Date:19990702
C.A. 153318

NOVA SCOTIA COURT OF APPEAL

Cite as: L.M. v. Children's Aid Society of Cape Breton, 1999 NSCA 101

Glube, C.J.N.S.; Pugsley and Flinn, JJ.A.

BETWEEN:

L.M. and B.M.	)	Appellants in Person
	)	
Appellants	)	
	)	
- and -	)	
	)	
CHILDREN'S AID SOCIETY OF CAPE BRETON	)	Robert M. Crosby, Q.C. for the respondent
	)	
Respondent	)	
	)	
	)	
	)	
	)	Appeal heard: April 16, 1999
	)	
	)	Judgment delivered: July 2, 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.; Glube, C.J.N.S. and Pugsley, J.A. concurring.

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.:

INTRODUCTION

[1] Following a hearing in the Family Court of Nova Scotia on November 5th, 1998, Chief Judge Ferguson (as he then was) decided that he had no jurisdiction to hear two applications which the appellants had made:

1. to terminate the permanent care order with respect to the child, E.H., which order was made by Judge MacLellan on November 26, 1997, pursuant to her oral reasons for judgment on October 23rd, 1997; and

2. to vary the permanent care order to permit the appellants access to the child, E.H.

[2] Prior to these applications coming on for hearing, the child, E.H., had been placed, by the respondent, for adoption; and the adopting parents, on October 5th, 1998, had given a notice of proposed adoption with respect to E.H. The essence of Chief Judge Ferguson's decision was that the provisions of the **Children and Family Services Act**, S.N.S. 1990, c. 5 as amended (the **Act**) prevented him from considering the appellants' applications because the notice of proposed adoption had been given. He decided that both applications be "held in abeyance during the continuation of the adoption placement" of E.H.

[3] The appellants claim procedural unfairness because both of their applications

preceded the notice of proposed adoption. Further, they submit that there is evidence of a change of circumstances since the permanent care order; and, therefore, their applications should be heard on their merits.

[4] It would be helpful to set out the history of this matter in some detail; and, thereby, consider the context in which the appellants' applications were made.

BACKGROUND

[5] The child who is the subject of the issue under appeal (E.H.) was born on October *, 1994 (*editorial note- removed to protect identity*). She will be five years of age in October of this year. The appellant L.M. is the mother of E.H. The appellant B.M. is E.H.'s stepfather. The appellants were married in December 1995.

[6] The history of these proceedings begins in March of 1996, before E.H. was 2 years of age. The Agency applied for and obtained an order (May 22, 1996) that E.H. was in need of protective services under s. 22 of the **Act**.

[7] On October 23rd, 1997, following a hearing in the Family Court of Nova Scotia, Judge MacLellan decided:

(i) that E.H. be placed in the permanent care and custody of the Agency;

(ii) that access to E.H., by the appellants, was not in the child's best

interests; accordingly, no provision was made in the order for access.

(iii) that the Agency's "Plan" for permanent placement of E.H. by way of adoption, was in E.H.'s best interests.

[8] The details as to what took place between March, 1996 (the date of the protection order) and October, 1997, (the permanent care order) are set out in the decision of Cromwell, J.A. in **Children's Aid Society of Cape Breton v. L.M. and B.M.** (1998), 169 N.S.R. (2d) 1.

[9] I will note, here, only these facts from that time period. Pursuant to the protection order, a supervision order was made which provided that E.H. would remain in the care and custody of the appellant, L.M., subject to the supervision of the Agency. It also provided that the appellant, L.M., was to have no contact with her husband (the appellant, B.M.) without the knowledge and consent of the Agency, and that the appellant, L.M., was to co-operate with the Agency and other authorities so that her husband would have no contact with her. The appellant, L.M., had accused her husband of serious physical abuse of both herself and E.H. Notwithstanding the terms of the supervision order, the appellant, L.M., took E.H. out of the jurisdiction thereby avoiding having to submit to the jurisdiction of the Agency. The appellant, L.M., left E.H.'s sibling (J.M.) behind in Nova Scotia with J.M.'s father (not the appellant, B.M.), where J.M. now resides. Contrary to the terms of the supervision order the appellant L.M. resumed cohabitation in the United States her husband. The appellants found their way to F.. When the trailer in which they resided was robbed, the two lived in

various different shelters in F.. Both were arrested and jailed on theft charges. The F. authorities apprehended the child, E.H., at a shelter in T., F.. One of the Agency workers had to travel to F., apprehend E.H., and bring her back to Nova Scotia, while the appellant, L.M. remained in jail. Eventually the appellant, L.M., returned to Canada. Access was arranged for the appellant, L.M., to see the child, E.H. Subsequently the Agency learned that B.M. was in the area and in contact with the appellant, L.M., at which time access was suspended. At this point the appellant, L.M., recanted the allegations of spousal and child abuse against B.M.

[10] In her judgment which formed the basis of the permanent care order, Judge MacLellan said the following concerning the appellants:

> ..... Their history is ridden with instability. The court has no assurance whatsoever that any order I could make, if I had the latitude, would be followed. Neither one follows court orders because they state their family is more important than court orders. But what did not following court orders end up with? Being raised in shelters, going to jail and having the child flown back into this country by an absolute stranger. This child was apprehended twice before age three. I have no assurance whatsoever that they will follow any order or any recommendation this court could make.
>
> In any event, I am satisfied that the Agency has met their onus. The evidence is overwhelming both on either version of the facts. I order that [E.H.] be placed in the permanent care of the Agency.

[11] The instability of the appellant L.M. (the mother of E.H.) and the inability (or refusal) of both appellants to deal with it, comes clearly into focus in reviewing what Judge MacLellan said concerning her:

> It has taken [L.M.] a long, long time to come around to her difficulty with the substance abuse and chronic lying. We have to remember that these were not chronic lies told while she was under the influence of alcohol. Many of these lies were told when she was not under the influence of alcohol, or at least did not

> appear to be. So there may well be two or three distinct sets of problems. But to date, [L.M.] has not had a psychological or psychiatric assessment, even though it was discussed in 1993 and opposed. After hearing [L.M.] and witnessing her in this court room for four days I find she is now in this most tumultuous situation. She finds herself to be expecting again. She needs indepth and immediate psychiatric or psychological or emotional assessment to help her find out is the problem drinking? Is the problem sexual abuse? Is the problem the past prostitution? Is the problem domestic abuse? What is the problem? Is it a little bit of everything? What's the road to recovery? Her grasp of the problem that she has is superficial. She does not see what a chronic problem she has. [B.M.] does not appear to grasp that there are serious problems with this past behaviour and his marriage.

[12] On the question of whether the parents should have access to E.H., and as to whether the Agency's plan for adoption was in E.H.'s best interests, Judge MacLellan said the following:

> ...I am satisfied after reviewing all the evidence that there is a plan for the permanent placement of this child for adoption. I am satisfied that risks as set forth still exist. I am satisfied the parental situation is unlikely to change in the foreseeable future. On all the evidence I am satisfied that adoption is clearly in [E.H.]'s best interests. I am ordering that access is not in her best interest and that access be severed.

[13] The appellants were represented by counsel at the hearing before Judge MacLellan.

[14] The appellants, unrepresented by counsel, appealed the permanent care order of Judge MacLellan to this Court. The appellants made an application to stay Judge MacLellan's order pending the hearing of their appeal. That application was dismissed by Cromwell, J.A. in Chambers (see (1998), 167 N.S.R. (2d) 341).

[15] On April 17th, 1998, this Court heard the appellant's appeal of the permanent care order. The appellants were not represented by counsel on the hearing of the

appeal. Cromwell, J.A., writing for the Court ((1998) 169 N.S.R. (2d) 1) dismissed all of the 13 issues raised by the appellants on the appeal. Justice Cromwell reviewed the history of the proceedings in detail. With respect to Judge MacLellan's findings, Justice Cromwell, for the Court, said the following:

> To conclude on this aspect of the appeal, I am persuaded that all of the key findings of the Family Court judge are supported by the evidence. In most cases, this support is found in the evidence of the appellants themselves. There is no basis upon which this Court should disturb her findings .

[16] In his detailed analysis of the trial judge's findings, Justice Cromwell provided the following analysis concerning the instability of the appellants, as well as their lack of credibility with respect to this matter, (the references in the following extract to Mr. and Mrs. M. are to the appellants):

> ..... The judge's finding with respect to instability is well supported by the evidence to the point that any other finding on the evidence adduced in these proceedings would have been perverse.
>
> Next, the judge found that less intrusive alternatives had been attempted and failed and would be inadequate to protect the child. The appellants submit that wrong information about their involvement with past support services was relied on in this connection. However, these findings are well supported by two facts about which there can be no dispute.
>
> First, after the interim supervision order was made, Mr. and Mrs. M. took their child out of the jurisdiction, thereby avoiding having to submit themselves to the Agency's supervision. Second, both Mr. and Mrs. M. had made it crystal clear that they placed their own judgment about the welfare of their family ahead of court orders or Agency supervision. For example, Mr. M. said:
>
> > Q. So did you have any concerns with regard to being in violation of the Court's Order?
> > A. No.
> > Q. Why not?
> > A. I figured our family is more important than Children's Aid.
> >
> > . . . . .
> >
> > Q. ... but do you remember that you were ordered by that

> Court to reside at 200 or 200-some L. D.?
> A. Ah, yes.
> Q. You do remember that?
> A. Yeah, yes.
> Q. But you lived at T. B. R.?
> A. Yes.
> Q. Is that because your family is more important than the police and the Provincial Court?
> A. Ah, yes.
>
> . . . . .
>
> Q. Your family is more important than Children's Aid? Your family is more important then this court?
> A. Yes.

> As for Mrs. M., she repeatedly lied to the Agency when she thought it was to her advantage. She also filed false evidence with the Court and violated a Court order to which she had consented.

> The judge concluded that she had " ...no assurance whatsoever [Mr. and Mrs. M.] will follow any order or any recommendation this court could make." This finding is amply supported by the evidence and this in turn supports the judge's conclusion that no order she could make short of permanent care would be adequate to protect the child.

[17] Justice Cromwell then referred, in detail, to the evidence at the trial, and the decision of Judge MacLellan, which demonstrated the appellants' lack of insight into the situation with respect to E.H. (the references in the following extract to E. are to E.H.):

> With respect to Mrs M., the judge observed: "Her grasp of the problem that she has is superficial"; with respect to Mr. M.: "Mr. M. does not appear to grasp that there are serious problems with this past behaviour and his marriage." These conclusions are strongly supported by the evidence.

> In relation to her time with E. in the Salvation Army Shelter in S. F., Mrs. M. testified as follows:
>
> Q. That was what kind of an experience? A good experience, not a very nice experience?
> A. No, it was terrible.
> Q. It was terrible?
> A. Yeah.
> Q. I take it that it was terrible for [E.] as well as for you?
> A. Yeah, it must have been.

This testimony was referred to by the judge as follows:

> It was disconcerting for me to note that in four days of evidence I heard very little and almost nothing from mother at all unless asked directly as to what affect did she think her conduct had on the child? She talked about her hurt, her upset, her pain, but what about this little girl who was with mom and dad in dubious situations in F. and then they're gone. They're gone. No one talked about that. Mother talked about it was hard on her. And Mr. Crosby asked her on cross-examination, and probably not easy on [E.] either? And she indicated to the effect; 'No I guess not, probably not.' But it was as if it was new thought. This I think is typical of someone who has to deal with [a] number of serious problems.

As for Mr. M., he displayed an equally significant lack of insight. For example, when questioned about the early period of his relationship with Mrs. M. he testified as follows:

Q. But, even though two months later you were married, you fought about drinking?
A. Yes.
Q. You fought about her drinking and you fought about your drinking?
A. Yes.
Q. You fought when you were both drinking?
A. Yes.
Q. And when you were not, she was?
A. Not every time we drank; on occasion, we fought.
Q. And [E.] was with you both at that time?
A. Yes.
Q. And [J.]?
A. Yes.
Q. It couldn't have been a very good time for the kids?
A. **They weren't complaining.**

(Emphasis added)

E. was under two at this point so it is not clear what complaint could be expected.

Further:

Q. Now, throughout your direct evidence with your lawyer you indicated on several occasions that you thought your relationship with [L.] during the early

parts of the marriage, and while you were in the United States, you thought it was good?
A. Yes.
Q. Would you agree that there were actually a lot of difficulties in that marriage?
A. Yes.

With respect to assistance with parenting, the following:

Q. Any other inquiries that you feel are necessary with regard to your own personal counselling?
A. Parenting.
Q. Parenting?
A. Yes.
Q. Okay, and have you made inquiries with regard to parenting courses?
A. Not yet.

The past and present instability, the ineffectiveness and unavailability of Court supervision and the lack of insight by Mr. and Mrs. M. into the situation of E. amply support the judge's finding that there was continuing risk to E. for the foreseeable future.

[18] With specific reference to Judge MacLellan's finding that adoption would be in the best interests of E.H., Justice Cromwell said the following:

The judge also found that adoption would be in E.H.'s best interests. The Agency's plan stated the matter this way:

> The child, [E.H.] has been in foster care since November 6, 1996, and until June, 1997, she had only a few visits with the Respondent, L.M [E.H.'s mother].
>
> It is the Agency's position that given the age of the child and the period of time she has been in foster care, it is time to make sound long-term decisions based on her emotional and physical needs.
>
> . . . . .
>
> The child, [E.H.] , is currently in an approved foster home and has been in the same home since first coming into care on November 6, 1996. There will be no changes in this placement until such time as a permanent placement is deemed necessary.
>
> Given the child's young age, adoption prospects are very good. As stated earlier, a Permanency Planning Committee

> meeting will determine adoption plans when the child is legally free to be adopted.
>
> While noting the lack of appropriate detail in the plan, the judge directed herself with respect to s. 47 which permits the Court to order access "unless the court is satisfied that the permanent placement in the family setting has not been planned." It was clear to the judge that the plan was for permanent placement for adoption. This finding is amply supported by the evidence before her. That being the case, it would have been inconsistent with the plan for adoption to order access. I also conclude that in finding that adoption was in [E.H].'s best interest, the judge made no error which would permit or justify the intervention of this Court. (emphasis added)

[19] Early on in the reasons for judgment of the Court, Justice Cromwell noted that what was being appealed was the permanent care order and not the original determination that E.H. was in need of protective services. He said the following:

> The finding that E.H. was in need of protective services was not subsequently challenged or appealed. It is not the subject of this appeal. The order under appeal is the permanent care order made in October of 1997.

[20] These reasons for judgment were released on May 14th, 1998.

[21] One month later, on June 16th, 1998, the appellant, B.M., applied to this Court in Chambers for an order to extend the time to file an appeal from the decision of the Family Court rendered in March of 1996 by which it was ordered that E.H. was in need of protective services. The application was heard by Chipman, J.A. on June 25th. The appellant, B.M., was not represented by counsel at the hearing of the application. The appellant, L.M., appeared with him before Justice Chipman.

[22] Among other things, the appellant B.M. took the position that he was never

given notice of the hearings which resulted in the protection order. He swore an affidavit which deposed, inter alia:

> 2. I have never been served any documents to appear at any hearings in relation to the hearings concerning custody, access or protection proceedings in Family Court of Sydney, Nova Scotia, throughout the case as seen in exhibit log of Family Court in Sydney, Nova Scotia; This is marked as Exhibit No. 1 to this affidavit.
>
> . . .
>
> 4. . . . the applications filed with the courts named both my wife . . . and myself as parties to the proceedings although I was never served, nor made aware of, nor present in these hearings.

[23] After a detailed review of the file, including the original Family Court file from Sydney, Justice Chipman rejected B.M.'s sworn testimony that he had not been served with the notice of the March 8th, 1996, hearing. Justice Chipman said:

> My confidence in the applicant's assertions to me that he was not notified of these proceedings is anything but unlimited.
>
> I am satisfied that having been served with the notice of the March 8th hearing, the applicant failed to show up and left the province shortly thereafter. He has thus disabled himself from receiving notice of the May 22nd hearing. He cannot complain that these proceedings took place in his absence.

[24] In dismissing the appellant B.M.'s application, Justice Chipman referred, among other things, to the preamble to the **Children and Family Services Act**, and the purpose of the **Act**. He said the following in his decision:

> The preamble to the **Act** includes the following:
>
> > WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being;
> >
> > AND WHEREAS children are entitled to protection from abuse and neglect;
>
> . . . . .

AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;

. . .

AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;

AND WHEREAS social services are essential to prevent or alleviate the social and related economic problems of individuals and families;

. . . . .

The purpose of the **Act** is stated in s. 2:

2(1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.

(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

The provisions of the **Act** dealing with intervention by the state in the family unit which can lead to the ultimate measure of placement in permanent care are designed to ensure that these objectives are attained where possible. The applicant had a full opportunity to demonstrate his fitness to play a role in E.H.'s future at the trial before Judge MacLellan. She found that the respondent established that adoption was clearly in E.H.'s best interests. Over two years have now elapsed since the orders were granted. In the nearly four years of her life, E.H. has been subjected to an environment of turmoil and uncertainty. The strict time limits for proceedings to be taken under the **Act** are undoubtedly designed to respect the child's sense of time and to avoid protracted litigation becoming a dominant or central event in a child's upbringing.

E.H. is still in foster care. Justice requires that, in view of Judge MacLellan's findings, affirmed by this Court, she be given the benefit of a stable environment without more delay.

(emphasis added)

[25] Justice Chipman's decision was released on July 7th, 1998.

[26] All of their appeal rights having expired, the appellants had to have known that an adoption placement was now imminent. Three weeks later, on July 29th, 1998, the appellants filed, with the Family Court, an application to terminate the permanent care order. It is this application which is the subject of this appeal.

[27] It cannot be said that the appellants were not aware of the requirement, under the **Act**, for leave to be obtained to make such an application. The application which the appellants filed is taken, verbatim, from Form 21.14B of the **Family Court Rules**. There are alternative second paragraphs in that Form as follows:

> AND TAKE NOTICE that no leave to make the within application is required as the Applicant herein complies in all respects with the provisions of Section 48 of the Children and Family Services Act.
>
> (or, AND TAKE NOTICE that leave has been obtained by order made the _____ day of _____, 19___ as required by Section 49(6)(___) of the Children and Family Services Act (if applicable)).

[28] The appellants included the first of these alternatives in their application, and deleted the second.

[29] There is no indication anywhere in the application, or in the affidavits filed in support of it, as to why the appellants took the position that leave was not required, when it clearly was required. It is a reasonable inference from these facts that the

appellants, simply, ignored the leave requirement.

[30] Further, this Court was apprised, during the hearing of this appeal, that the appellants have, without counsel, instituted a further proceeding in the Supreme Court of Nova Scotia in Sydney, raising objection to the Notice of Proposed Adoption given by the adopting parents with respect to E.H. I understand that matter has been adjourned pending a resolution of this appeal.

[31] There is one further matter, in my recitation of the history of these proceedings, which should be noted here. On April 22nd, 1998, the respondent filed an application in the Family Court requesting a finding that the appellants' youngest child, C.M. (at the time approximately two weeks old), was in need of protective services under s. 22(2)(b) of the **Act**. The matter came on for hearing before Buchan, J.F.C. Judge Buchan dismissed the respondent's application. She determined that the respondent had not satisfied the onus upon it to prove that the child, C.M., was in need of protective services.

[32] The appellants have asked this Court to take into account Judge Buchan's decision as relevant to the matters which are the subject of this appeal.

[33] In my opinion, Judge Buchan's decision is not relevant to the matter before this Court. The issue before Judge Buchan was whether the Agency had proved that a child of the appellants (less than one year old) who had been with the appellants since

his birth, was in need of protection under the s. 22 of the **Act**. Judge Buchan decided that the Agency did not satisfy the onus upon it. That matter is not before this Court. Likewise, the paramount consideration in this appeal - what is in the best interests of the child E.H. - was not before Judge Buchan. There are very different considerations involved in determining, on the one hand, what is in the best interests of an infant child (less than one year old) who has been with his mother since birth (the situation which was before Judge Buchan) and the considerations involved in determining what is in the best interests of E.H., a child who, at the time of the hearing before Chief Judge Ferguson, was four years of age, was the subject of a permanent care order, and as of that time had been in foster care for two years. Further, Judge Buchan's decision would not have considered the impact of adding another child to this formerly unstable family.

THE DECISION OF THE TRIAL JUDGE

[34] With this background, I will now analyse Chief Judge Ferguson's decision.

[35] The issue that was before Chief Judge Ferguson was set out by him in his decision as follows:

> The agency submits that the legislation governing these applications [the application to terminate the permanent care order and the application for access] prevents the court from proceeding until the adoption application is dismissed, discontinued or unduly delayed.
>
> The parents submit, to the contrary, that, given the dates of their existing applications, the applicable legislation does not prevent the hearing of these applications but does prevent the agency from placing their child for adoption on October 5, 1998.

The Application for Access

[36] With respect to the appellants' application for access to the child, E.H., s. 47(2) of the **Act** is determinative of the issue. It provides:

> **47** (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; (emphasis added)

[37] In my opinion, Chief Judge Ferguson was correct in concluding that s. 47(2)(a) of the **Act** prevented the Court from making an access order on November 5th, 1998, since as of October 5th, 1998, permanent placing in a family setting was not only possible but had, in fact, been planned and implemented.

[38] I would, accordingly, dismiss the appeal from the decision to refuse the appellants' application for access.

Application to Terminate the Permanent Care Order

[39] The conflict which presented itself to Chief Judge Ferguson was the fact that the Agency (after the appellants' appeal rights had expired) had made plans for E.H.'s adoption (something which the Agency was prevented from doing while the appellants were litigating the permanent care order and the original protection order). An adoption

placement was found, and the adopting parents gave notice of proposed adoption. In conflict with that, was the right, under the **Act** (subject to certain restrictions), for the appellants to make an application to terminate the original permanent care order.

[40] Section 48(3) of the **Act** provides that the appellants may apply to terminate the original permanent care order:

> **Application to vary or terminate order**
>
> 48 (3) A party to a proceeding may apply to terminate an order for permanent care and custody or to vary access under such an order, in accordance with this Section, including the child where the child is sixteen years of age or more at the time of application for termination or variation of access.

[41] Section 48(6) places restrictions on the appellants' right to apply. Having challenged on appeal, the permanent care order, the appellants could not make such an application without first obtaining leave of the Court. The relevant part of s. 48(6) is as follows:

> **Restriction on right to apply**
>
> 48 (6) notwithstanding subsection (3), a party, other than the agency, may not apply to terminate an order for permanent care and custody
>
> .....
>
> (c) except with leave of the court, within
>
> .....
>
> (iii) six months after the date of the final disposition or discontinuance of an appeal of an order for permanent care and custody or of a dismissal of an application to terminate an order for permanent care and custody pursuant to subsection (8).

[42] The parties to this appeal concede that s. 48(6)(c)(iii) applies to the appellants. The appellants were required to obtain leave to make the application to

terminate the permanent care order. No leave was obtained in this case.

[43] There are further restrictions, on the application itself, which I will refer to later.

[44] With respect to the obligation on the Agency, Chief Judge Ferguson said the following in his decision:

> The agency, after the granting of a permanent care and custody order, has a legal obligation to make long-term plans for the child. In **Re Tanner** (1974) 24 A.P.R. 444, Justice Morrison stated at page 446:
>
> > "It is within the authority of the defendant society and, as a matter of fact, may well be its duty, to encourage the adoption of children who have been made wards of the society."

[45] In this case, without applying for, and obtaining, leave as required under the **Act** (and with the certain knowledge that an adoption placement was imminent), the appellants filed an application to terminate the permanent care order on July 29th, 1998. Prior to any adjudication with respect to that application, the adoption placement had been found for E.H., and the adopting parents had given notice of proposed adoption.

[46] Obviously, both of these processes cannot be going on at the same time. One has to give way to the other.

[47] I will refer to the relevant provisions of the **Act** because, in certain circumstances, they can create some confusion in considering which of these

conflicting legal processes should prevail.

[48] There are restrictions under the **Act** with respect to the adoption of a child who is the subject of a permanent care order.

[49] Section 70(3) provides as follows:

> **Child in permanent care and custody with access order**
> 70 (3) No child in permanent care and custody and in respect of whom there is an order for access pursuant to subsection (2) of Section 47 may be placed for adoption unless and until the order for access is terminated pursuant to Section 48.

[50] Section 70(3) has no application, here, because there is no order for access. There is no dispute on this point.

[51] Section 76 of the **Act** is entitled “Prerequisites to adoption”. It provides in its entirely as follows:

> **Prerequisites to adoption**
>
> 76 (1) Except as herein provided, where the person sought to be adopted is under sixteen years of age, the court shall not make an order for the child’s adoption unless
>
> (a) notice of the proposed adoption has been given to the Minister not later than six months before the application to the court for an order for adoption, or where one of the applicants for adoption is a parent of the child, notice of the proposed adoption has been given to the Minister not later than one month before the application to the court for an order for adoption;
>
> (b) notice of the hearing of the application and a copy of the application and all material to be used in support of it have been filed with the Minister not later than one month before the date of the application; and
>
> (c) the child sought to be adopted has for a period of not less

> than six months immediately prior to the application, lived with the applicant under conditions that, in the opinion of the court, justify the making of the order.
>
> **Modification of prerequisites by Minister**
>
> (2) The Minister may, by certificate in writing, shorten the length of any notice or period of residence required by subsection (1) or dispense with any notice or period of residence.
>
> **Effect of appeal**
>
> (3) In the case of a child who is a child in permanent care and custody, the notice of the proposed adoption shall not be given until any appeal from an order for permanent care and custody of the child or from a decision granting or refusing an application to terminate an order for permanent care and custody is heard and finally determined or until the time for taking an appeal has expired.

[52] There is no dispute in this case that the adopting parents have given the notice of proposed adoption as contemplated by s. 76(1)(a).

[53] Section 76(3) entitled “Effect of Appeal”, while its wording is awkward, provides for two situations, where notice of proposed adoption shall not be given, in the case of a child in permanent care and custody:

(i) until any appeal from an order of permanent care and custody of the child is heard and finally determined, or until the time for taking such an appeal has expired; and

(ii) until any appeal from a decision granting or refusing an application to terminate an order for permanent care and custody is heard and finally determined or until the time for taking an appeal has expired.

[54] With respect to (i), and as counsel before Judge Ferguson agreed, this

Court's decision rejecting the appellants' appeal of the order of permanent care and custody of E.H. was handed down on May 14th, 1998. The notice of proposed adoption in this case, given on October 5th, 1998, satisfies prerequisite (i).

[55] With respect to (ii), there was argument before the trial judge that no notice of proposed adoption could be given where a termination application is "before the courts". Since the appellants had filed an application to terminate the permanent care order, it was submitted that the notice of proposed adoption did not comply with s. 76(3) of the **Act**, and, therefore, should not have been given. The trial judge rejected that argument, and in my opinion was correct in doing so.

[56] In **Telfer v. Family & Children Services of Annapolis County** (1982), 50 N.S.R. (2d) 136, this Court interpreted s. 19(4) of the previous **Act** (**Children's Services Act**, S.N.S. 1976, c. 8), a section which is virtually identical to s. 76(3) of the current **Act**. Section 19(4) of the previous **Act** provided as follows:

> **19** (4) In the case of a child who is a child in the care of an agency, the notice of the proposed adoption shall not be given until any appeal from the committal of the child to the care and custody of an agency or from a decision granting or refusing an order to terminate the care and custody of an agency is heard and finally determined or until the time for taking an appeal has expired.

[57] Justice Jones, writing for the Court, said the following at p. 151:

> .....Section 19(4) of the *Act* provides that notice of a proposed adoption shall not be given until an appeal from a termination order is determined. That section can only be taken to refer to orders made in the first instance before a notice of adoption is given. ..... (emphasis added)

[58] With respect to (ii), as of the date of the notice of proposed adoption, October

5th, 1998, there was no order granting or refusing an application to terminate the permanent care order. Further, there was not even any request for leave to make that application, which is required here.

[59] Therefore, by virtue of s. 76 of the **Act**, the notice of proposed adoption which was given in this case complied with all the prerequisites of the **Act** for the giving of such a notice, and the adoption application should, on that basis, be permitted to proceed.

[60] However, the matter may be complicated by the wording of the provisions of s. 48 of the **Act**, which gives the appellants the right to apply for an order to terminate the permanent care order, subject to restrictions both on the right to apply and on the application itself.

[61] I have already made reference to s. 48(3) of the **Act** which permits the appellants to apply to terminate the original permanent care order, and the requirement for them, under s. 48(6), to obtain the leave of the Court before such an application is made.

[62] Assuming that the appellants obtained the leave required by s. 48(6)(c)(iii), there are further restrictions on the actual application under s. 48(4) of the **Act** which provides as follows:

> **Restriction on application for order**
>
> 48 (4) Where the child has been placed and is residing in the home of a person who has given notice of proposed adoption by filing the notice with the Minister, no application to terminate an order for permanent care and custody may be made during the continuance of an adoption placement until
>
> (a) the application for adoption is made and the application is dismissed, discontinued or unduly delayed; or
>
> (b) there is an undue delay in the making of an application for adoption.

[63] In his decision, Chief Judge Ferguson decided that he had no jurisdiction to deal with the application to terminate the permanent care order because the notice of proposed adoption had been given. In coming to that conclusion he relied on the decision in **Telfer (supra)**. He referred to the following from the decision of the Court at pp. 151-152:

> In the light of the authorities it seems clear that the Legislature intended to preclude the making of an order terminating custody where the child has been placed for adoption. Section 19(4) of the *Act* provides that notice of a proposed adoption shall not be given until an appeal from a termination order is determined. That section can only be taken to refer to orders made in the first instance before a notice of adoption is given. It should be noted that s. 53(1) provides that the guardianship shall not be terminated once the child is placed for adoption.
>
> .....
>
> It follows that both Judge Black and Judge Nicholson were precluded by s. 53 of the *Act* from terminating the Agency's guardianship of HT.

[64] While **Telfer** was decided on the basis of the provisions of the previous legislation, it is not clear to me that the intention of the Legislature is different under the previous legislation and under the current **Act**. Therefore, it is not clear to me that I can, simply, disregard the decision in **Telfer** because it was decided under the previous legislation.

CONCLUSION

[65] In view of the conclusion in which I have come to in this matter, it is not necessary for me to decide whether the intention of the legislature, with respect to the current **Act**, is to preclude the Court from terminating a permanent care order in every case where a notice of proposed adoption has been given which complies with all of the prerequisites of the **Act**.

[66] However, in the circumstances of this case, Chief Judge Ferguson was correct, in my opinion, to conclude that the appellants' application to terminate the permanent care order must give way to the adoption proceedings.

[67] I have come to that conclusion on the basis that the appellants cannot be said to have made an application to terminate the permanent care order with respect to the child E.H., within the meaning of s. 48(4), because they did not first obtain leave to make that application which leave is mandated by s. 48(6)(c)(iii).

[68] There is, in my view, a sound basis for the requirement to obtain the leave of the Court before making an application to terminate a permanent care order as that requirement is set out in s. 48 of the **Act**; in particular s. 48(6)(c)(iii) in this case. The requirement for leave is a matter of substance. It is not merely a formality. In fact, the **Family Court Rules** require a separate and distinct application for leave.

[69] Rule 21.14(3) of the **Family Court Rules** provides as follows:

> 21.14 (3) Where a party is required to obtain leave of the court under Section 48(6), prior to making an application to terminate an order for permanent care and custody, the party shall first file an application for leave, supported by affidavit, and, if leave is granted, an application in Form 21.14B shall be filed and served as directed by the court.

[70] It is precisely because the interests of the child are paramount that the leave provisions must be met. As to the importance of, and requirement for, leave to make an application to terminate a permanent care order, Judge Levy of the Family Court of Nova Scotia said the following in the case of **D.L.G. v. Family & Children Services of Kings County** (1994), 136 N.S.R. (2d) 131, at p. 133:

> It is evident from the entirety of s. 48 that the Legislature intended that the Agency, on obtaining permanent care and custody, would have a six month "window" of time, free from court proceedings, to work with and possibly place children. That "window" is not to be interfered with unless a judge grants leave.
>
> An application to terminate a care and custody order of necessity interjects delay and uncertainty into an Agency's plans for children. It may well be that this delay and uncertainty would compromise the best interests of the children. So too might the possibility of further assessments, (48(8)(c)), and the distraction of Agency workers from the task of settling the child. If a parent could keep the Agency and its plans on a permanent hold simply by continuously applying for termination, much of, if not the entire value of a permanent care and custody order would be lost. Certainly any undue delay in settling children or commencing the necessary "healing" process can prejudice a child's healthy development.
>
> Wisely, the **Act** seeks not to altogether forbid or preclude an application within the six month period. There may be any number of circumstances that would justify proceeding with such an application to terminate. Imposing the necessity of, (and granting the opportunity to), obtain leave is a mechanism to secure balance and flexibility for appropriate circumstances.

[71] As to the burden on the applicant, Judge Levy said at p. 134:

> ... , the applicant for leave must, in my opinion, present ostensibly credible and weighty evidence that those deficiencies in the parent or her circumstances that led to the care and custody order being granted have improved, or are being convincingly and meaningfully addressed with a realistic expectation of success

> in the reasonably foreseeable future.

[72] And further:

> The applicant for leave does not have to prove that the children should be returned forthwith. What must be established however, is that there is sufficient evidence to warrant holding a hearing and of having any agency plans, put on hold; some reasonable prospect of success. The parent's rights and her evidence are to be weighed against whatever negative consequences there might be from holding a hearing, and the decision, as with all decisions under the **Act**, is to be made in the best interests of the children.

[73] Generally speaking, I endorse those comments of Judge Levy. Further, there are two very relevant factors which are present in this case, which were not present in **D.L.G.**, and which make the requirement for leave even more significant. Those two matters are:

(i) before leave was requested, the Agency made use of the "six month window" about which Judge Levy spoke. An adoption placement had been found for E.H.. E.H. was placed in the adopting parents home, and the adopting parents gave a notice of proposed adoption. That should not be interfered with, unless a judge grants leave;

(ii) as of the date of the hearing before Chief Judge Ferguson, E.H. had been out of the appellants' care for two years. Under all of the circumstances here, it is unreasonable for the appellants to simply "file" an application (ignoring the leave requirement), and expect that other processes, with respect to the child, E.H., (which have already been on hold for some time) will be put on hold again.

[74] Chief Judge Ferguson considered this latter fact when he considered the

submission of counsel for the appellants that it was unfair for a notice of proposed adoption to have been given once the appellants had filed their application for termination of the permanent care order. The trial judge said the following:

> The agency's counsel, in his oral submission, replied to the parents' suggestion of unfairness. He acknowledged the agency's allowing the adoption process to proceed to placement with the knowledge of an impending termination request might be considered unusual. He however noted, however, that this was an unusual situation. He talked about the length of time this matter had been pending and [E.H.'s] age; that the appeal to the Supreme Court of Nova Scotia (sic) and the possibility of an appeal to the Supreme Court of Canada forestalled the agency in its obligation to make appropriate arrangements for [E.H.]; that, given the foregoing, it was decided, in the child's interest, to allow the adoption process to continue to placement.
>
> EH became four years old on October *, 1998 (*editorial note- removed to protect identity*) . When Judge MacLellan gave her decision, she was almost three years of age. Her decision notes that the agency's first involvement with [E.H.], insofar as Court appearances are concerned, was March 8, 1996; further, that on the date of her decision she had been in foster placement for approximately one year when placed in permanent care and custody. As of the date of this decision she has been in foster care for two years.

[75] As to the submission by the appellants that it was procedurally unfair for the Agency to have been involved with the giving of a notice of proposed adoption after they had "filed" their application to terminate the permanent care order, Chief Judge Ferguson said the following:

> .....I do not find it in [E.H.'s] best interest that prior knowledge of such an application should serve as a bar to the agency's continuing in its mandate to secure her future even if it includes adoption.

[76] In summary, the appellants never requested, nor obtained, leave to make an application to terminate the permanent care order prior to the notice of proposed adoption having been given. That being the case, the appellants are prevented, by statute, from making an application to terminate the permanent care order. Therefore,

Judge Ferguson was correct to refuse to consider the application which the appellants filed.

[77] In view of this conclusion it is not necessary to deal with the appellants' submissions as to the merits of their application to terminate the permanent care order.

[78] Since the appellants were prevented, by statute, from making both of the applications which are the subject of this appeal, it was not correct, in my view, for Chief Judge Ferguson to have ordered that these applications be "held in abeyance during the continuation of the adoption placement" of E.H. Since these applications did not comply with the statutory requirements of the **Act,** they are not to be considered as valid applications, being "held in abeyance".

[79] I would dismiss the appeal.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.