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C.A. 152312

# NOVA SCOTIA COURT OF APPEAL

**Cite as: K.A.B.S. v. Nova Scotia (Community Services), 1999 NSCA 95**
**Freeman, Flinn and Cromwell, JJ.A.**

**BETWEEN:**

| | | |
|---|---|---|
| K. A. B. S.<br>and T. R. S.<br><br>Appellants | ) | Kenneth C. Greer<br>for the appellants |
| - and - | ) | |
| MINISTER OF COMMUNITY SERVICES<br><br>Respondent | ) | Gordon R. Kelly and<br>James Leiper<br>for the respondent |
| | ) | Appeal heard:<br>April 8, 1999 |
| | ) | Judgment delivered:<br>June 22, 1999 |

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**THE COURT:** Appeal dismissed per reasons for judgment of Flinn, J.A.; Freeman and Cromwell, JJ.A. concurring.

**FLINN J.A.:**

[1] This is an appeal from the decision and order of Judge Williams of the Family Court of Nova Scotia (as he then was), wherein Judge Williams ordered that the two children of the appellants be placed in the permanent care and custody of the Minister of Community Services pursuant to s. 42(1)(f) of the **Children & Family Services Act**, S.N.S. 1990, c. 5, as amended (the **Act**). The originating application of the agency involved the appellants' three children, C., born October *, 1989, A., born October *, 1992 and N., born February *, 1994. (**editorial note- dates removed to protect identity*) C. died during the course of these proceedings.

[2] Essentially, the trial judge's decision was based on:

1. The inability of the appellants' to parent their children, coupled with their inability to change, through counselling, notwithstanding the provision, by the respondent, of various services over several years; and there being no prospect of change; and
2. The substantial risk of harm (physical and emotional) to A. and N. if they were left in the care of the appellants.

[3] The appellants' grounds of appeal, in addition to alleging error of law by the trial judge in his treatment of the evidence, and in his failure to order access, also include submissions that the trial judge exceeded his jurisdiction with respect to certain of his findings. In view of these submissions, I will review the history of these proceedings in some detail.

[4] The hearings which culminated in the trial judge's order followed a lengthy involvement of the Department of Community Services with the appellants and their children, beginning in 1992. I will refer to that prior involvement in more detail later in these reasons; however, I note here what the trial judge said concerning that prior involvement with the agency and the appellants' family:

> .... It would be difficult to identify services that have not been made available to the S. over the past five to six years. It would be difficult to identify efforts that could have been made by the representatives of the agency that have not been made.

[5] The actual proceedings, which are the subject of this appeal, commenced on August 21st, 1997. The respondent made an application in the Family Court for an order that the children of the respondent (C., 8; A., 5; and N., 3)

> are in need of protective services under the **Children and Family Services Act**, s. 22(2), paragraphs (a), (b), (f), (g), (h), (j), (ja) and (k).

[6] I will set out these various paragraphs of s. 22(2) later in these reasons.

[7] It is clear from the application that the respondent would be seeking an order that all three children be placed in the permanent care and custody of the respondent.

[8] The documentation in support of this application is approximately two inches thick, and contains all of the material upon which the respondent relied, at a subsequent disposition review hearing.

[9] Under s. 40(1) of the **Act** the Court is required "not less than 90 days after the date of the application" to hold a protection hearing and determine whether the child is in need of protective services.

[10] On November 10th, 1997, (within the 90 day time limit), the trial judge issued a protection order, with the consent of counsel for the appellants. The trial judge ordered that the three children, who were the subject of the application:

> ..... are in need of protective services pursuant to the **Children and Family Services Act**, **s, 22(2)**, **paragraph (k)**, reserving to the Applicant, the Minister of Community Services, the right to call evidence and seek a finding with respect to the allegations in relation to **s. 22(2)**, **paragraphs (a), (b), (f), (g), (h), (i), (j) and (ja)** of the **Children and Family Services Act**, and reserving to the Respondents, K. A. B. S. and T. R. S., the right to cross-examination on the affidavit evidence and all other documents on file herein.

[11] It was ordered that the child C. remain in the temporary care and custody of the respondent. It was ordered that A. and N. remain in the care and custody of the appellants subject to supervision of the respondent on terms.

[12] Section 41(1) of the **Act** provides that where the Court finds the child is in need of protective services, the Court shall, not less than 90 days after so finding, hold a disposition hearing and make a disposition order pursuant to s. 42.

[13] On January 19th, 1998, (within the 90 day time limit) a consent disposition order was issued pending the trial of the matter to be held in March. This order is entitled "Supervision Order/Order for Temporary Care and Custody (Disposition Hearing: January 19th, 1998)". This order recites the protection order of November 10th,

1997, the application for disposition and notice of hearing, and the consent of counsel. The order provides that C. remain in the temporary care and custody of the respondent; that A. and N. remain in the care and custody of the appellants, subject to the supervision of the respondent, which terms of supervision were set out in the order; and that a review hearing would be held in March of 1998.

[14] The Court has the power under s. 42(1) of **Act**, at the conclusion of the disposition hearing, to make a supervision order. The supervision order, by virtue of s. 43(4) shall not extend beyond 12 consecutive months of supervision.

[15] Evidence was heard over five days in March, 1998. Prior to the trial judge's decision on the review hearing (May 13th, 1998) the child, C., died. On this matter the trial judge said the following:

> There is nothing before me to indicate anything but that this was of natural causes, apparently following a seizure. C. had a history of seizures. The proceeding concerning C. is obviously terminated.

[16] In his decision the trial judge said the following:

> As stated, the agency is seeking an order of permanent care and custody concerning A. and N.. The S. seek effectively a continuing supervision order. The evidence before me is extensive. It includes twelve witnesses who gave *viva voce* evidence, and the reports and affidavits of others for whom rights of examination or cross-examination were waived. It includes the family history and its involvement with the Department of Community Services since 1992. It includes the family history as it relates to involvement with a wide variety of community agencies over a period that is literally years.

[17] The trial judge then referred to the problems which the appellants had with the child, C., who was developmentally delayed and hyperactive, and who the trial

judge thought, on the evidence, would have placed significant demands on any parent. He referred to the previous interventions by the Department with respect to the appellants, and referred specifically to one involving a criminal prosecution and conviction of Mrs. S. for assault on C.. He referred to the fact that many of the other interventions were aimed at the appellants themselves, and their own individual and personal needs. He then made reference to a report and the evidence of Dr. Swaine as follows:

> ..... Dr. Swaine prepared an assessment of the S.s dated June 5th, 1997. Dr. Swaine is an experienced and respected clinician. Dr. Swaine described K. S. in his evidence (quoted from page 16 of the transcript of his evidence) as follows:
>
> > Essentially you see a disturbed individual who has great difficulty with emotions, temper problems, rigidity, depression. She puts herself down, she feels distant from other people. In relation to other parents, she experiences parenting stress at levels that are much, much higher than other people do. Even with C. out of the home, which I would have guessed resulted in decreased stress, in fact the stress was still very, very high. In relation to parents who physically abuse or assault their children, the ratings were still high enough to determine a serious risk.
> >
> > This is a woman whose background is filled with unhappiness. She says, although I don't have direct documentation, that she was physically and sexually abused in her own home. This would appear to me to have had a chronic long-term impact on her parenting skills that would appear to have quite a significant impact on her ability to tolerate frustration and manage her anger. It certainly contributes to relationship difficulties.
>
> Dr. Swaine described T. S. as follows (quoting from Page 18 and 19 of his evidence):
>
> > T. has always had difficulty learning in school. He also, on the Basic Personality Inventory, scored very, very high. Lots of difficulties with cognitive organization. By that I mean he has great difficulty understanding what is said to him, putting

> it together so that it makes sense. He is very dependent on other people to help him make decisions or to guide and direct him. Very concrete in his thinking. In relation to other parents who are stressed, he is higher than 99% of them. He is very, very high in all of that., indicating that in a practical way his knowledge of parenting, his flexibility in parenting, his competence as a parent, his understanding of child development, is very poor. Similarly the child abuse potential inventory is extremely high.

Dr. Swaine describes their joint parenting as follows:

> In relation to their joint parenting, there seems to be a difficulty. They do not work well as a couple. They do not work well as collaborative parents. K. is the lead parent. She guides and directs T. and she needs to do that because he would not be able to manage on his own. They do not turn to one another when there is a problem. They tend to turn to others, turn to outsiders, to other therapists, and this has been addressed over many, many years, and it doesn't seem to have changed very much. These results are essentially the same results that the previous assessment obtained, I think it was, in 1993, and it's consistent with the interviews that I conducted.

At page 20 (of the transcript of his evidence) he goes on:

> There is a couple whose parenting capacity is severely incapacitated by a personal relationship and emotional problems and their parenting capacity is poor. They can probably manage two children, provided these children are not under any stress and as long as the parents are not under any stress, but it would not take, in my opinion, very much stress for this situation, as happened with C., to happen again with A. and N..

[18] The trial judge then referred to what Dr. Swaine stated with respect to the children A. and N. as follows:

> ..... With respect to N. and A., Dr. Swaine stated:
>
> > I was very concerned that these two children are growing up in essentially the same psychological environment as their brother - that is that there has been virtually no change in the

> way that the kids are managed in the home and the parenting style. Essentially it's the same place as far as I could tell as it was five or six years ago. And I was very concerned that while these children are young and not presenting any demands, that they could probably be satisfactorily cared for by T. and K.. However, if there was stress, stresses such as wanting to do things their own way, having behaviour problems in school, challenging parents' authority, this frequently happens with children as they are growing up, these parents are not flexible enough, not knowledgeable enough, to know how to provide an appropriate intervention. The children may be subjected to yelling, inappropriate parenting, criticism, harsh discipline, emotional ups and downs that would make it extremely difficult for them to continue to develop at their optimal rate. I think, provided there is external structure, that there is somebody in the home on a regular basis every week, or maybe more frequently than that, that you will see that these children will do reasonably well. The problem is that without supervision, it is likely that they will continue to parent these children in exactly the same way as C. was parented - that is, they would be subjected as I mentioned before to yelling and temper outbursts and neglect and inadequate supervision. All of those things. That would mean that they would become increasingly difficult to manage and then we would have, as you referred to before, this chicken and egg escalating behavioural cycle and the children will be increasingly difficult to manage and out of control. That's likely, my guess is, that it would probably start to happen with A. within a couple of years of starting school. I saw him about eight months ago, so probably within a year or so you should be able to begin to see problems.

[19] After referring to other evidence before him, the trial judge said the following:

> ..... I am extraordinarily concerned about the S.s' circumstances, and by extension, those of A. and N..
>
> The evidence as a whole is pessimistic, yet acknowledges that the S.s' care of A. and N. may now be more of a potential problem than an immediate one. I have really little evidence that directly concerns A. and N.. Most of the evidence is related to the inadequate parenting and social skills of the S.s. I recognize that in saying that I am dancing on the head of a pin. To suggest that the evidence as it concerns parenting is somehow not evidence as it concerns A. and N. is in one sense a fiction.
>
> Since I heard evidence in this proceeding, a devastating event has occurred - C. died. I have no evidence of its effect on the S.s. I have no evidence of its effect on A. and N.. It is obvious that the event would have an impact on the view of all

> concerned, including the children, of any placement in care. I am very concerned that the S.s have either purposely or through their own limited abilities deflected counselling. I am concerned that some of the problems the S.s have are, simply put, not capable of being remediated through counselling. Their blaming of others, stonewalling with silence at times, and anger are all significant issues. I have reviewed the matter thoroughly. I am not prepared to conclude that an order of permanent care and custody with respect to the two children before me is the most appropriate order at this time. I want to emphasize the phrase "at this time". I want the benefit of more information concerning N. and A. generally and in terms of their reaction to the death of their brother. Further, while it is clear from the evidence before me that extended family were explored as a possible placement with respect to C., the evidence with respect to N. and A. is that no one came forward. I believe the Court has a positive duty to ensure that that issue is explored before considering an order of permanent care and custody.

[20] The trial judge then said:

> The S.s cannot in all likelihood parent totally on their own. I think that that is obvious. I think it is obvious that the Department of Community Services has extended virtually every reasonable service that it can to the S.s and that the result of those services has had limited effect. In large part this is due to the behaviour, of the S.s. You cannot refuse to talk at counselling sessions or storm out of case conferences and blame others for the failure of those processes. In many respects the agency has done almost all that it can.

[21] The trial judge decided that, before making a final decision in this matter, he wanted further evidence concerning the status of A. and N., he wanted a proposal from the appellants, including individual and couple counselling or psychiatric care, so that he could make some assessment as to their commitment to change; and he wanted a proposal that would indicate what support was available from the community, including the appellants' family and church, as support for the appellants and, ultimately, the children.

[22] The trial judge said the following:

> I have considered specifically the time frames available under the legislation and the ages of the children. I have considered the evidence as it is before me and particularly the evidence of Dr. Swaine. I am using some time that is available to me to secure more information concerning A. and N. and to give the S.s an

> opportunity to act rather than react. When I say "the S.s", I mean them, their extended family and community. I recognize that the S.s have some real personal limits. The reality is, though, that if they and their extended family and community are not capable of putting together care arrangements for these children that address the concerns so bluntly put by Dr. Swaine, the proceeding will inevitably result in a permanent care order.

[23] The children, A. and N., remained in the care and custody of the appellant, subject to Agency supervision. The matter was set over several times while assessments were done on the children, while the appellants formulated their plan, and while the Agency, eventually, supported the placement of the children with a family placement alternative, selected by the appellants.

[24] Following a further Review Hearing in October, 1998, Judge Williams rendered his decision on November 30th, 1998. He said the following at the commencement of his decision:

> As I've indicated, the finding in need of protective services order in this proceeding expressly reserved the right to call evidence on a series of other subsections under Section 22(2). I believe it is in the interest of these children that those issues be addressed. And I would, to the degree that it is necessary, if necessary at all, make findings that the two children are in need of protective services pursuant to Section 22(2)(b), Section 22(2)(g), and Section 22(2)(j)(a) of the Children and Family Services Act.
>
> In making those findings, I consider the record as a whole. The evidence -- to this point in time, the evidence concerning the S.'s parenting, the evidence of Dr. Swaine and other individuals who have been involved with them, and the lengthy background to this matter, I think it's significant and it is obvious from the sections that I have referred to that these sections refer to risk of harm. I believe the record is clear in indicating there is a substantial risk of harm in this situation, harm both emotional and physical.

[25] After referring to the three matters on which the trial judge wanted more evidence (as indicated in his May 13th, 1998 reasons), and after referring to other

evidence, the trial judge said the following:

> The evidence before me is consistent in two respects. The first is that A. and N. are, in relative terms, doing fairly well at this point in time. The second is that there are extremely serious problems, both individually and as a couple that Mr. and Mrs. S. have that create significant risk to the development of these two children.
>
> I have, in considering the evidence, attempted to be sensitive to the fact that C. placed extraordinary demands on them.
>
> I have considered and know that the onus of proof in these proceedings, the burden of persuasion, is clearly on the Child Welfare Agency.

[26] Following a detailed review of Dr. Swaine's Report of June, 1997, the trial judge said the following:

> The essence of this situation is that K. and T. S. have significant and serious personal and interpersonal problems. These are documented and to a significant degree, even acknowledged.
>
> There has been little demonstration of any ability to respond or to maintain any counselling or intervention that addresses these problems. There have been years of support and efforts by the Agency and by, I would conclude, individuals in the community.
>
> I believe I have to consider A. and N.'s age and stage of life. In examining whether a less intrusive intervention is adequate to protect the children at this time, I believe one only has to look at the history to know that the issues that are here, the issues arising from anger and individual limits and the marital difficulties, K.'s domination of T., T.'s intellectual intervention limits, K.'s victimization as a child and youth, herself, are not going to go away. There is no intervention that can be there 24 hours a day.
>
> We sometimes consider intrusive intervention as simply the removal or non-removal of children from a home. It would be naive, and I think that Mr. Greer has been crystal clear in expressing this, it would be naive to think that the intervention of the Agency over the past almost six years has not been intrusive on or to this family.
>
> The family has essentially been kept together through a very intrusive course of action that has impacted and added pressures to K. and T. S. in the name of

> attempting to keep the children in their home. That kind of intervention is not appropriate on a forever basis, in my view, and, as I said, cannot be there ultimately to address the issues in terms of risk of physical punishment and physical and emotional isolation that are raised from the record.

[27] As to what the trial judge considered in reaching his conclusion, he said the following:

> I have had the opportunity to hear evidence from both of the S.s. I have had the opportunity to hear evidence from K. S. more often than T. S.. I have reviewed the extensive record. I have had transcripts prepared of some of the record to ensure that my review of the record was as complete as it could be. I have reviewed the opinions of Dr. Swaine and compared those to the opinions of other professionals who have been involved with the family and considered them.
>
> I have considered the mandate and purpose of the Act which is to protect children from harm and promote the integrity of the family and ensure the best interest in the children and to consider the paramount consideration as the best interest of the children. I have considered the Act as a whole.
>
> I have also considered, specifically, the definition of "best interest" as it is defined in this legislation in Section 3(2), particularly Section 3(2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m),(n). While considering all of those subsections, I note that the best interest of the child as defined in this Act directs the Court to consider:
> (a) The importance of the child's development of a positive relationship with her parent or guardian in a secure place as a member of a family;
> (e) The child's physical, mental, and emotional needs and the appropriate care or treatment to meet those needs;
> (f) The child's physical, mental, and emotional level of development and;
> (m) The degree of risk, if any, that justified the finding of the child is in need of protective services, the degree of risk.
>
> At the start of this decision, I addressed the need of protective services with respect to the section 22(2) that dealt with allegations of risk to these children. They were not formally addressed at the time of the original finding in need of protective services through the consent of counsel and, essentially, a desire by counsel and, ultimately, the Court to proceed with matters on a consent basis to the extent that they could be proceeded with on a consent basis.
>
> The risk issues in this situation, however, were outlined, I believe, in some detail in my May 13th decision. I believe, as I've indicated, that it is appropriate that there be explicit findings with respect to that risk, and have made them.

[28] The trial judge then concluded as follows:

> In the end, what is a very difficult situation and decision must focus on these children. I am satisfied that there is substantial risk to these children in this home. I am satisfied that there is very little evidence of any substantial change in the circumstances of the parents. I am satisfied that there is little prospect of change in the challenges that K. and T. S. face personally and interpersonally. I believe that view has been shared by a series of professionals who have been involved with them to this point.
>
> I am satisfied that with legislation such as this, that a Court has a responsibility not to wait until children are physically harmed or visibly distressed to make a decision. I am satisfied, considering the burden of proof on the Agency to be a high or significant burden of proof and the evidence before me that it is in the best interest of these children that the Agency plan be adopted and that they be placed in the permanent care and custody of the Agency.
>
> I have examined the question of access and conclude that a family placement is desirable for these children and that the best way to facilitate that placement, considering all of the evidence as available to me, is to at least provide the opportunity for it to proceed on the basis of an adoption.
>
> I note that I have very little evidence from the S.s' extended family before me. It is my hope that the Agency plan and family placement, whether by way of adoption or otherwise, will ultimately ensure some ongoing meaningful contact between the S.s and the children in the future. That may be reviewed if a family adoption placement is not pursued.

[29] The appellants submit that the trial judge's decision should be set aside, and the children returned to the parents, on two general bases: (i) the trial judge lost jurisdiction because he extended the time with respect to findings which he made under s. 22(2) of the **Act**, and (ii) the evidence does not support the findings that the trial judge made.

## Jurisdictional Grounds

[30] Counsel for the appellants, in his factum, raises three submissions:

1. That the learned Family Court Judge erred in extending the time line with respect to certain findings under section 22(2) for the purpose of section 40(4) of the *Children and Family Services Act* from the finding date of November 10, 1997, to November 30, 1998;
2. That the learned judge erred in not determining the grounds upon which the Disposition finding was made in his decision of May 13, 1998;
3. That the learned judge erred in extending the time line for finding pursuant to section 22(2)(b), (g) & (j) or (ja) beyond the decision date of May 13, 1998, as the Respondent Agency made no representation or argument with respect to further finding under additional sections at that time or in November 30, 1998.

[31] It is difficult to follow the substance of counsel's submissions here. He appears to be submitting that the trial judge's decision should be set aside, and the children returned to their parents, because findings which the trial judge made (that A. and N. were in need of protective services pursuant to ss. 22(2)(b), 22(2)(g) and 22(ja) of the **Act**) were not made by the trial judge until his decision of November 30th, 1998, one full year following the protection hearing

[32] Counsel then submits that because the trial judge did not mention these findings (that A. and N. are in need of protective services pursuant to ss. 22(2)(b),

22(2)(g) and 22(ja) of the **Act**) in his decision of May 13th, 1998, then, as appellants' counsel, he was unfairly prejudiced because he was not aware that he had to concern himself with those sections and did not bother to deal with them at the hearing in October, 1998.

[33] These submissions, in my view, have no merit. They are technical arguments in the extreme. These submissions ignore what actually took place between January, 1998 and November, 1998, when the trial judge - working within the one year time constraints of a Supervision Order - was attempting to resolve the problem that was presented to him in the least intrusive manner, and in the best interests of the children.

[34] I will review what took place in light of these submissions.

[35] As I have indicated previously in these reasons, the actual proceedings which are the subject of this appeal commenced in August of 1997. The respondent made an application in the Family Court for an order that all three children of the respondent:

> are in need of protective services under the **Children & Family Services Act**, s. 22(2), paragraphs (a), (b), (f), (g), (h), (j), (ja) and (k).

[36] These provisions of the **Children and Family Services Act** are as follows:

> 22 (2) A child is in need of protective services where

(a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;

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

.....

(f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the condition;

.....

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

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

(k) the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;

[37] It is clear that the Department of Community Services was relying on s. 22(2)(a), (f), (h) and (j) with respect, only, to the child C.; because there was evidence of actual harm to C.. With respect to A. and N., it was the risk of harm that the Department was relying upon, as well as the inability of the appellants to parent.

[38] It was also clear from the outset that the Department was seeking an order that all three children be placed in its permanent care and custody; and all of the material in support of that application had been delivered to counsel for the appellants at the time of the application in August of 1997.

[39] As required under s. 40(1) of the **Act**, a protection hearing was held within 90 days on November 10th, 1997. The Protection Order provided:

> ..... are in need of protective services pursuant to the **Children and Family Services Act**, **s, 22(2)**, **paragraph (k)**, reserving to the Applicant, the Minister of Community Services, the right to call evidence and seek a finding with respect to the allegations in relation to **s. 22(2)**, **paragraphs (a), (b), (f), (g), (h), (i), (j) and (ja)** of the **Children and Family Services Act**, and reserving to the Respondents, K. A. B. S. and T. R. S., the right to cross-examination on the affidavit evidence and all other documents on file herein.

[40] C. remained in the temporary care and custody of the respondent and it was ordered that A. and N. remain in the care and custody of the appellants subject to supervision of the respondent on terms.

[41] It is necessary, under the **Act** (s. 41(1), to hold a Disposition Hearing within a further 90 days.

[42] On December 5th, 1997, the Agency, on notice to counsel for the appellants, made application to Judge Williams for a disposition order.

[43] The application referred to all of the documentation on file with respect to the original application for the Protection Order, as well as the Agency's Plan for the children's care.

[44] A consent Disposition Hearing was held on January 19th, 1998. Judge Williams issued a Supervision Order on that date. The Order recites the following:

(a) That the three children were found to be in need of protective services pursuant to s. 22(2)(k) of the **Act** on the 10th of November, 1997;

(b) That the Agency has applied for a Disposition Order and Notice of Hearing which included the Agency's Plan for the children's care and all the documentation on file;

(c) That all proper persons have received notice of the Disposition Hearing;

(d) That counsel for the appellants had consented to the Disposition Order.

[45] At the hearing of this appeal, counsel for the appellants acknowledged that he consented to the Order on the basis of the Department's position that the appellants were unable to "parent".

[46] The Order which Judge Williams issued provided as follows:

1. That pursuant to s. 42(1)(d) of the **Act**, C. was placed in the temporary care and custody of the Minister of Community Services;
2. That pursuant to s. 42(1)(b) of the **Act**, A. and N. were to remain in the custody of the appellants subject to the supervision of the Minister of Community Services;
3. That the terms and conditions of the childrens' care and custody were set out in detail;
4. That pursuant to s. 46 of the **Act** a Review Hearing was set for March, 1998.

[47] Section 42(1)(d) of the **Act** permits the judge, at the conclusion of the Disposition Hearing, to order that a child be placed in the temporary care and custody of the Agency for a specified period. Further under s. 42(1)(b), the judge has the power to order that the child remain in or be returned to the care or custody of a parent subject to supervision of the Agency for a specified period.

[48] Section 43(4) of the **Act** provides that in no case shall a Supervision Order extend beyond 12 consecutive months of supervision.

[49] Section 46 of the **Act** deals with Review Hearings and provides what powers the judge has on the hearing of an application for review. In its entirety it provides as

follows:

46 (1) A party may at any time apply for review of a supervision order or an order for temporary care and custody, but in any event the agency shall apply to the court for review prior to the expiry of the order or where the child is taken into care while under a supervision order.

(2) Where all parties consent, the supervision by an agency of a child under a supervision order or the care and custody of a child under an order for temporary care and custody may be transferred to another agency, with the other agency's consent, and, where all parties, including the other agency, do not so consent, the court may, upon application, order the transfer of an agency's supervision or care and custody to another agency, in the child's best interests.

(3) Where an application is made pursuant to this Section, the child shall, prior to the hearing, remain in the care and custody of the person or agency having care and custody of the child, unless the court is satisfied, upon application, that the child's best interests require a change in the child's care and custody.

(4) Before making an order pursuant to subsection (5), the court shall consider

(a) whether the circumstances have changed since the previous disposition order was made;

(b) whether the plan for the child's care that the court applied in its decision is being carried out;

(c) what is the least intrusive alternative that is in the child's best interests; and

(d) whether the requirements of subsection (6) have been met.

(5) On the hearing of an application for review, the court may, in the child's best interests,

(a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;

(b) order that the disposition order terminate on a specified future date; or

> (c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.
>
> (6) Where the court reviews an order for temporary care and custody, the court may make a further order for temporary care and custody unless the court is satisfied that the circumstances justifying the earlier order for temporary care and custody are unlikely to change within a reasonably foreseeable time not exceeding the remainder of the applicable maximum time period pursuant to subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

[50] The Disposition Review Hearing was held on six days in March of 1998. The trial judge's decision with respect to that hearing was issued on May 13th, 1998. As I have indicated previously in these reasons, between the time of the hearing and the time of the decision the child C. died. I have set out, in some detail, the substance of the trial judge's conclusions in his May 13th decision.

[51] Among the findings which the trial judge made in his decision of May 13th was that he was satisfied on the evidence that the appellant Mrs. S. hit and probably abused C. on more than one occasion; and that the evidence suggests that A. is starting to misbehave and challenge the appellants as parents.

[52] Having referred to the actual harm which had been caused to C. while in the appellant's care; the fact that the appellants could not, in all likelihood, parent on their own; the fact that the Department had extended virtually every reasonable service to the appellants, with little effect (in large part due to the appellant's behaviour) he concluded that he was "extraordinarily" concerned about the appellant's circumstances,

"and, by extension, those of A. and N.". The trial judge came to that conclusion after saying the following:

> Child welfare decisions are the most difficult decisions I make as a judge. I find this circumstance and situation exceedingly difficult. I have reviewed the relevant provisions of the **Children and Family Services Act**, the preamble, section 2, section 3, section 41, section 46, section 42, section 22(2). I have reviewed the law as it relates to burden of proof and the fact that the burden of proof lies on the agency, that it is a civil standard of proof, that it is a civil standard that is somewhat elevated. .....

[53] Clearly, the trial judge concluded in his May, 1998, decision that the appellants were unable to parent on their own (s. 22(2)(k)); and that A. and N. were at risk of both physical and emotional harm.

[54] The trial judge then recognized the time frames available to him under the **Act** (the Supervision Order which he had issued on January 19th, 1998, could not be in place for more than one year). He decided to use some of the time that he had to give the appellants an opportunity to alleviate his concerns. There was no evidence of actual harm to A. and N.; however, the trial judge was obviously concerned about ensuring that every avenue be explored to deal with the issue of risk of harm. He referred to Dr. Swaine's opinion that it would not take very much stress on the children, or on the appellants, for the same thing to happen to A. and N. as happened to C..

[55] The trial judge decided that he would not make a permanent care order "at this time". He wanted to use the time he had available to him to secure more information about A. and N. and to give the appellants an opportunity to come up with a proposal which detailed their commitment, their arrangements for support, including any

individual and couple counselling or psychiatric care as well as detailed support from the appellants' immediate family and the church. He said:

> If the family and the church community does not step up and either provide that care for the children or a great deal of assistance for the care of the children then the Court will have only one alternative and that is to place the children in the care and custody of the Agency.

[56] As I have indicated, in setting out the decision of the trial judge, dated November 30th, 1998, following the Disposition Review Hearing of October, 1998, the trial judge was not satisfied with the effort that was made, he made further findings under s. 22(2), and issued the Permanent Care Order which is the subject of this appeal.

[57] The findings of the trial judge, in his decision dated November 30th, 1998, under s. 22(2)(b), (g) and (ja) all deal with risk of harm to the children A. and N.. Those allegations had been on the table from the initial application in August, 1997. Counsel for the appellants acknowledged, at the Protection Hearing in November, 1997, the right of the Agency to call evidence with respect to those allegations. All of the documentary evidence in support of those allegations accompanied the original application of August, 1997. All of the Agency's evidence with respect to those allegations was put before the trial judge at the Disposition Review Hearing of March, 1998. The reasons of the trial judge in May, 1998, are not confined to s. 22(2)(k) (inability to parent). The trial judge made it clear that he was "extraordinarily concerned" about A. and N..

[58] Counsel for the appellants has no cause to submit that since the trial judge -

in his decision dated May 13th, 1998 - did not deal specifically with findings under s. 22(2)(b), (g) and (ja), that they were no longer on the table.

[59] The trial judge has broad powers at a Disposition Review Hearing held under s. 46 of the **Act** when he deems it to be in the child's best interests.

[60] There can be no doubt that the trial judge had only the interests of A. and N. in his mind when he gave the appellants, in May, 1998, an opportunity to alleviate his extraordinary concern about A. and N. continuing in their care.

[61] The disposition of the trial judge was made within the time constraints that were upon him under the Supervision Order which he issued in January, 1998. There is no basis for saying that the trial judge lost jurisdiction to make findings that A. and N. were in need of protection because of risk of harm (in addition to the finding that had already been made that these children were in need of protection because of the inability of the appellants to parent). In my opinion, there was no procedural unfairness in the making of those findings.

[62] I would dismiss these grounds of appeal related to loss of jurisdiction.

**Evidentiary Grounds**

[63] The appellants raise several evidentiary issues on this appeal. The

appellants submit that the trial judge placed disproportionate weight on the opinion of Dr. Swaine, and that he relied on Dr. Swaine to determine "the ultimate issue" instead of considering and weighing all of the evidence and coming to his own conclusions. Further, counsel submits, the trial judge did not take into account the divergent opinions of Dr. Swaine with other professionals, and errors made by Dr. Swaine in the recording of information from other professionals. Lastly, counsel submits, there was insufficient evidence to find substantial risk to A. and N. under s. 22 of the **Act**.

[64] Before dealing with these submissions, it is appropriate to set out the function of this Court in dealing with an appeal of this nature.

[65] In **Nova Scotia (Minister of Community Services) v. S.M.S. et al** (1992), 112 N.S.R. (2d) 258, Chipman, J.A., writing for the Court, said the following at pp. 268-269:

> Overall, it is important to remember that the function of this Court in dealing with appeals of this nature is a limited one. In **Children's Aid's Society of Colchester County v. Macguire and Boutlier** (1979), 32 N.S.R. (2d) 1; 54 A.P.R. 1, Mr. Justice Cooper said at pp. 7-8:
>
> > "It is no doubt true that an appeal court should not interfere with findings of fact made by a trial tribunal unless they are clearly wrong. The trial judge must have made a 'manifest error' or some 'palpable and overriding error' - see **Talsky v. Talsky**, 7 N.R. 246; [1976] 2 S.C.R. 292, at p. 294, and **Stein et al. v. The Ship "Kathy K" et al.**, 6 N.R. 359; [1976] 2 S.C.R. 802, at p. 808. It has, however, been said on many occasions that an appeal court is free to draw its own inferences from proven facts ...
> >
> > "A trial judge in dealing with the custody of an infant is called upon to exercise a discretion which it is recognized will only

> be interfered with if he has gone wrong in principle or overlooked material evidence. It was put thus by Viscount Simonds in the following passages in **McKee v. McKee**, [1951] A.C. 352, Privy Council, at p. 360:
>
> > 'Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decisions should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.'"
>
> These observations are particularly appropriate here where the trial judge has seen and heard a large number of witnesses over a 20 day trial, has considered the evidence, made a number of findings of credibility and in particular, has made an assessment of the appellant's parenting skills and the effect that continued exposure of her to her children would have on them. We simply do not have the many advantages he had. We are not, in these circumstances, in a position to substitute our judgment for his.

[66] In considering the role of an Appeal Court in reviewing the weight given to the evidence by a trial judge, in **Children's Aid Society of Cape Breton v. S.G.** (1995), 142 N.S.R. (2d) 57, Freeman, J.A., writing for the Court, said the following at pp. 60-61:

> The second ground was that Judge Wilson gave undue weight to the evidence of Dr. Carol Pye, a psychologist in whose opinion S.G. was not a fit parent. The appellant asserts Dr. Pye's evidence was contradicted by the evidence of other "involved professionals" and was demonstrably wrong. The weight of evidence is a matter for the trial judge in his assessment of the facts. His decision is entitled to deference by an appeal court, which has not heard nor seen the parties and the witnesses. (See **Family and Children's Services of Kings County v. D.R. et al.** (1992), 118 N.S.R.(2d) 1; 327 A.P.R. 1 (C.A.); **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 112 N.S.R.(2d) 258; 307 A.P.R. 258; 41 R.F.L.(3d) 321 (C.A.); **M.D. v. Children's Aid Society of Halifax** (1994), 130 N.S.R.(2d) 132; 367 A.P.R. 132 (C.A.)). In child welfare matters the deference to be shown the decision of the trial judge, and the assessment of errors of law and fact, must be determined in the light of the best interests of the child as defined by the **Children and Family Services Act**. The record of the Family Court hearings makes it clear that Judge Wilson was obviously mindful of the best interests of the child in the context of the Act and applied the law to the

> evidence before him. I have not been persuaded that Judge Wilson committed reversible error and I would dismiss the second ground of appeal.

[67] To the extent that the trial judge relied on the opinion of Dr. Swaine, that was his prerogative. Notwithstanding that, the trial judge did not rely solely on the evidence of Dr. Swaine. He said in his November 30th, 1998, decision:

> I have been conscious in reviewing the matters before me, not to over-rely or to rely solely on the opinions of one witness or one expert.

[68] At that point in his reasons the trial judge referred specifically to a report dated February 10th, 1998, from Catherine Lambert in which she reiterates her concern about the children being in the home without the intervention of the Department, because she saw no prospect of change in the appellants' adversarial approach to counselling.

[69] The trial judge further stated in his November 30th reasons:

> I have had the opportunity to hear evidence from both of the S.s. I have had the opportunity to hear evidence from K. S. more often than T. S.. I have reviewed the extensive record. I have had transcripts prepared of some of the record to ensure that my review of the record was as complete as it could be. I have reviewed the opinions of other professionals who have been involved with the family and considered them. (emphasis added)

[70] I have reviewed the evidence for the purpose of considering the specific submissions of counsel for the appellants as to the alleged divergent opinions of the professionals; and the failure of the trial judge to take those into account in relying on Dr. Swaine's opinion. I agree with the submission of counsel for the respondent on this issue. With respect to the underlying basis of the trial judge's concern for A. and N.

(namely the inability of the appellants to parent and the lack of prospect for any change in that regard because of their adversarial approach to counselling), there is, essentially, no divergence in this various testimony.

[71] The trial judge did not, as counsel for the appellants submits, leave the determination of the ultimate issue to Dr. Swaine. In his May 13th reasons, which the trial judge incorporated into his November 30th reasons, the trial judge said the following, after concluding that if the appellants and their extended family and community are not able to come forward with a plan for the care of A. and N. that a permanent care order was inevitable:

> This is not the agency saying to the S.s "do something". It is not open at this point, in my view, for the S.s to say "well, if only the agency wasn't around, or if only the agency wasn't saying that these problems were ..." This is **my** conclusion, and my conclusion is that it is very unlikely that the S.s can independently parent on their own in the long term. The order I'm making is designed to give them a very specific and concrete opportunity to respond to that and put forward a plan of care that is, as I previously stated, a plan of action rather than reaction.

[72] Lastly, I do not accept the submission of counsel for the appellants that the evidence before the trial judge did not support his finding of "substantial risk" to A. and N.. Substantial risk is defined in s. 22(1) of the **Act** as meaning a real chance of danger that is apparent on the evidence. The following evidence supports the trial judge's conclusion in this regard:

1. This family has, essentially, been kept together through the intervention of the respondent - by the provision of various services for a period of six years; all without success (largely due to the

appellants' behaviour); and there is no prospect of success in the immediate future.

2. The detailed evidence concerning the physical and emotional harm that was inflicted upon C. while he was in the care of the appellants.
3. The opinion of Dr. Swaine, which the trial judge accepted, that it would not take very much stress for the situation which occurred with C. to happen again with A. and N.;
4. The evidence before the trial judge concerning the position of the appellants that they did not need counselling, and their adversarial approach to counselling.

[73] There is no doubt, that the trial judge was faced with a difficult decision. He clearly recognized that difficulty himself. There was no evidence of actual physical or emotional harm to A. and N.. In fact, as the trial judge noted, in relative terms, they were doing fairly well. He decided, however, that there was a substantial risk to these children; that his decision must "focus on these children", and that the Court has a responsibility not to wait until children are physically harmed or visibly distressed to make a decision. He considered whether a less intrusive intervention was adequate to protect the children at this time, and decided that none was available nor practicable under the circumstances. He found that it was in the best interests of A. and N. that the Agency plan (a family placement by way of adoption) be adopted and that A. and N. be placed in the permanent care and custody of the Agency.

[74] In this matter involving the custody of young children, unless the trial judge has “gone wrong in principle” or “overlooked material evidence”, his judgment is entitled to deference by this Court. The trial judge presided over this matter over an extended period of time. He heard, and assessed, many witnesses, including the appellants and professionals in the field. Since the trial judge made no error in principle, nor did he, in my view, overlook any material evidence, I cannot, and will not, interfere with his conclusion.

[75] I will refer, at this point in these reasons, to an application by counsel for the appellants to adduce fresh evidence on the hearing of this appeal. The evidence is in the form of two affidavits of the appellants. They depose to the present status of the children, as well as the efforts which the appellants have made, at counselling, since the decision of the trial judge in November, 1998. As Justice Freeman noted in **Children’s Aid Society of Cape Breton v. S.G., supra** at p. 61:

> If the evidence relates to facts which arose after the hearing, the appellant must show that the result reached by the trial judge is not, or is no longer, in the best interest of the child.

[76] The evidence advanced by the affidavits which have been filed does not, in any way, demonstrate that the result reached by the trial judge is not or is no longer in the best interests of the child. Therefore, that evidence has no bearing on the issues raised in this appeal.

[77] The appellants final ground of appeal is that the trial judge erred in not

providing access rights for them to A. and N.. The trial judge did not order that the appellants have no access. He, simply, did not provide for access in the order, and rightly so. An order for access of a child who is the subject of a permanent care and custody order would prevent the placement of that child for adoption (see s. 70(3) of the **Act**). Counsel for the appellants conceded this point during oral submissions.

[78] The trial judge had approved the plan of the respondent for the placement of A. and N., for adoption, with a family who are related to the appellants, and a family whom the appellants, themselves, suggested. In his decision, the trial judge clearly anticipates that there will, at some point, be access to A. and N. by the appellants.

[79] I would dismiss this appeal.

Flinn, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.