family continued. Concerns included sexualized behaviour by the two older children with each other as well as with other children; out of control behaviour by the children; and physical discipline by E.Z. The family home was filthy and in disarray. There were clear fire hazards within the home as well as unsafe conditions.

[7] Concluding that conditions had again deteriorated to an unacceptable level this protection proceeding was commenced. An interim supervision order was granted on the initial hearing (July 14, 2005) with the children remaining in E.Z.'s care but subject to a number of conditions including the completion of an updated parental assessment.

[8] J.M. had had limited contact with the children since the termination of the previous proceeding. E.Z. and J.M. were engaged in a private custody dispute.

[9] On September 1, 2005 the children were again taken into the Agency's care. The supporting Affidavit outlined significant concerns with respect to the condition of the home, lack of supervision, the use of physical discipline as well as abuse and chronic neglect. Access by E.Z. was on a supervised basis. The Agency facilitated therapy for the three children to assist them in dealing with the effects of their chaotic and risk-filled lifestyle. In a report dated December 23, 2005, Dr. Jolaine States recommended that the children be placed in a structured environment, that the youngest be placed separately from the two older children in hopes of limiting imitative negative behaviour and that all three children continue in counselling. At the December disposition hearing, the temporary care order was continued on the consent of E.Z. J.M. advised of his intent to withdraw from any further participation in the proceedings.

[10] A March 23, 2006 parental capacity assessment by Dr. Susan Hastey recommended permanent care with a follow-up letter recommending that there be no ongoing access by E.Z. As to E.Z.'s parenting ability, Dr. Hastey made the following observations: E.Z. denied problems existed with the children; she was unable to set or maintain appropriate limits as a result of which the children lacked a constant or predictable home environment; E.Z. is defensive, lacking any insight into the root of the children's dysfunctional behaviour - for which she lays blame on the children; all foster parents and professionals working with the children view their behaviour as extremely dysfunctional and anti-social; the dynamics between each child and E.Z. indicate an extremely anxious attachment indicative of an extreme level of past parenting inconsistency; E.Z.'s communication with the children is ineffective and she is unable to set limits, even in an access environment; any small progress E.Z. had made in her parenting practices during access could not be maintained as E.Z. failed to acknowledge deficits in her own parenting skills and was not committed to change.

[11] The children were ordered into the permanent care of the Agency with access to E.Z.

STANDARD OF REVIEW

[12] An appeal is not a retrial where the appellate court can substitute its own exercise of discretion for that of the trial judge (**Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58, 232 N.S.R. (2d) 121 (C.A.) at para. 26). A trial judge's decision on a child protection matter may be set aside on appeal only if the trial judge erred in legal principle or has made a palpable and overriding error in his/her appreciation of the evidence (**Family and Children's Services of Kings County v. B.D.**, (1999), 177 N.S.R. (2d) 169; [1999] N.S.J. No. 220 (Q.L.) (C.A.) at 175; **Nova Scotia (Minister of Community Services) v. C.(B.) T. and F.Y.** , 2002 NSCA 101, 207 N.S.R. (2d) 109 (C.A.), at 111, **Nova Scotia (Minister of Community Services) v. B.F.**, 2003 NSCA 119, 219 N.S.R. (2d) 41 (C.A.) at para. 44).

GROUNDS OF APPEAL

[13] The Agency says, in ordering access, the judge erred in legal principle and made a palpable and overriding error in his appreciation of the evidence.

ANALYSIS

[14] The trial took place over fifteen days in June, July and September 2006. Counsels' submissions were completed on November 7, 2006, with the judge reserving his decision. On April 16, 2007 the judge delivered his oral reasons for judgment (unreported). At the outset of his reasons the judge commented that, although J.M. had declined to participate in the final hearing, he had indicated his intention to be present for the decision. The judge had concluded that with J.M. present he would be unable to deliver a lengthy oral judgment without J.M. becoming disruptive. As it turned out, J.M. did not appear on decision day. The judge said:

> ... In view of my expectation that he would be here (and in fact he may show up at any time), <u>I therefore decided to place my decision on the record in short form this morning</u>, reserving the right to file or place on the record, written or oral reasons at a subsequent date if I determine that it is necessary to do so.
>
> (Emphasis by trial judge)

[15] The judge did not subsequently deliver additional or expanded reasons, and accordingly, in addressing the issues on appeal, we have resorted to his oral remarks, aware that they are not as fulsome as might ordinarily be the case.

[16] Section 42(4) of the **Children and Family Services Act**, S.N.S. 1990, c. 5 as am. (the "**Act**") provides that a permanent care order may only be made where the judge concludes that ". . . the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits . . ." set out in the **Act** (see **Nova Scotia (Minister of Community Services) v. L.L.P.**, 2003 NSCA 1, 211 N.S.R. 92d) 47 at paras. 17 to 19). The judge found that the Agency had met the burden upon it and that a permanent care order was in the best interests of the children. The evidence overwhelmingly supported permanent care. That conclusion is not in dispute here. The judge ordered that the mother should continue to have access with the children. It is this determination that is on appeal.

[17] The **Act** sets out the circumstances in which access may be granted in conjunction with permanent care:

47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.

(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that

(a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;

(b) the child is at least twelve years of age and wishes to maintain contact with that person;

(c) the child has been or will be placed with a person who does not wish to adopt the child; or

(d) some other special circumstance justifies making an order for access.

(3) Any access ordered pursuant to subsection (2) may be varied or terminated in accordance with Section 48.

. . .

(Emphasis added)

[18] This is an issue upon which a high level of deference is accorded the trial judge. In **Children's Aid Society of Cape Breton (Victoria) v. A.M.**, **supra**, Cromwell, J.A. wrote for this Court:

[36] These submissions must be considered in light of three important legal principles. First, I would note that once permanent care was ordered, the burden was on the appellant to show that an order for access should be made: s. 47(2): **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, [1998] 2 S.C.R. 534 at para. 44 and authorities cited therein. Second, I would observe that, as Gonthier, J. said in **L.M.** at para. 50, the decision as to whether or not to grant access is a "... delicate exercise which requires that the judge weigh the various components of the best interests of the child." It is, therefore, a matter on which considerable deference is owed to the judge of first instance for the reasons I have set out earlier. I would note finally that, in considering whether the

appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access.

[19] As the trial judgment is unreported I will set out the judge's reasons at some length. He said:

> Now dealing with the issue of access, the Court has given the matter of access a great deal of thought. The Court finds that there are special circumstances that do exist here, and the question is 'has the burden on the mother in this case been met', so that access should be provided by the Court? In considering the arguments before me, the Court has particularly considered the age of the children, and again I refer to ten, eight and five at the present time. Secondly, the Court has considered the needs of the children. Thirdly, the Court has considered the personality and other personal characteristics of the mother as demonstrated in the evidence which she and others have given. Fourthly, the Court has considered and finds that a mother is 'a loved parent' by relatively young but street wise children, particularly in the case of the older two children. The mother in this case is a strong minded, determined, perhaps single minded, courageous mother (the Court so finds). She has had limited mentoring with respect to her own bringing up. She has not, as many people in our society have done, turned to the normal vices when she has been faced with stressful situations. She has not involved herself in drugs, alcohol, gambling or severe acting out behaviour. She has coping skills which are admirable. She has demonstrated perseverance in difficult times and she has, to her best ability, nurtured the children with herself having had inadequate role models (prior to services being offered by the Agency). As mentioned, she has accomplished much without reliance on vices which are often so common in our society. The children, as a result of a long history of matters which are set forth in the evidence, do at this time have special needs and the appropriate attendance to these special needs are beyond the mother's ability at this point in time.
>
> The Court finds that the experts and others called by the Agency to give evidence with respect to whether or not there should be access in this circumstance, did give evidence indicating there should be no access. The Court has given full consideration to that evidence. That evidence supported "no access" for the "usual reasons" (my italics) which include that children need a stable home environment without fear of physical harm, where they can be stimulated, where they can form strong bonds and be part of a loving family and anything that interrupts with that, particularly dealing with young children should be avoided as it is in the young children's best interests to form those strong bonds with third parties, normally by way of adoption.
>
> As previously stated, every case must be decided on its own facts and this Court again goes back to looking at these children and the ages of these children. These

are not young infant children. They are ten, eight and five. They also have been affected by each other – they have relationships with each other.

The Court finds that there is credible evidence before me, that the older children have blamed themself and each other for being taken into care. I was particularly disturbed by that evidence, but it is understandable. Looking at text authority "see *Intervention for Children of Divorce, Custody, Access and Psychotherapy* (2nd ed.) by Dr. William Hodges. Dr. Hodges deals extensively with how children perceive matters from time to time, often blaming themselves when they should not do so. I find that the evidence before me did not deal adequately with this reality, namely, the fact that I find the children have blamed themselves and each other for their being taken into care. It is one of the findings of this Court that the children's best interests dictate that these children should not, to the extent that it is possible, be burdened this way. The best way to deal with this reality and to give the children reassurance, if and when necessary, the Court so finds is through emotionally healthy access with each other and with their mother (not necessarily at the same time). What I mean by that is, the mother doesn't necessarily have to meet with all three children at the same time. The purpose of this access and I want to make this perfectly clear in the Court's opinion is not to encourage the re integration of the family unit, or re establish the family unit. Having said that, considering the parenting needs of these children and the parenting skills of the mother, the children and the mother must come to understand and accept that the mother does not have the parenting skills to adequately parent the children. This does not mean that the mother is not capable of being a positive influence in the lives of these children. As the children grow, they will be asking deeper questions, they will be curious and they will be willing to face challenges, but it is not in a parental role that the mother will now be proceeding forward. The children's needs have overwhelmed this well-intentioned mother and the children's best interests are served by granting the permanent care as I have already mentioned. The access to which I refer must be child driven access. The access can not be allowed to interfere with the children's best interest and, as mentioned, the children must have stable, secure environment without fear or physical harm (not that mother would be physically harmful to them) without fear of physical harm from any sort, without fear of emotional harm, in an environment where their special needs can be attended to, where they can be cared for on an individual basis, and where they can be part of a lovely home and family. Unless access can be carried out in and **promote** this type of environment, the access, of course, can be reviewed (and terminated if necessary) by the Court at some future date.

[E.Z.] will need to seriously reflect on this decision and accept that she must adjust to child driven access (as opposed to access for the purpose of family re-integration at some future date). The access granted today cannot be allowed to be problematic for these children [See: Intervention for Children of Divorce, Custody, Access and Psychotherapy (2nd ed.) at pages 186-195 where Dr.

William Hodges deals with applications to terminate access.] A timely application to the Court to vary, terminate or place conditions on the nature of access may be necessary at some future date.

It is further noteworthy that Judge Wilson, referring to recent amendments to the Act, stated in his decision, "There is an attempt now to enter into access agreements from time to time and that is another option which can be looked at". This too may be an option the Agency may consider in the future.

In arriving at this decision, the Court finds that there is no question that the mother is a loved parent (particularly by the two oldest children) and there is ongoing access and communication between all three children. The age and circumstance of these particular children at this time in their lives is clearly distinguishable from a situation where the children may be all under three or very young children, who for the reasons argued by the Agency, it may be in their best interest not to have access. That is not the case on the facts before me. The Court has found that in the eyes of these two older children the mother is a loved parent, there is guilt, grief, anger and loss associated with their separation from their mother and that grief, anger, guilt and loss must not be allowed to interfere with the children's ability to form and maintain healthy attachments with each other and other persons. <u>Their ability to receive the positive influences which this Court finds the mother can contribute to them from time to time is in the best interests of all three children</u>. In order to best ensure this, the Court will order, as costs to take into care, counselling to provide assistance and guidance to and for the children with respect to all matters, but also in particular with respect to the access. Such counselling shall also provide access guidelines (and "instructions" if necessary) to the mother with respect to access. Once she has had the opportunity to understand, appreciate and discuss with her legal Counsel (and other persons if she so decides) the nature of this decision; she too can put her mind with the help of those guidelines and instructions and Counsel to how access can best be carried out, not with the eventual goal of family unification, but so that the children can learn to know her, can understand that they should not be blaming themselves or each other for what has happened. They can learn from her with respect to her commendable coping skills, qualities of perseverance and other qualities which hopefully can be a good effect on their lives as they face challenges, as I mentioned, when they are asking deeper questions and are curious. With respect to the nature of the "counselling" (i.e. determination of appropriate child-centered access guidelines). <u>I believe that there should be at least semi-annual assessments involving the children, the Agency and their care-givers</u>. There should be an assessment perhaps done before, prior to June 30 or thereabout as to how access is going. <u>We know (from this decision) the future focus of this child centered access and the need for the mother to rise above her own feelings and put her children's best interests first</u>. There perhaps can be some recommendations available immediately, but I would say depending on the availability of a qualified person between say between June 30 but not later than

> September 30, somewhere in there, there be an assessment with respect to how it's going from the children's perspective and then perhaps from that assessment, guidelines being provided to the mother so she can be directed with respect to the access. There may be different guidelines for each of the children depending on their circumstances. We have a range of five years here in their age. The Court is informed that the children have access between themselves from time to time and this decision is dealing with the issue of access between the mother and the children. The semi-annual assessments should continue for approximately a period up to maximum three years or as otherwise ordered by the Court. The Agency retains its usual discretion to arrange access consistent with the children's best interests while complying with this decision or as otherwise directed by the Court.

(Emphasis added)

[20] Drs. Susan Hastey and Jolaine States testified on behalf of the Agency. Both supported an order for permanent care and opposed access.

[21] Dr. States provided opinion evidence, qualified as a clinical psychologist with expertise in the area of psychological assessments, parenting capacity evaluations, psychological assessments for children and also with respect to counselling and therapy services for adults and children. She had completed a Parenting Capacity Assessment in relation to E.Z. as well as a Children's Needs Assessment. She was involved with the family from 2003 to 2005.

[22] Dr. Susan Hastey, who had also testified at an interim hearing in this matter, was qualified to give opinion evidence as a consultant specializing in parenting capacity psychological assessments. She had prepared an interim Parenting Capacity Assessment in relation to E.Z., dated November 17, 2005 and a final assessment dated March 23, 2006.

[23] Each expert provided a written report and testified at the final hearing. Each spoke against ongoing access and were cross-examined in some detail on this issue.

[24] It is helpful at this point to outline the access history. The children had been taken into Agency care on May 16, 2003 in the prior child welfare proceeding. They remained in Agency care for about 16 months until their return to E.Z. in October 2004 under a supervision order. That supervision order was in effect until the time limits on that proceeding expired in March of 2005. The children were again taken into Agency care on September 1, 2005 where they continued to be at the time of this hearing.

[25] Throughout this proceeding, the court ordered that E.Z.'s access with the children be supervised to protect them from further harm. This was in response to the dramatic deficits in E.Z.'s parenting skills which had resulted in the chronic neglect of the children and had had significant repercussions on their emotional development.

[26] Both expert assessors testified that E.Z. had made minimal progress in developing parenting skills since the Agency's involvement in 2003. This, despite the provision of significant remedial services by the Agency. Key impediments to progress identified by the assessors were the mother's inability or unwillingness to acknowledge the extreme difficulties in the children's behaviour; her blaming of others for the children's circumstances; her emotional distance from the children; her inability to show affection; and her opposition to Agency intervention.

[27] As a result of the emotional neglect experienced over their lifetimes, the children exhibited a high level of hostility to their mother during access visits, characterized by verbal and physical aggression. Dr. Hastey testified that the interaction between E.Z. and the children during access ranked in the top 90th percentile of dysfunction she had observed in her fourteen years of doing assessments. Dr. Hastey opined that it was highly significant that E.Z. did not view the children's behaviour as dysfunctional nor did E.Z. believe she had any difficulty in managing the children. She had a *laissez-fair* parenting style and was unwilling or unable to respond to the children's emotional needs.

[28] Dr. Hastey identified the children's attachment to their mother as "extremely anxious" or "anxious/negative". She testified that this attachment pattern occurs when a child has had so little consistency and predictability in their early relationship with their primary caregiver that they develop difficulty in responding to requests or cooperating with, not only that caregiver, but any authority figure. Such children also tend to have problems interacting with their siblings, as was the case here. These children, she testified, have an uncommonly high level of hostility toward their mother even though she has been the primary attachment figure. Given the level of chaos that has surrounded their interaction with their mother, the children have been unable to bond with each other. Because their own social and emotional needs are so infrequently met they can't reach out to other children, even their own siblings.

[29] Dr. Hastey noted that although E.Z. had made some parenting progress over the years of intervention, it really amounted to "baby steps". Even when the two youngest children were separated from the oldest for access visits, dysfunction prevailed. As described, in part by Dr. Hastey:

> . . . And so in general, a lot of miscuing on the part of the parent, a lot of escalation in anxiety and subsequently, hostility on the part of the two girls, and an inability on the part of [E.Z.] to take direction from an outside person who's there to assist her.

[30] When asked by E.Z.'s counsel whether she was concerned that her recommendation that access cease would have a negative effect on the children, Dr. Hastey responded that it was a concern in every case, however, it would take years to fully address the dysfunction between E.Z. and the children, if at all. Nor could the significant parenting deficits be remedied through access visits alone - much more frequent and intensive intervention would be necessary. It was her concern that in the intervening period access would inhibit the children from forming attachment relationships with other care giving figures and impede those caregivers from addressing the children's substantial behavioural issues.

[31] Dr. States' evidence as to E.Z.'s parenting deficiencies, attitude toward intervention and the impact of chronic neglect on the children was to similar effect. It too was her opinion that the children have an "anxious" attachment to their mother. An anxious attachment, Dr. States described, is a "dysfunctional" one. Neither had she seen an appreciable level of progress in E.Z.'s parenting over the three years of most recent Agency involvement, such that the children would benefit from contact. She opined that access is a source of anxiety for these children and that the quality of interaction between the children and E.Z. during visits causes their behaviour to regress. The children's anxious behaviour escalates as access visits approach. In Dr. States' opinion, "much more harm comes from the contact than good". The children, she said, should not be sacrificed so as to permit E.Z. to improve her parenting skills at a glacial pace. Access, she testified, is detrimental to the children's well-being with their developmental outcomes compromised by continued access.

[32] These concerns, as expressed by Drs. Hastey and States, were shared by other service providers. For ease of reference I repeat the judge's reference to the evidence about access:

> . . . The Court finds that the experts and others called by the Agency to give evidence with respect to whether or not there should be access in this circumstance, did give evidence indicating there should be no access. The Court has given full consideration to that evidence. That evidence supported "no access" for the "usual reasons" (my italics) which include that children need a stable home environment without fear of physical harm, where they can be stimulated, where they can form strong bonds and be part of a loving family and anything that interrupts with that, particularly dealing with young children should be avoided as it is in the young children's best interests to form those strong bonds with third parties, normally by way of adoption.
>
> (Emphasis added)

[33] It is my respectful view that in dismissing the evidence supporting a termination of access as “the usual reasons” the judge materially misapprehended the evidence. Dr. States and Dr. Hastey’s evidence was far from generic and was directed specifically at the problems these children were exhibiting.

[34] I would add, however, that the “usual reasons” as summarized by the judge - a stable home environment without fear of physical harm, where the children can be stimulated, form strong bonds and be part of a loving family - are, in themselves, important factors in assessing whether continuing access would be in the children’s best interests. These are not trivial concerns but key issues for these children who have been so emotionally compromised due to parental neglect.

[35] A judge is clearly not required to defer to the expert view on any issue - however, here the judge had obviously found the expert evidence reliable and compelling on the issue of permanent care. The concerns which supported permanent care - the longstanding neglect of the children stemming from E.Z.’s inability to parent or connect with them in an appropriate emotional context - were relevant, as well, to his decision on access. As was noted by Gonthier, J. in **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, [1998] 2 S.C.R. 534:

> 38 An order for permanent guardianship is the result of a consideration of the best interests of the child. In considering whether visiting or access rights should be granted, the judge cannot ignore the fact that he or she has first found it necessary to remove the child from the parents' care completely and permanently, so that the child's welfare will not be jeopardized any further. The judge must therefore consider whether more limited contact might still be beneficial for the child.

[36] This was not a case where the permanent care resulted from external factors such as a parent’s substance abuse or chaotic domestic partnering, which, if eliminated would permit the parent to relate appropriately with the children. The conditions giving rise to the permanent care ordered were inherent in the mother’s personality and could not be divorced from the access relationship.

[37] As is obvious, in assessing whether continued access is in the child’s best interests, evidence of what has occurred during access leading up to the permanent care order is especially relevant. As Gonthier, J. wrote in **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, **supra**:

> 52 The evidence as to how access has been exercised is particularly relevant, since it relates both to the attitude of the parent and to the effects of the visits on the child. Every parent must place his or her child's interests ahead of the parent's own. The parent's inability to do so, and the harm suffered by the child, are factors that may result in access being prohibited. This will be the case, for example, where the parent is violent, manipulative, unstable or unable to control his or her emotions. With regard to the effects of the visits on the child, signs such as sadness, anxiety, regression, the reappearance or exacerbation of behavioural problems, mood and nightmares may evidence harm. . . .

[38] Here, with respect, the judge appeared not to consider the compelling evidence that access visits were, on balance, detrimental to the children.

[39] The judge expressed concern that the children blamed themselves for their apprehension and separation from their mother. This factor was central to his conclusion that continued access would be in their best interests. He said:

> ...I find that the evidence before me did not deal adequately with this reality, namely, the fact that I find the children have blamed themselves and each other for their being taken into care. It is one of the findings of this Court that the children's best interests dictate that these children should not, to the extent that it is possible, be burdened this way. The best way to deal with this reality and to give the children reassurance, if and when necessary, the Court so finds is through emotionally healthy access with each other and with their mother (not necessarily at the same time).

[40] To address what he perceived to be a gap in the evidence on this issue the judge turned to the text **Intervention for Children of Divorce, Custody, Access and Psychotherapy** (2nd ed.) by Dr. William Hodges. Neither counsel had referred the judge to that authority. Having consulted Dr. Hodges’ work, the judge

concluded that the appropriate way to address the children's perceived emotional issues arising from their self-blame was to continue access.

[41] With respect, the judge's treatment of this aspect of the evidence is fundamentally flawed. While there was some comment in the evidence that the children blamed themselves or each other for the apprehension, it amounted to no more than an occasional reference placed in the context of the whole body of evidence. Importantly, there was no evidence that this was a significant issue for them.

[42] Nor was there evidence that continued access would alleviate the perceived self-blame or that the mother could have "emotionally healthy" access with the children. The judge appears not to have turned his mind to the evidence of continuing dysfunction during the access visits and the toll it was taking on the children as exhibited by their hostility and anxiety. The order for ongoing access was irreconcilable with the evidence that E.Z. was unwilling or unable to comply with the efforts of the access supervisors to assist her in developing more appropriate interaction with the children.

[43] The judge's resort to the **Hodges** text is not supportable here. It clearly does not fit within the test for judicial notice as set out by the Supreme Court of Canada in **R. v. Find**, [2001] 1 S.C.R. 863 at para. 48, per McLachlin C.J.:

> 48 ... Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy ...

[44] This formulation of judicial notice was originally posited by Professor E. M. Morgan in "Judicial Notice" (1943-1944), 57 Harv. L. Rev. 269.

[45] This is a strict test for judicial notice which does not apply in all cases in which a court takes judicial notice. As Binnie J. put in **R. v. Spence** [2005] 3 SCR 458:

> ¶ 60 Professor Davis' useful distinction between adjudicative facts and legislative facts is part of his larger insight, highly relevant for present purposes, that the permissible scope of judicial notice should vary according to the nature of the issue under consideration. For example, more stringent proof may be called for of facts that are close to the center of the controversy between the parties (whether social, legislative or adjudicative) as distinguished from background facts at or near the periphery.
>
> ¶ 61 To put it another way, the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria. Thus in Find, the Court's consideration of alleged juror bias arising out of the repellant nature of the offences against the accused did not relate to the issue of guilt or innocence, and was not "adjudicative" fact in that sense, but nevertheless the Court insisted on compliance with the Morgan criteria because of the centrality of the issue, which was hotly disputed, to the disposition of the appeal. While some learned commentators seek to limit the Morgan criteria to adjudicative fact (see, e.g., Paciocco and Stuesser, at p. 286; McCormick, at p. 316), I believe the Court's decision in Find takes a firmer line. I believe a review of our jurisprudence suggests that the Court will start with the Morgan criteria, whatever may be the type of "fact" that is sought to be judicially noticed. The Morgan criteria represent the gold standard and, if satisfied, the "fact" will be judicially noticed, and that is the end of the matter.
>
> ¶ 62 If the Morgan criteria are not satisfied, and the fact is "adjudicative" in nature, the fact will not be judicially recognized, and that too is the end of the matter.
>
> ¶ 63 It is when dealing with social facts and legislative facts that the Morgan criteria, while relevant, are not necessarily conclusive. There are levels of notoriety and indisputability. Some legislative "facts" are necessarily laced with supposition, prediction, presumption, perception and wishful thinking. Outside the realm of adjudicative fact, the limits of judicial notice are inevitably [page491] somewhat elastic. . . .

[46] The "facts" which the judge judicially noticed here were, for him, dispositive of the issue he had to address and therefore the strict test set out in **R. v. Find, supra** should have been applied. That test was not met. Moreover, the judge's use of the **Hodges** text without notice to the parties deprived them of any opportunity to challenge the substance of the "facts" which the judge noticed.

[47] The judge referred to the absence of evidence adequately addressing the issue of the children’s self-blame as the reason for relying upon the **Hodges** text. There was ample opportunity for the judge to raise his concerns about this issue

during the trial or in the months between final argument and the delivery of his reasons. He did not do so. The use of this extrinsic source in this manner was clear error.

[48] Finally, the **Hodges** text is not relevant to the issues before the court. The book is directed to access in the context of parental divorce, not parental access in child welfare proceedings. The preface of the book confirms that it is "designed to provide ... lawyers and judges with principles for working with children of divorce".

[49] In **Nova Scotia (Minister of Community Services) v. B.F.**, **supra**, at paras. 90 through 100, this Court addressed a similar error where the judge relied upon an extrinsic aid in substitute for expert opinion.

[50] I would find that the judge erred in his reliance on the **Hodges** text in these circumstances.

[51] In **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, **supra**, Gonthier J. addressed the principles relevant to determining parental access when children are placed in permanent care:

> 39 My consideration of whether access should be granted is based on the following principles. First, there is no inconsistency in principle between a permanent guardianship order and an access order. Second, access is the exception and not the rule. Third, the principle of preserving family ties cannot come into play in respect of granting access unless it is in the best interests of the child to do so, having regard to all the other relevant factors. Fourth, an adoption, which is in the best interests of the child, must not be hampered by the existence of a right of access. Fifth, access should not be granted if its exercise would have negative effects on the physical or psychological health of the child.

[52] Gonthier, J., reviewed the provisions for access in Canadian child welfare legislation. He noted that under the Nova Scotia **Act**, (s.47(2)) access may only be ordered in "exceptional circumstances".

[53] The preservation of family ties operates in favour of granting access only if access is in the best interests of the children. An emotional bond between the child and the parent is only to be preserved through access if it is not contrary to the other interests of the child such as security or psychological health (**New**

Brunswick (Minister of Health and Community Services) v. L.(M.), **supra**, paras. 48 - 49).

[54] Gonthier, J. acknowledges, as well, that adoption can take priority over access:

> ¶ 50 If adoption is more important than access for the welfare of the child and would be jeopardized if a right of access were exercised, access should not be granted *(New Brunswick (Minister of Health and Community Services) v. R.N.* (1997), 194 N.B.R. (2d) 204 (Q.B.)). In other words, the courts must not allow the parents to "sabotage" an adoption that would be beneficial for the child *(Re S.G.N.*, [1994] A.J. No. 946 (QL) (Prov. Ct.)). In *New Brunswick (Minister of Health and Community Services) v. D. (K.)*, [1991] N.B.J. No. 222 (QL) (Q.B.), the child was severely disabled, both physically and mentally. In view of the evidence that the mother was interfering inappropriately in the foster family's life and was thereby reducing the already slim chances of finding adoptive parents, Athey J. refused to grant access (see also: *Children's Aid Society of the District of Thunder Bay v. T.T.*, [1992] O.J. No. 2975 (QL) (Prov. Div.), and *Children's Aid Society of the Durham Region v. W. (C.)*, [1991] O.J. No. 552 (QL) (Gen. Div.)). Because of the urgent need to find the child an adoptive home, access was denied to the extent it was unduly delaying the adoption process (see: *Nova Scotia (Minister of Community Services) v. D.L.C.* (1995), 138 N.S.R. (2d) 241 (C.A.)).

[55] As previously noted, the link between adoption placement and access is included as s. 47(2)(a) of the **Act**. Repeating that section here:

> (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
>> (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
>
> . . .

[56] As others have commented, the wording of s. 47(2) cries out for legislative clarification. It suffices to say here that, at a minimum, this is statutory recognition that permanent placement of the child (which is usually, but not always, accomplished through adoption) takes precedence over access and that an access order must not be made where it will impair a child’s opportunity for permanent placement.

[57] The evidence is that the Agency plans adoption for these children, recognizing that placement of children with severe behavioural issues can be challenging. The fact that an access order would reduce the pool of available prospective adoptive parents, as was the evidence, is highly relevant when determining whether ongoing access is in the best interests of the children. Here, both experts emphasized the urgent need to find a stable home for these children as a first step in addressing the results of years of emotional neglect. Not only would ongoing access limit prospective placement options, the evidence was compelling that access was anxiety provoking for the children and caused them to revert to dysfunctional behaviours.

[58] While recognizing the high level of deference owed to the trial judge, particularly in matters of the custody of children, an appellate court is entitled to intervene where there is ". . . error in principle, a failure to consider all relevant factors, a consideration of an irrelevant factor or a lack of factual support for the judgment . . . ." (**New Brunswick (Minister of Health) v. C. (G.C.)**, [1988] 1 S.C.R. 1073, at p. 1077, per L'Heureux-Dubé, J. for the Court). Respectfully and regrettably, I would find that all of these errors are evident here.

[59] In summary, although the judge recited the proper burden of proof in his reasons, a review of the evidence reveals that he could not have concluded that ongoing access would be in the best interests of the children. There was no factual support for his key finding that the children's "blaming of each other" would be relieved through ongoing access with E.Z.; he erred in principle, in the circumstances of this case, in relying upon unspecified passages of the **Hodges** text in support of continuing access; he failed to apply the statutory factors in s. 47(2) and the guidance of the Supreme Court of Canada in **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, **supra**, to the mother's request for access; there was no evidentiary support for his conclusion that children could receive positive influences from their mother or enjoy "emotionally healthy" access with her.

[60] As this is sufficient to dispose of the appeal I find it unnecessary to address the Agency's argument that the judge erred at law in ordering continued counselling and semi-annual assessments following a permanent care order, contrary to the holding of this Court in **Nova Scotia (Minister of Community Services) v. B.F.**, **supra**.

DISPOSITION

[61] I would allow the appeal, set aside the order of Hubley, J.F.C. and order that the three children (Y.M., G.M. and G.M.) be placed in the permanent care of the Agency without access by E.Z. or J.M.

Bateman, J.A

Concurred in:
MacDonald, C.J.N.S.
Saunders, J.A.