Docket No.: CA 167724
Date: 20001215

NOVA SCOTIA COURT OF APPEAL

[Cite as: Children's Aid Society of Halifax v. B.M.J., 2000 NSCA 144]

BETWEEN:

CHILDREN'S AID SOCIETY OF HALIFAX

Applicant

- and -

B. M. J. and T. S. M.

Respondents

DECISION

Counsel: Thilairani P. Pillay, for the applicant
Terrance G. Sheppard, for the respondent, B. J.
Tanya Jones, counsel for the respondent, T. S. M.
Application Heard: December 7, 2000
Decision Delivered:December 15, 2000

BEFORE THE HONOURABLE JUSTICE FLINN

IN CHAMBERS

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.

FLINN, J.A. (In Chambers):

[1] Following a three day trial in the Supreme Court (Family Division) Justice Hood dismissed the appellant Agency's application, under the **Children and Family Services Act** , S.N.S. 1990, c. 5, as amended by S.N.S. 1996, c. 10, s. 8, for an order that the two children of the respondents be placed in the Agency's permanent care and custody. The trial judge ordered the children, C., six years of age, and M.E., five years of age, to be returned to their mother (the respondent B. M. J.) subject to the supervision of the appellant, and on detailed terms and conditions.

[2] The appellant has filed a notice of appeal from this decision and order of the trial judge, and has applied for a stay of execution of the trial judge's order pending the hearing of the appeal. The application is opposed by both respondents.

[3] Since this application involves the custody of young children, it is appropriate to set out in some detail how the trial judge arrived at her decision. The careful and detailed manner in which the trial judge dealt with the matter before her is relevant to my consideration of the merits of this application.

[4] The trial judge in this case had presided over an interim hearing on March 10, 2000 at which time the children were placed in the temporary care and custody of

the Agency with supervised access to the parents. The Protection Hearing was held on May 1, 2000 and, by consent, a finding was made that the children were in need of protective services and were placed in the temporary care and custody of the Agency with supervised access to the parents.

[5] The history of this matter had clearly demonstrated, and the trial judge so found, that the principal problems associated with this family arise directly or indirectly from the respondent, S. M., and his role in the family. The trial judge said the following about that in her decision:

> S. M. had the dominant role in the family. It was he who refused to accept that C. has special needs. He was the one who refused to complete the Parental Capacity Assessment. It was he who brought C. to court and pulled the children out of school and daycare. It was S. who scuttled the June 9, 2000 Agency Plan by his refusal to co-operate with B.'s plan to parent the children by herself. It was he who argued with Will Chambers about proper babysitters. The list goes on. His lack of co-operation is well documented in the exhibits before the court.
>
> S. M. directly caused problems by his attitude toward the Agency, his refusal to co-operate with the Agency and his adamant refusal to accept the fact that his children, especially C., have special needs.
>
> Overall, S. M.'s role in this family also caused problems indirectly because of the effect of his personality on B. J.. Even S. M. himself does not seem to dispute his dominant role in the relationship between B. J. and himself. However, he has little appreciation of the degree of that dominance. He disagreed with B.'s characterization of his demands on her time and the extent of those demands. Throughout the reports of all who came into contact with both there are frequent references to B.'s passivity in the presence of S.. Suzanne Eakin says in her report (Exhibit 11 at p. 33) that:
>
> > [his] history and current presentation are consistent with a diagnosis of an Anti-Social Personality Disorder...

> It is not surprising that a person trying to parent with such a person would show parenting deficits far beyond any she might have on her own.

[6] A Parental Capacity Assessment, ordered in March 2000 was completed in April 2000 and thereafter a case conference was held on May 10, 2000. At that time counsel for the respondents put forward a proposal for the respondent mother to parent the two children herself. Her proposal was that she and S. M. would separate, commit to maintaining that separation and would establish separate residences. The mother also proposed that they would both attend all appointments and complete the services the Agency required. The mother would provide a list of people in the metro area that would form her support network. Both parents would acknowledge the children's, especially C.'s, special needs.

[7] This proposal ultimately formed the basis of the Agency's plan dated June 9, 2000. However, at a pre-trial, prior to the disposition hearing, S. M. told the court that he was not in agreement with the plan dated June 9th for the mother to parent the children alone. He stated at that time that he was going to put forward a plan to parent the children himself.

[8] That position by the father caused the Agency to file a new plan on June 29th which proposed permanent care and custody of the children be given to the Agency with no access by the parents.

[9] The trial judge referred to the evidence of Will Chambers, a social worker

employed with the Agency who has been involved with this family since July of 1999. The trial judge said the following about his evidence:

> He acknowledged on cross-examination that B. J. was largely co-operative with the Agency and that, in spite of the Agency's concerns, the June 9th Agency plan had, as its goal, the return of the children to B. J. under a supervision order, provided certain conditions were met. B.'s roles and responsibilities included having a separate residence from S. M. and a commitment to remain permanently separated from him.

And further:

> Mr. Chambers testified on cross-examination by Mr. Sheppard that he needs to know that S. M. has no power, influence and authority over B. J. and that if he had that evidence he would consider her plan to parent alone.

[10] The trial judge then referred to the evidence of Suzanne Eakin who had prepared the Parental Capacity Assessment. The trial judge said, among other things, the following with respect to her testimony:

> At the hearing Ms. Eakin said there was "some hope" of B. being able to parent the children on her own, but that she felt very cautious about it although she said it could be possible. At the hearing, she testified that although B. is now living in N.B. and has separated from S., she continues to believe that the best plan for the children is permanent care. Ms. Eakin said that there would have to be "a pretty major turn around" before she felt that B. could cope with parenting two children alone. She expressed doubt about B. J.'s "psychological disengagement" from S. M.. She also testified that she believes that B. needs counselling and work on her parenting skills. She referred quite often to B. J.'s statements to N.B. workers that she could not cope with the children on her own.
>
> Ms. Eakin did not recall having seen the affidavit of A. M. and based her comments about the support B. J. would receive from her mother on a conversation Ms. Eakin had with A. M. in April of 2000. She said she would have grave reservations about B. J. parenting the children unless she stayed with her mother "forever".
>
> Ms. Eakin agreed on cross-examination by Mr. Sheppard that B. J. has done

> what has been asked of her but said that she would like to see it sustained for a longer period to be sure that B. J. would stay apart from S. M. and that she would show progress in therapy. She also said on cross-examination by Mr. Pavey that B. J. has the best opportunity for personal change, that is a better prognosis to change, than S. M. has, but that in her view the question still remains whether B. J. will in fact change.

[11] The trial judge also referred to the evidence of Cathy Manuel, a social worker with the N.B. Department of Family and Community Services. The trial judge said the following:

> Cathy Manuel testified that B. J. had come in to see her in S. J. around the end of August, 2000. She said they discussed services which would be available and where they could be obtained.
>
> Ms. Manuel also testified on cross-examination, that one of the Agency's main concerns in 1996, 1997 and 1998 was the physical environment in the children's home. She agreed that that is not a concern at present. She also testified that, although the N.B. Department supports the present application for permanent care and custody of the children, if the children were returned to B. J. under a supervision order, the N.B. Department would get involved to try to support B. and her children if it was seen to be in the best interests of the children.

[12] The trial judge then referred to the evidence of A. M., B. J.'s mother as follows:

> A. M., B. J.'s mother, testified as well. Her affidavit, sworn July 19, 2000 is Exhibit 28. She testified that she and B. have a good relationship and that B. and the children are welcome to stay with her until B. is "on her feet" or longer.

[13] As to the testimony of the respondent B. J., the trial judge said the following:

> I was favourably impressed with the testimony of B. J.. She testified about leaving S. M.. She said that she needed to be away from him to see what she wanted for herself and her children. She said that she understands now that when she was with S. M. she felt she had to do what he said. B. J. testified that now she can make her own decisions. She said she had hoped she could change S. but that she now realizes that she cannot and that she must get on with her life

> without him. She recognizes now that his behaviour was controlling and that she kept giving him another chance again and again. She said it was like having three children, with S. being the third, and that he provided her with no emotional support when she needed it.
>
> B. J. also testified that she was upset with S.'s response to the Children's Aid Society involvement and that she wanted to do what they asked.
>
> B. J. also testified about what she has done in S. J. since arriving there around the first of August. She has found a part-time job which she likes; she is seeing a counsellor; she has gone to a "Job Options" program which assists people in finding work and in preparing for interviews, etc; she has talked to school authorities about schooling for C.; and has obtained information about programs in S. J. for the children and for herself.
>
> B. J. testified that since she has been in S. J. her "whole personality has changed". She said she has had a boost to her self-esteem and knows she has people around her who will listen to her and be supportive of her.

[14] After referring to the Agency's plan for the permanent care and custody of the children, the trial judge reviewed, in some detail, the various sections of the **Children and Family Services Act** which she was required to consider in reaching her decision. She quoted from decisions of this court, including reference to the best interests of the child being a paramount consideration, and references to the burden of proof on the Agency in seeking an order for permanent care and custody. As to the onus on the Agency the trial judge said:

> The onus is on the Agency to satisfy me that there is no less intrusive way to protect the interest of these children than an order that they be placed in the permanent care and custody of the Agency.

[15] Having found as a fact that the principal problems associated with this family arose directly or indirectly from the respondent S. M. in his role in the family,

the trial judge made the following findings on the evidence of the respondent B. J.:

> The B. J. who testified in this court before me is, in my view, a different woman from the B. J. described in the case recordings and reports and in the assessment of Suzanne Eakin. Although B. J.'s mother, A. M., was certainly trying to be helpful to her daughter in some of her testimony, I do accept her testimony about the change she has seen in B. since B.'s recent separation from S. M., her return to S. J., N.B. and since she got a job.
>
> I was impressed with B. J.'s intelligence and self-awareness and with the obvious efforts that she has made to get out from under the control of S. M..
>
> In the testimony of Will Chambers, in the Agency Plan of June 9th, 2000 and in the report and testimony of Suzanne Eakin, there is evidence of the potential of B. J. to parent C. and M.E.. When it appeared that both S. M. and B. J. were committed to having separate residences and separating permanently, the Agency was willing to have the children returned to B. J. under a supervision order.
>
> That plan, in my view, changed only when S. M. failed to go along with the plan to separate from B. J., stated his intention to put forward a plan of his own to parent the children alone, and when B. J. appeared unable to make the commitment to leave S. M..
>
> Although B. J. did not make the move to S. J., N.B. until the first of August, I am satisfied that her intent now is clear to remain there apart from S. M.. (Emphasis added)

[16] The trial judge then referred to the concerns which were expressed by the Agency, and her findings with respect to those concerns. She said:

> In Suzanne Eakin's parental capacity assessment, on page 28, she says of B.:
>
> > She may be unable to muster the wherewithal to overcome the deficits she sees in her life or to achieve the support she desires from others.
>
> In spite of this, B. J. has taken the step of moving to S. J., getting somewhat settled there, finding a job and seeking out some supports for herself and her children. In light of the nature of B.'s personality and the control S. M. has always exerted over her, this is to me the most important step B. has taken to

gain control over her life and therefore control over the lives of her children.

[17] The trial judge said further:

> In recommendations on page 44 of her report, Ms. Eakin refers to what should be done should B. return to S. J.:
>
> > Should she opt to return to N.B. where she has family supports, there is at least a possibility that she may be able to provide for the children's needs but the situation would require maximal supports and careful monitoring by the child protection agency to avert further neglect. She would also need to be able to acquire the skills to appropriately discipline her children. Without a significant stabilization in her personal functioning and the establishment of child-centred priorities, this will not be a viable option.
>
> In my view, B. J. has the family supports she need in S. J., N.B.. She is seeing a therapist. She will have supports and can have monitoring. I conclude that B. J. has stabilized her personal functioning, largely because she has been able to extricate herself from her very unhealthy relationship with S. M.. In my view, she is now, at long last and at almost the last moment, establishing child centred priorities. (Emphasis added)

[18] Finally, the trial judge expressed her only reservation with respect to this matter, and the conclusion which she came to in spite of it, in the following words:

> My only reservation comes with looking at the short period of time B. J. has been away from S. M. who has had such a hold on her for all of her young adult life. B. J. is now only 26 years old but has invested more than eight years of her life with S. M.. It has not been, and will not be, an easy thing for her to sever her ties to him and maintain that severance. However the Agency has not satisfied me that her commitment to doing so, as evidenced by her recent actions, will falter.
>
> I am therefore not satisfied that the Agency Plan for permanent care is the least intrusive alternative. Nor am I satisfied that the circumstances which would justify an order for permanent care are unlikely to change within a reasonably foreseeable time.

[19] Having come to this conclusion the trial judge was still concerned as to

whether the children should be returned to the mother unconditionally. The trial judge said the following with respect to this:

> Now that B. J. has separated from S. M. and is establishing herself with a home, at least for now with her mother and step-father, and with a part-time job, I am satisfied that she has the supports in place to assist her as she makes the transition from a partner in an abusive relationship which caused her to put her children at risk, to a more independent person who has the motivation and the ability to raise her children. She will need support not only from her family but at least in the short term must be under a supervision order. However I am satisfied that B. J. should have C. and M.E. returned to her care and custody now under a supervision order. (Emphasis added)

[20] The trial judge restricted access to the children by the father, the respondent S. M., to such access, and under such conditions as the Agency deems appropriate. The trial judge expressed concern that such access by S. M. not involve the mother because, as she said:

> My decision to allow the children to be returned to B. J. is predicated upon her continuing separation from S. M..

[21] The trial judge therefore ordered the children to be returned to the mother, subject to the supervision of the Agency and upon 19 terms and conditions all of which are set out in the order. These terms and conditions include:

> 1. the respondent B. J. remaining permanently separated from the respondent S. M.;
>
> 2. conditions concerning where the respondent B. J. must reside; her responsibility for parenting; her participation in evaluation programs; her co-operation with the human services counsellor in regard to parenting instruction; her co-operation with the N.B. Agency and her attendance at counselling;

3. several conditions directly related to the emotional, behavioural and developmental needs of the children, including that the respondent B. J. shall ensure the children are supervised at all times; that babysitters responsible for the care of the children are first approved by the N.B. Agency; that the daughter M.E. be enrolled in a behavioural day care program, and that she be referred to, and participate in, sessions with a play therapist, and that she be referred to speech therapy; that the child C. be scheduled for future developmental assessments, be referred for counselling to address his emotional and social development delays, and that he attend specialized child care after school program consistent with his developmental abilities.

[22] The order of the trial judge, further, specifically provides that should the respondent B. J. renew contact with S. M., or facilitate unsupervised access between Mr. M. and the children, the children will automatically be removed from B. J.'s care and custody.

[23] The trial judge's decision was that the children be turned over to the mother now, subject to supervision and the various terms and conditions contained in her order. Initially, the trial judge gave her decision orally, in October. The order giving effect to her decision is dated November 9, 2000. The written reasons followed on November 22, 2000. The notice of appeal is dated and filed December 1, 2000.

[24] The temporary care and custody of the children, which was ordered by the trial judge at the Protection Hearing in May 2000, ceased with the order of the trial judge dated November 9, 2000. There is no provision in the **Children and Family Services Act** (the **Act**) by which that temporary care and custody is automatically

extended beyond the trial judge's order of November 9, 2000.

[25] Section 49 of the **Act** sets out the provisions relating to an appeal of the trial judge's order:

> **Appeal**
>
> 49 (1) An order of the court pursuant to any of Sections 32 to 48 may be appealed by a party to the Court of Appeal by filing a notice of appeal with the Registrar of the Court of Appeal within thirty days of the order.
>
> **Stay**
>
> (2) A party may apply to the court at the time of the order for an order staying the execution of the order, or any part of the order, for a period not to exceed ten days.
>
> **Stay by Appeal Division**
>
> (3) Where a notice of appeal is filed pursuant to this Section, a party may apply to the Court of Appeal for an order staying the execution of the order, or any part of the order, appealed.

[26] The application before me is pursuant to s. 49(3). The **Act** is silent as to the factors which the court should take into account before ordering a stay.

[27] I note, in passing, that I have nothing before me to indicate why the Agency did not apply for a stay at the time of the trial judge's order, pursuant to s. 49(2).

[28] What, then, is the test by which I should consider the Agency's application for a stay of execution of the trial judge's order?

[29] Justice Hallett, whose decision in **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341 sets out the standard by which an application for a stay of execution of a judgment in a civil case is measured, recognized that a different standard is used in cases involving custody of children. He said at p. 344:

> That is not the only test: this Court has considered stays of custody Orders on the ground that if special circumstances exist that could be harmful to a child if the Order were acted upon before the appeal was heard, a stay would be granted (**Millett v. Millett** (1974), 9 N.S.R. (2d) 26 (C.A.); **Routledge v. Routledge** (1986), 74 N.S.R. (2d) 290; 180 A.P.R. 290 (C.A.)). These cases involved children's welfare, not monetary judgments. In **Millett** the stay was granted; in **Routledge** refused. In the latter case, Clarke, C.J.N.S., stated:
>
> > "In my opinion, there need to be circumstances of a special and persuasive nature to grant a stay."

[30] Justice Bateman made reference to this test in the recent decision of **Ryan v. Ryan** (1999), 175 N.S.R. (2d) 370, as did I in the case of **Ellis v. Ellis** (1998), 163 N.S.R. (2d) 397.

[31] There is, at least, one very good reason why the test for granting an application to stay the execution of a judgment in a custody case is different. The question of custody of a child is a matter which peculiarly lies within the discretion of the judge who hears the case. The ultimate issue in such a case - the best interests of the child - is fact driven. The trial judge has the opportunity, generally denied to an appellate tribunal, of seeing the parties and investigating the child's circumstances. For these reasons the court of appeal shows considerable deference to the decision of a trial judge in custody matters. The court of appeal will only interfere with such a decision where the trial judge has gone wrong in principle, or has overlooked material evidence (see **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 112 N.S.R. (2d) 258).

[32] This appellate court deference is, in my view, particularly significant in this

case where the trial judge did not grant unfettered custody to the mother. The mother's custody is subject to supervision and to the 19 conditions to which I have already referred.

[33] The cases of **Millett, Routledge, Ryan** and **Ellis** referred to in § 28 and 29 all involve disputes between parents over the custody of children. In the trial of the matter before me a child welfare agency was seeking permanent custody of the children, without access to the parents, and thereby depriving both parents, permanently, of their parental rights. That difference does not, in my view, require me to relax, in any way, the test set out by Chief Justice Clarke in **Routledge**, in assessing the Agency's application.

[34] Therefore, in order for me to stay execution of the trial judge's order, pending the hearing of an appeal by the Agency, and to interfere - albeit on a temporary basis - with what the trial judge decided was in the children's best interests, the Agency must demonstrate, with evidence, that there are circumstances of a special and persuasive nature which warrant such a stay.

[35] The only evidence before me on this application, apart from the decision and order of the trial judge, and the notice of appeal, is an affidavit of the Agency's solicitor. This being a contested matter, and, particularly, considering that the subject matter involves custody of children, the applicant should provide the

Chambers judge with an affidavit from some party at the Agency who has first hand knowledge of the facts being deposed. It is not appropriate that the evidence in support of this application come from the Agency's counsel. It is a long established rule that a lawyer should not be both counsel and witness in a case, especially where the issues are contested.

[36] In any event, even considering the depositions in counsel's affidavit, those depositions fall far short of demonstrating circumstances of a special and persuasive nature which would warrant my granting a stay of the trial judge's order.

[37] The relevant paragraphs of the affidavit are:

> 4. The children in this proceeding, C. and M.E., are currently residing in a foster home in the metro area and receiving services which have been identified as responding to their individual needs. For example, M.E. is currently engaged in play therapy and C. is participating in a specialized school program with respect to his developmental delays.
>
> 5. The Order of Justice Hood issued November 9, 2000, requires that the children be returned to their mother, B. M. J., under the supervision of the Children's Aid Society of Halifax. Ms. J. is currently residing near S. J., N.B. with her mother.
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> 6. I am advised by Will Chambers, social worker with the Children's Aid Society of Halifax, and do verily believe, that the children are doing well in foster care and are responding positively to the services being provided.
>
> 7. Both Respondents, B. J. and S. M., have ongoing access to the children.

[38] With respect to § 4 of the affidavit, the trial judge ordered that the mother's custody of the children be subject to the supervision of the Agency, and also subject to detailed terms which I have set out earlier in these reasons, some of which deal

specifically with the individual needs of the two children. That being the case, the facts set out in § 4 of the affidavit provide no new information, nor do they indicate circumstances of a special and persuasive nature which would warrant my staying the trial judge's order.

[39] With respect to § 5 of the affidavit, the trial judge was well aware that the mother was currently residing near S. J., N.B. with her mother.

[40] With respect to § 6 of the affidavit, the fact that the children are doing well in foster care, and are responding positively to the services being provided, does not mean, necessarily, that the children will not do well in the care of their mother nor respond positively to the services which the trial judge has insisted be made available to them.

[41] With respect to § 7 of the affidavit, and as I have indicated previously in these reasons, it is now nearly two months since the trial judge decided that the children be turned over to their mother, and in those two months the mother has had one access visit with the children which lasted only two hours. If I were to grant a stay, I would not consider that to be appropriate ongoing access to the mother.

[42] Quite apart from the affidavit, and as counsel for the Agency pointed out in her submission, it is obvious that there will be disruption to these two young children being moved from their present foster care to their mother's care, and then back

again to foster care if the appeal is successful. However, such disruption will be present in every case involving the transfer of care of young children. If that was the sole basis on which I was to grant a stay of the trial judge's order, it would be tantamount to making a stay automatic in cases involving the custody of young children, because that factor of disruption will likely be present in every case.

[43] The legislature has not seen fit to make provision for an automatic stay of execution of the trial judge's order upon the filing of a notice of appeal. Further the **Civil Procedure Rules** make it clear that the filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from (see **Civil Procedure Rule** 62.10(1)).

[44] There could be a case where, even with the limited information that a Chambers judge has at his disposal, it might be apparent to the Chambers judge that there, likely, was an error in the trial process, and, for that reason, the appeal is likely to succeed. In such a case, the matter of the disruption of the children would, in all probability, be a circumstance of a special and persuasive nature warranting a stay.

[45] I cannot say that it is apparent to me from the record which I have reviewed that the Agency's appeal is likely to succeed.

[46] The grounds of appeal set out in the notice of appeal filed by counsel for the

Agency are as follows:

> 1. The Honourable Justice erred in law by unduly emphasizing Section 42(2) of the *Children and Family Services Act* as the primary consideration in the permanent care and custody hearing, overriding the paramount consideration as outlined in Section 2(2) of the *Children and Family Services Act* which is the best interests of the children.
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> 2. The Honourable Justice erred in law in her interpretation of Section 46 of the *Children and Family Services Act* as this section is applicable only to review applications and not a disposition hearing.
>
> 3. The Honourable Justice erred in law in her interpretation of Section 3(2) of the *Children and Family Services Act*;
>
> 4. Such further and other grounds as may appear.

[47] The relief which the Agency requests is that the children be placed in the permanent care and custody of the Agency.

[48] During the hearing of this application I asked counsel for the Agency to expand upon the various grounds of appeal, particularly how the trial judge erred in her interpretation of s. 46 of the **Act** and of s. 32 of the **Act**. Counsel responded by indicating that there is, essentially, one main issue in the appeal; that is that the trial judge overemphasized the less intrusive alternatives of s. 42(2) of the **Act** as the primary consideration, overriding the paramount consideration which is the best interests of the children.

[49] While that may be an arguable issue on appeal, the error is not apparent to me

upon reading the decision. Further the detailed conditions under which the trial judge ordered the children to be turned over to their mother, including those specifically related to the individual needs of the children, seem to belie the suggestion that the trial judge did not have as a primary consideration, the best interests of the children.

[50] There is no suggestion in the grounds of appeal, or otherwise, that the trial judge overlooked material evidence or that she misinterpreted the evidence.

[51] There is no evidence before me of any material change in circumstances since the trial, no evidence that any of the conditions which the trial judge imposed as part of her order have not, or will not, be met, and no evidence from which I could conclude that harm is likely to come to the children if they are turned over to their mother in accordance with the terms of the trial judge's order. Evidence on any one of these matters might very well amount to circumstances of a special and persuasive nature warranting a stay; however, there is none before me.

[52] I have referred earlier in these reasons to the various conditions which the trial judge imposed as part of the order granting custody of the children to the mother, subject to supervision. I note, also, that by virtue of the provisions of s. 43(2) of the **Act**, and in these circumstances where the trial judge has made a supervision order, any representative of the Agency has the right to enter the residence of the children

to provide guidance and assistance, and to ascertain that the children are being properly cared for.

[53] In summary, this application falls far short of that which would be required for me to stay the execution of the trial judge's order in this case.

[54] The application is therefore dismissed. In accordance with the terms of the trial judge's decision and order, the children are to be turned over to their mother forthwith.

Flinn, J.A.