Date: 19980513 Docket: CA 144659

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Community Services) v. B.M.,
1998 NSCA 132

Roscoe, Pugsley and Flinn, JJ.A.

BETWEEN:

THE MINISTER OF COMMUNITY SERVICES	)	Lorne MacDowell, Esq.
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	
B.M. and L.M.	)	Frank E. DeMont, Esq.
	)	for the Respondents
Respondents	)	
	)	
	)	
	)	Appeal Heard:
	)	April 17, 1998
	)	
	)	Judgment Delivered:
	)	May 13, 1998

Editorial Notice

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

THE COURT: The appeal is allowed, per reasons for judgement of Pugsley, J.A.; Roscoe and Flinn, JJ.A., concurring.

Pugsley, J.A.:

The Minister of Community Services (the Agency) appeals from a decision and order of Judge Robert White of the Family Court, dismissing the Agency's application for a finding that the six children of the respondents, BM and LM, were children in need of protective services as defined by s. 22(2)(a) and (b) of the **Children and Family Services Act**, (1990) c. 5 S.N.S. (the **Act**).

The grounds of appeal may be summarized as follows:

- Judge White failed to properly determine, and apply, the burden imposed on the Agency under the **Act**, and made a palpable and overriding error in his assessment of the facts disregarding material evidence.

Background

The children, EM (male, DOB January *, 1986), SM (female, DOB May *, 1988), JM (male, DOB January *, 1990), RM (female, DOB December *, 1992), GM (female, DOB October *, 1994), and YM (female, DOB May *, 1996) are the biological children of the respondents. (* *editorial note- dates removed to protect identity*)

The respondents and their six children live in rural Nova Scotia and occupy a mobile home (64' by 14') located on a large tract of land. BM is apparently in his late 30's and his wife, LM, was 34 at the time of the hearing in December, 1997.

In mid-September, 1997, a confidential informant contacted the RCMP alleging that the respondent BM:

- "Dominated his wife, and children, and had openly stated that he did not believe the law in regard to discipline of children and that he would discipline his children as he saw fit." ;

- "Had been witnessed by the confidential informant spanking his children and hitting them with a stick, leaving observable bruises."

It was further alleged that SM disclosed that her father had given her the bruise observed. Finally, concerns were raised that the children were schooled at home, did not socialize with other children, and that their only outing "would be to church".

Acting upon the referral, protection workers employed by the Agency attended at the mobile home on September 16, 1997. As the respondents would not permit the children to be interviewed by the protection workers, an *ex parte* application was made on behalf of the Agency for an investigative order pursuant to s. 26(2) of the **Act**.

The order was granted on September 18 authorizing the Agency, among other things, to enter the respondents' mobile home, conduct a physical examination of the children, remove the children for a medical examination if one was deemed reasonably necessary, and further to remove the children and attend with them at the offices of the Agency, or the RCMP in A. to interview them with respect to the allegations made against their parents. The order further provided for the interview to be video taped.

The children were accordingly taken to the RCMP detachment in A. and the three oldest, EM (eleven years, nine months), SM (nine and a half), and JM (six years, nine months), all provided individual video-taped statements, collectively lasting approximately two hours.

As a result of the interviews, the Agency sought, and subsequently obtained, certain assurances from the respondents, who by then had obtained legal advice, that they would not use corporal punishment while the Agency brought the matter before the Court.

The Agency initiated an application on September 25 for an order that the children were in need of protection. The interim hearing was resolved by a "without prejudice" consent order entered into by counsel for both parties.

During the course of the protection hearing heard in mid-December, 1997, the video-taped interviews of EM, SM and JM were introduced as exhibits. *Viva voce* evidence, in addition, was called on behalf of the Agency and the respondents. SM was the only child who gave *viva voce* evidence at trial. Judge White reserved decision after submissions were advanced on December 15, and subsequently released a written decision on December 23 dismissing the Agency's application. He declined to award costs, noting that there was no *mala fides* exhibited in the conduct of the Agency, and further concluded that none of the agents of the Agency acted in an excessive, or officious, manner.

Scope of Inquiry at the Protection Hearing

The **Act** provides a three-stage process - a process that may involve an interim hearing, a protection hearing, and finally, a disposition hearing.

The first stage requires the Agency, within five days of an application being made to determine whether a child is in need of protective services, to bring the matter before the Court for an interim hearing (s.39(1)).

At the end of the interim hearing, the Court is given a wide discretion to take steps for the protection of the child if the child is found to be in need of protection. The Court is obliged to dismiss the Agency's application, however, if it finds that there are no reasonable and probable grounds to believe the child is in need of protective services (s.39(2)).

In this case, the only evidence tendered before Judge White at the interim hearing was by way of affidavit deposed by Cathy Cashen, a protection worker employed by the Agency. No *viva voce* evidence was called. A "without prejudice" order, consented to by counsel for the parties, was issued declaring that there were reasonable and probable grounds to believe the children were in need of protective services. The children were permitted to remain in the care and custody of the respondents, subject to the supervision of the Agency.

The **Act** then provides for a second hearing, the protection hearing, which must be held not later than 90 days after the date of the application. If, as was determined in this case, the Court finds after the protection hearing that a child is not in need of protective services, the Court is obliged to dismiss the application brought by the Agency (s.40(5)).

If the Court determines at the conclusion of the protection hearing that the child is in need of protective services, the Court must convene a disposition hearing within 90 days. At the conclusion of the disposition hearing the Court has a number of options under s.42, including the option to "dismiss the matter".

All of the options available under s. 42 are to be made, however, in "a child's best interests". This phrase does not appear in the sections of the **Act** relating to the interim hearing, or the protection hearing.

A preliminary question is whether the Court, at a protection hearing, should consider the best interests of the children or whether the inquiry should be limited to the narrow question of whether the Agency has established that the children were in need of protective services pursuant to s. 22.

Section 76 of the former **Children's Services Act**, C-8, S.N.S. (1976), provided that:

> In an action under this Act, the court shall apply the principle that the welfare of the child is the paramount consideration.

Commenting on this provision, Jones, J.A., on behalf of this Court, in **C.A.S. of Halifax v. Lake** (1985), 45 N.S.R. (2d) 361(SCAD) stated at 375:

> An order cannot be made under the ***Children's Services Act*** on the sole ground that it is in the best interests of the child to do so without making a determination that the child is in need of protection. If a judge cannot make a finding that the child is in need of protection, he must dismiss the case.

In place of s. 76 of the former **Children's Services Act**, s.2(2) of the **Act** provides:

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

The change of the wording ensures that the best interests of the child is an issue to be considered at every proceeding, and matter, including the protection hearing.

While some of Judge White's observations arguably related to this issue, unfortunately he failed to review the evidence or make any findings, as required by the **Act**, respecting the critical issue before him - namely, whether the Agency established that the children were in need of protective services pursuant to s. 22.

The Respondents' Disciplinary Beliefs

The respondents were married in June of 1984. The respondent BM is a *., as well as a *. The respondent LM, in addition to caring for and looking after the education of all of the children, sells *. (* *editorial note- removed to protect identity*) She teaches the

children with texts approved by the local Board of Education. She believes the public schools:

> ...teach a lot of humanism and come from an atheist situation, an evolutionist and I would rather teach them from a theistic point of view and I prefer a creationist point of view . . .

Both respondents accept the Bible as literal truth "inspired by God". The respondents are not members of any church, but have found fellowship in the S. M. C.

The respondents testified that their disciplinary methods respecting the children are determined from their understanding of the Bible. It is therefore relevant to consider these beliefs.

The respondent BM testified that he believes:

> . . . in the depravity of man. That man was born in original sin. . . . even for that matter that a little child is born in sin.

BM states that he is commanded by the Bible to follow its guidelines which instruct children to be obedient to their parents "as foolishness is bound up in the heart of a child".

He acknowledges that there are many methods of discipline, but if a child is wilfully disobedient to his parents, then it is appropriate for that child to be chastised.

He explained chastisement as:

> . . . where you would use...ah...the rod on the child, you would basically take the rod in your hand . . . it's a stick and you would . . . strike the child with the rod on the, ah, basically on the buttock area.

The purpose of chastisement, BM explained, is:

> . . . for the moral moulding the character of the child and also to relieve the child of the guilt that he would have developed by disobeying you.

The respondent BM testified that his method of chastisement was "fairly constant. I don't vary it . . it's a very relaxed thing"; that his objective was to use the rod "maybe three times" as there was "no reason to hit them more ". BM employed two "rods" (i.e. birch sticks) for discipline - the larger for the older children was about 18 inches long, tapering in width from three-eights of an inch to one-half inch. The smaller, approximately 12 inches long, three-eights inches wide, was made of "much lighter wood" and was usually used for the younger children.

The evidence discloses that the rod was used only on a child who was clothed, and on the child's buttocks. In the case of an infant, the rod was applied to the diaper.

The respondent BM was responsible for approximately 90 per cent of the chastisement in the home; discipline carried out by the respondent LM occurred only when BM was absent.

While the respondent BM acknowledged that a child being chastised would cry because "it would hurt. . . there shouldn't be any physical harm to the child".

The initial pain would last "maybe a minute or two minutes . . . I can't imagine there being much more pain beyond that". He stressed he did not want to hurt the child and was "very conscious . . of how much pain I'd be causing".

The respondent LM stressed that chastisement was only a "very minor area of the discipline in our home".

The respondent BM admitted using the rod to hit YM when she was approximately 15 months old. He testified that he gave her "maybe two very, very light swats on the diaper. . . possibly for biting".

Chastisement was carried out usually in private to preserve "the child's dignity".

Findings of the Trial Judge

Section 22(2) of the **Act** provides:

> 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);

The trial judge made some specific findings:

- I am prepared to accept the taped evidence of the children as being more accurate and reflective of the circumstances that prevailed prior to the intervention of the agents of the Minister.

- On the other hand, I found the evidence of the Respondents to be guarded, evasive and rationalized to a great extent. Moreover, whether overtly or by conduct I find that the Respondents affected the attitude of the children after the taped interviews were given. Clearly [SM] when giving her viva voce evidence in court was not the same person that was interviewed on video tape.

  Courts are entitled to, and do, take taped evidence as being true and more acceptable to vague and varied evidence given in court at a later time. I find that to be the case with respect to the evidence given by [SM];

- . . . it does appear that the frequency with which punishment is administered, the reasons for such punishment for trivial incidents such as some sibling rivalry and some sibling squabbling, seems excessive when other methods to command obedience would be equally as practical and finally, the age of some of the children being disciplined appears to offend common sense as to their ability to appreciate the reason for the corporal punishment.

  Having said this, on the one hand, I share the concerns of the child protection authorities over not only the issues related to the corporal punishment, but also on issues related to the emotional or psychological and social development of the children. Notwithstanding these concerns, based upon the balance of probabilities, I am not persuaded that there is sufficient evidence before the court to make an order directing protective services.

  (emphasis added)

The trial judge referred to the evidence of the confidential informant who had contacted the RCMP in mid-September, 1997.

> The evidence of the anonymous source while raising issues of concern and which the court does accept bore not much substance as to direct knowledge of matters related to s.22(2)(a) or (b) of the [Act] and is premised mostly upon suspicion and conversations with one of the Respondents. . . . (emphasis added)

I infer that the acceptance highlighted was an acceptance by the trial judge of the concerns raised by the anonymous source, rather than an acceptance of the evidence.

The trial judge continued:

> While the court could speculate upon the accuracy of the suspicions of the witness, it would be folly to do so. I do not find, however, that the informant was unjustified in registering concern with the authorities. Also, there was no medical evidence upon which the court could make a finding requiring an order for protective services. There was not any professional psychological evidence as to the concerns to which I have alluded and again it would be folly for the court to speculate that the concerns which I may have are valid and worthy of intervention.

Section 40(4) of the **Act** requires the Court to state at the conclusion of the protection hearing:

> . . . either in writing or orally on the record, the court's findings of fact and the evidence upon which those findings are based.

Unfortunately, the trial judge did not analyze the evidence in light of the issue raised in s.22, nor did he make any specific findings respecting that evidence. This failure constituted a failure to exercise jurisdiction amounting to an error of law (**Lowe v. Tramble** (1980), 42 N.S.R. (2d) 481).

It is necessary, therefore, to review the evidence to determine whether the Agency, at the protection hearing, met the burden of proof imposed on it, namely to establish on the balance of probabilities that the children, or one or more of them, were in need of protective services.

It is helpful in conducting this review, to consider the evidence arising out of s. 22(2)(a) separately from that relevant to s.22(2)(b).

Section 22(2)(a)

The term "physical harm" as it appears in the section is not defined in the **Act**.

Both counsel direct our attention, however, to Professor E. A. Rollie Thompson's comments (see *The Annotated Children and Family Services Act*, August, 1991), at p.41:

> (1) Degree of harm Clause (a) does not on its face distinguish between degrees of physical harm. It does not require "serious" or "substantial and observable" harm. Does this mean that any physical harm, however slight, can give rise to intervention? Faced with the potential scope of such a wide definition, some courts have drawn back and introduced some threshold notion of degree of harm .
>
> . . .
>
> It is submitted that some guidance may be drawn from a definition of "bodily harm" found in s.267 of the Criminal Code which covers "any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature". A test of this kind would serve to ensure the screening-out of trivial cases, while maintaining a low enough threshold to capture cases where the child has experienced observable bruising. (emphasis added)

The Agency submits that there are three specific examples disclosed in the evidence where the children of the respondents experienced "observable bruising" amounting to physical harm from the actions of their father - a bruise on SM's buttocks, a bruise on JM's lower back, and a bruise suffered by RM.

During the course of her interview, SM stated that on one occasion a spanking by her father left a mark on her bottom. She observed it when she was washing because "it hurt more than usual". It was a "little bruise", brown in colour. She was not questioned, nor did she volunteer during the course of the interview, the length of time after the spanking that she made the observation. During her *viva voce* evidence, she stated that she made the observation "very soon after and it was the same day".

The respondents adduced evidence from Dr. M. C. S., a family practitioner, who looked after the medical needs of the children for the previous three years.

Dr. S. testified that:

> A bruise is as a result of some bleeding into tissues and it leaves a colouration . . . It usually starts off as a darker colour, purple or blue, sometimes black, and progresses through to a brown and yellow colour as it fades away.

Counsel for the respondents submits that the brown bruise observed by SM, in view of its colouration at the time it was noticed, must have been present for several days prior to SM's observation, that it hurt "more than usual" because SM was struck on an area of her buttocks already bruised, and finally that there was no evidence that the bruise was caused by any action of the respondents.

A review of the evidence, in light of the absence of any finding by the trial judge, does not convince me, on the balance of probabilities, that the Agency established the bruise resulted from a spanking administered by her father.

With respect to the bruise on JM's lower back, the Agency adduced evidence from the confidential informant who noticed at a church luncheon held in August of 1997:

> . . . a bruise on [JM's] back that looked like the shape of a stick . . . his shirt just was untucked, like, and just the way he moved, I could see it . . . a long skinny bruise that looked like someone had tried to spank him and missed his bum and hit his back.

The respondents called a friend, who attended with her children at the same picnic. The friend testified that when JM was playing on a "jungle gym", he fell on his back, lost his wind, cried "quite hard for a period of approximately five minutes".

The respondent LM, confirmed the incident, and stated that she checked her son's back immediately after the fall, and noted:

> ...He had a scrape on his back just where the board on the piece of play equipment, he had caught his self on this fall and scraped it . . . It was red at the time . . . It was. . .maybe seven inches long.

The trial judge did not make any finding respecting this bruise. I am not satisfied the Agency has established that it was caused by the wilful act of either of the respondents.

RM was not interviewed by the Agency, nor did she give evidence at trial.

The respondent BM testified that he noticed, after chastising RM with a rod when she was four, in the winter of 1997, an "incidental bruise" had developed on her buttocks. He testified that of all the children, RM was the one particularly susceptible to bruising "and that's why we've been very cautious with her, because she's the one that did bruise".

Although she had the bruise for two days, the respondent BM testified that there was "no indication that it affected her".

These three instances constituted the evidence respecting observable bruising.

I conclude that in these circumstances, one observable bruise on a child who is particularly susceptible to bruising, is not sufficient to satisfy the burden imposed under s. 22(2)(a) that the child has suffered physical harm.

I would not disturb the conclusion of the trial judge that there was not sufficient evidence before the Court to make an order directing protective services under s. 22(2)(a).

Section 22(2)(b)

The term "substantial risk" that appears in this section is defined in s. 22(1) as meaning:

> ...a real chance of danger that is apparent on the evidence.

The Agency submits that Judge White imposed a heavier burden on the Agency than that imposed under the **Act**, when he stated:

> As well, I am cognizant of the current status of the law with respect to the rights of parents to raise their children in accordance with their religious beliefs. This is subject however, to the obligation of the state to intervene when there is a pressing and substantial risk to the child or children. More especially in the case law related to the charges under s. 43 of the Criminal Code of Canada, courts have to be aware as to whether there is real risk of danger to the child, that the age and sex of the child should be considered, that the effects flowing from the punishment, and the force does not exceed what is reasonable in the circumstances. It does appear that there are case which state that the child must be capable of appreciating the reason for the correction. The fact that there is some bruising which is not extensive is not a ground for a criminal conviction. (emphasis added)

Section 22(2)(b) of the **Act** does not require the Agency to establish a "pressing and substantial risk" that a child will suffer physical harm. Rather, the burden is to establish that

there is a "substantial risk". I conclude that the trial judge erred in imposing on the Agency a burden of adducing evidence greater than that imposed under s. 22(2)(b).

I do not agree with the Agency's submission that there is a significant difference between the term "a real risk of danger" as used by the trial judge, and a "real chance of danger" as used in s. 22(1) of the **Act**.

I further conclude, however, that the trial judge erred to the extent that he considered s. 43 of the **Criminal Code**, and cases decided thereunder, to be relevant to the issues in this case.

Section 43 of the **Criminal Code** provides:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable in the circumstances.

The "reasonable force" exception in s.43 does not appear in the **Act**. A parent may not be criminally responsible for using force against a child, yet the child nevertheless may be in need of protective services under s. 22.

In **CAS (Ottawa-Carlton) v. W (S)** [1988], W.D.F.L. 458 (Ont. Prov. Ct. - Family Division), Judge Sheffield noted that a protection proceeding is "not a criminal prosecution of the parents" and referred with approval to the comments of Professor Bernard Dickens that:

> Provincial child welfare laws focus, however, not upon the guilt and punishment of the parents but upon the protection of children. The need for protection exists independently of parental culpability . . . (*Parental Discipline*: Re O (1978) 1 Can. J. Fam. L. 601 at 607).

I agree, as well, with these comments.

I do not consider that the failure of the Agency to establish that the children, or one or more of them, have suffered physical harm under s. 22(2)(a) of the **Act** is determinative of the issue raised under s.22(2)(b). (**Children's Aid Society of Halifax v. Lake** (1981), 45 N.S.R. (2d) 361 (N.S.S.C.A.D.)).

The trial judge noted that:

> There was no medical evidence upon which the court could make a finding requiring an order for protective services.

I do not take this comment as anything more than an observation on the evidence, or lack of evidence, that was before him. While medical evidence might well assist the Agency to establish a child is in need of protective services, it is not essential for the Agency to adduce evidence of this kind in order to satisfy the burden imposed under s. 22(2)(a) or (b).

In view of the failure of the trial judge to make any specific findings, or analysis, of the evidence on this issue, the questions for this Court are whether the trial judge has

erred, and if so, whether the Agency has met the burden to establish that there is a real chance of danger that the children, or one or more of them, will suffer physical harm inflicted by the respondents.

I consider the evidence on the following issues to be of particular significance in this case:

- the reasons for chastisement;
- the frequency of chastisement;
- the number of strokes employed by the respondents;
- the age of the children when chastisement commenced;
- the granting of authority to SM to discipline her younger siblings;
- the respondents' belief that incidental bruising should not be a concern.

(1) Reasons for Chastisement

Ms. Cashen testified that when she first attended at the respondents' home in September, 1997, LM indicated that corporal punishment would be used only when the children, by their actions, placed themselves in a position of danger.

At trial, however, she described the activities of the children that merited chastisement in broader terms:

> In our home, the consequence of rebellious disobedience is chastisement.

SM, declared in the interview, that chastisement would result for relatively trivial matters, such as fighting with EM "over doing the dishes", or "fighting over worms".

EM advised that spankings resulted from activities such as trying to break a wooden fence, lying to the respondents, climbing a book shelf, or putting dents in cars.

In the course of reviewing the evidence, I am guided by the trial judge's finding that the interview evidence should be accepted as being more "accurate and reflective of the circumstances", than the *viva voce* evidence given by SM at trial, or inferentially, the *viva voce* evidence given by the respondents at trial.

The trial judge remarked that the evidence of the respondents at trial was "guarded, evasive and rationalized to a great extent".

Bearing these comments in mind, I conclude that chastisement often resulted from fairly minor breaches of the rules of the household.

(2) <u>Frequency of Chastisement</u>

EM advised that he was receiving "much less spankings than I use to .. like maybe, once or twice a month, you know."

SM, as well, confirmed that she:

> ... hardly ever [is spanked] anymore. Usually it's like - once every two (2) months. . . . I used to get spanked a lot because I would hit [JM] on the head or bang a lot on the back, but I don't do that any more. . . . Cause I've learned. . . . Because they spanked me consistently every time I did it.

SM noticed the bruise on her buttock in May of 1997.

The frequency of chastisement, particularly with respect to JM, is very troubling.

Notwithstanding that the respondent LM noted JM to be "a little slower than the other children, a little behind his age", the frequence of chastisement being administered to JM was justified because "he challenges authority more often than the older children do."

The respondent, BM, testified under cross-examination:

> Q. So, at [JM's] age [i.e. six and a half] and with his demeanour, is twice a week unusual?
> A. Ah, more common would be . . .about once a week would be . . . would be . . . fairly common for [JM].
> Q. So, in the last year of [JM's] life, has that gotten more or less as he's gotten older? Is he chastised less or more?
> A. Less.
> Q. So, it used to be more than once a week. Is that correct?
> A. Ah, that could be.
> Q. Well, is it or isn't it?
> A. Uh, not necessarily.
> Q. But you just told me that it was once a week?
> A. Well, you could say . . . once a week.
> Q. So in the last year, using 52 weeks as our guideline, he's gotten the stick 52 times in the last 12 months, is that right?
> A. I couldn't say. I... I wouldn't be able to say exactly 'cause it wouldn't .. . . . .
> Q. Is there anyone who gets it more than [JM] in your house right now?
> A. I would say . . that . . it varies. <u>It varies in .. what the child is going through, you know, emotionally and spiritually</u> and . . and in all different areas of their life. It would depend . . . it would vary. . .(emphasis added)

Guided by the trial judge's findings on credibility, I conclude that chastisement of all children occurred far more frequently than suggested by the respondents.

(3) <u>The Number of Strokes Employed by the Respondents</u>

The respondent BM testified that his goal was to:

> Use three strokes and three strokes is usually . . . usually enough to bring a child under control.

Although he testified he did not vary his practice, he admitted that EM would sometimes receive "maybe 10" strokes at one chastisement.

The respondent LM testified that her husband, BM, usually gave the children "three to five" swats.

EM's interview evidence was somewhat contradictory, but his estimate was much higher than that given by his parents, as is demonstrated by the following exchange:

> . . . about 40 hits. That is what they usually . . . sometimes give me. They usually don't do this, but 40 would be fair. . .
> Q. And how many times then - can you remember any particular times that you've been spanked with a stick, how many times you've been struck?
> A. Oh, about 10, well . . when I'm really bad they like give me a hard spanking . . about 20 hits . . .
> Q. Did you ever count how many times you were spanked? . . What was the highest that you ever counted?
> A. Oh, uh, fift...thirty-five.
> Q. You counted at 35 yourself?
> A. ([EM] nods to indicate yes)

SM responded that if they did something:

> . . . like have a great big argument with Daddy and say that he's bad and stuff . . . . then it's about 10 or 15. . . I'm just guessing. . . I don't know because it's not like 20 or 30 or 40 or 50 or something like that . . around 10.

If a child, according to the respondent BM, can usually be brought “under control” when he administers three strokes of the rod, what possible justification could there be for 10 or 15, or as many as 35 strokes as the children indicated?

(4) <u>The Age of the Children When Chastisement Commenced</u>

The respondent BM testified that JM, a "quiet boy" was first chastised when about two and a half; GM, age two and over; RM, age two years; and YM at 15 months.

BM attempted to justify the chastisement of YM, notwithstanding her age, for:

> …something .... very serious such as biting ... if a child is born in sin, certainly some of that sin is going to come out and the child is going to require correction.

The following exchange illustrates the respondent BM's position:

> Q. You said you don't want to hurt your child.
> A. Yes
> Q. Isn't the object of the chastisement to cause pain?
> A. But in a very young child . . . yes . . but in a very young child just the idea of, you know, maybe even hearing the noise of it, or just . . . just you know, that is sometimes enough. You know, like, the child may not even feel it . . .
> Q. Okay.
> A. But then again, she may.

Both parents expressed the view that the younger children require more chastisement because they disobey more often.

(5) The Granting of Authority to SM to Discipline Her Younger Siblings

SM advised that she used the stick to discipline her two younger sisters, GM and RM. This activity was carried out when her parents were not present to discipline themselves. SM stated:

> A. Yeah, I always call [M]om though. "Give them two swats, [S]". "They aren't listening [M]om after those two swats". "Give them two swats more." And after those two swats they go to bed.

The respondent LM agreed under cross-examination that she had no control over the amount of force used in that situation but she was not prepared to rule out similar action in the future.

(6) The Respondents' Belief that Incidental Bruising should not be a Concern:

The respondent BM was asked about the bruise that was observable on RM's buttocks two days after she was chastised with a rod. She was four years of age at the time.

> Q. So despite your good intentions, you marked your child, you bruised your child with a rod, did you, Mr. [BM]?
> A. I corrected my child, in a way I believe I was supposed to. Ah, and she was, ah, very, ah, defiant. And, ah, and it took that ...
> Q. Are you telling me that there is something in the Bible that you - say it's okay to mark your child with a rod?
> A. Yes sir ..... (emphasis added)

After the respondent BM was given a copy of the Bible, he testified:

> It's talking about foolishness being bound up in the heart of a child? And the rod of correction driving it out. And, ah . . . ah, it's unfortunate that, that, that ... ah ... incidental bruising . . . ah, sometimes take place in the chastisement of a child. It's not the goal of a parent to cause bruising at any time . . . . Yes sir, I've got one more. The blueness of a wound cleanseth away evil. So do stripes the inward part of the belly. That's the one there that would say that it's, it's not the object, but if it happens, ah, it would be better to chastise the child, and, and, and ah bring them under control, ah, to ah, relieve them of their, ah, guilty conscience from disobeying their parents. . . . When Godly parents are chastising their children, ah, for the purpose of of ah, moulding their moral character, ah, due to their religious beliefs. I, I believe that if an incidental bruise does occur, ah, that, ah, that ... that shouldn't be a concern.
>
> Q. Is that a yes then? Do you believe it's acceptable?
>
> A. It should never be, be something that, ah, that, ah, should be, ah, you should never try to bruise your child ...
>
> Q. But if it happens, as it happened with [RM] it is acceptable in your view of God's eye? Isn't that true?
>
> A. Well the scripture speaks for itself. (emphasis added)

The evidence of the disciplinary methods exacted by the respondents is extremely disturbing. Children, at an increasingly younger age, and at more frequent intervals, are disciplined with a rod for minor misconduct which the respondents characterize as disobedience. Although both respondents testified that they take care to ensure the children are not harmed, incidental bruising, in the words of the respondent, BM, "should not be a concern" when the purpose is to bring a child under control to relieve him or her of a "guilty conscience of disobedience".

The use of the rod for discipline purposes seems to be all pervasive. It occurred frequently, both in and outside the house, when the children were taken to visit relatives, and also occurred both in, and outside, the van used for transportation.

The respondents were not prepared, at least at the time of the protection hearing in December, 1997, to moderate their disciplinary methods as they believe that they are carrying out God's will as revealed to them in the Bible.

I am mindful that the Agency employees testified the children:

> . . . seemed comfortable at home and happy . . engaged in conversation very naturally . . very forthcoming, pleasant . . didn't seem fearful . . seemed happy and content and interacted freely with their parents.

I have also noted the evidence of Dr. S. who examined the children approximately three times a year for their physical needs. She testified that they always were lively, and bright children, who interacted normally with their parents as well as herself.

The trial judge, as well, remarked:

> From my brief observation of these children, they appear to be lovely, healthy, intelligent and sharing children, but there do appear to be some deficits that could be addressed.

Notwithstanding these favourable observations, the weight of the evidence convinces me that there is good reason to be troubled about the frequency of the use of the rod, the force with which it is applied, the young age at which it is introduced and the delegation to SM of the authority to use it.

While the parents are recognized as having the responsibility and the right to discipline their children in a manner they deem appropriate, which could include

reasonable use of a rod, that right is restricted by the duty to ensure that no action they take will result in a substantial risk the children will suffer physical harm.

The rod was used on children who could not possibly understand the use of force, and was being used on children at decreasing age thresholds. The respondent BM acknowledged that:

> It’s not very possible to strike a child ... without leaving a ... a reddish mark where the child is struck,
>
> Q. How long do the marks last?
> A. I don't know. Maybe, maybe ... a - a hour. . . .
> Q. . . . What's the longest?
> A. Ah, maybe two days.

While the evidence falls short of demonstrating that the children have suffered "physical harm" within the meaning of s.22(2)(a), I conclude that the Agency has established, on a balance of probabilities, there is a substantial risk that the children will suffer physical harm as a consequence of the actions of the respondents.

I further conclude, with respect, the trial judge erred in placing a burden on the Agency not provided in the legislation. As a consequence of the failure of the trial judge to state his findings of fact, and to review the evidence on which the findings were based, I am of the opinion that he failed to appreciate the substantial risk in which these children were placed.

Section 49(6)(b) and (c) of the **Act** grants to this Court the power to rescind any order made by the trial court and to make any order the trial court "could have made".

I would order that the children are in need of protective services as defined by s. 22(2)(b). I would further direct that a disposition hearing be held within 90 days from the date of the order of the Court. At that hearing the Court will have the freedom to consider the options available under s. 42 that should be exercised in the best interests of the children.

Pugsley, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.

C.A. No. 144659

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THE MINISTER OF COMMUNITY SERVICES	)	
Appellant	)	
- and -	)	
B.M. and L.M.	)	
	)	REASONS FOR JUDGMENT BY:
Respondents	)	
	)	PUGSLEY, J.A.