NOVA SCOTIA COURT OF APPEAL
Citation: ***L.D. v. Children's Aid Society of Cape Breton-Victoria***,
2010 NSCA 20

Date: 20100319
Docket: CA 319761
Registry: Halifax

Between:

L.D. and B.S.

Appellants

v.

The Children's Aid Society of Cape Breton-Victoria

Respondent

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

Judges: Bateman, Fichaud and Beveridge, JJ.A.

Appeal Heard: February 24, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Fichaud and Beveridge, JJ.A. concurring.

Counsel: David Iannetti, for the appellants
Lee Anne MacLeod-Archer, for the respondent

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

[1] This is an appeal by the mother (L.D.) and father (B.S.) from a permanent care order placing their child (S.D.) in the permanent care of the Children's Aid Society of Cape Breton-Victoria (the "Agency").

[2] The permanent care determination was made by the Honourable Justice M. Clare MacLellan in an oral decision delivered at the conclusion of the final disposition hearing on July 31, 2009. The related order was issued on October 24, 2009. Written reasons were filed on November 18, 2009 and are reported as **Children's Aid Society of Cape Breton-Victoria v. L.D.**, 2009 NSSC 352. The parents were represented by counsel at trial. They prepared the appeal themselves, but had counsel speaking for them at the hearing.

BACKGROUND

[3] The child was born in March, 2007, approximately six weeks premature. On May 11, 2007, she was rushed to the Cape Breton Regional Hospital for treatment as a result of an incident of apnea, where the child stopped breathing.

[4] During the course of her treatment, it was discovered that she had suffered metaphyseal lesions, or fractures through the metaphyses above and below the knees in both legs. The medical evidence described the metaphyses as the weakest part of the bone immediately next to the growth plate, where new bone is formed.

[5] The Agency's concerns at the time of its application for temporary care on May 18, 2009, included the unexplained leg fractures; a history of substance abuse by the parents; and the parents' lack of insight into their parenting difficulties.

[6] On September 10, 2007, following a contested hearing, the child was found to be in need of protective services as defined in section 22(2)(a) of the **Children and Family Services Act**, S.N.S. 1990, c. 5. Pursuant to s. 22(2)(a) a child that "... 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" is in need of protective services.

[7] It was the consensus of the doctors who testified at the protection hearing that the injuries were non-accidental. The judge accepted this evidence.

[8] The Agency's initial plan of care contemplated the return of the child to her parents' care following their successful completion of remedial services and their acceptance of responsibility for her safety.

[9] A temporary care order was issued on consent and continued pending the preparation of an assessment of parental capacity by psychologist Michael Bryson.

[10] As a result of changes in Agency counsel and an application by the parents to introduce fresh evidence the matter was dismissed and restarted on consent, with the protection finding and temporary care orders continuing into the new proceeding. This had the effect of extending the original date for a final disposition hearing by six months. A revised Agency plan was filed on November 4, 2008 and amended on March 18, 2009 with the final hearing commencing on March 20, 2009. By the time of the final hearing the Agency was seeking an order for permanent care.

[11] As set out above, the child was ultimately placed in the permanent care of the Agency, without ongoing access by the parents. The plan is to place the child for adoption.

THE GROUNDS OF APPEAL

[12] The parents allege that the judge made the following errors:

> 1. The decision of the Learned Trial Judge has effectively prohibited the Appellants' for their lifetimes, or ever having a child in their care;
>
> 2. The Learned Trial Judge's decision failed to consider that the Respondent did not properly examine placement with extended family as is required by the Children's and Family Services Act;
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> 3. The Learned Trial Judge failed to give due consideration to the fact that the Respondent had changed its position from one of initially seeking temporary care and custody of the Appellants' child to one which evolved into an Application for Permanent Care and Custody;

> 4. The Learned Trial Judge failed to properly give due consideration to the services completed by the Appellants, such services being recommended by the Respondent;
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> 5. The Learned Trial Judge failed to consider a recommendation of two Parental Capacity Assessments completed by Michael Bryson, both of which recommended the return of the child to the Appellants pending completion of remedial services;
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> 6. The Learned Trial Judge failed to allow evidence or results of a polygraph test initially requested by the Agency who subsequently opposed the introduction of the results of the polygraph test;
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> 7. The Court of Appeal should hear an Application for Fresh Evidence by the Appellants in that an application for custody was filed for the child, S.M.D., by J.S., paternal grandmother of the child, on April 16, 2008;
>
> 8. The solicitor for J.S. failed to make application to join the proceeding which is the subject of this Appeal. The Appellants request that a new Trial be ordered to allow the application of J.S. to be joined;
>
> 9. The Learned Trial Judge failed to consider the lack of direct evidence implicating either of the Appellants in causing injury to the child who is the subject of this Appeal.

[13] In oral submissions on the appeal counsel for the parents narrowed the issues, focussing mainly upon: the polygraph results; the issue of a possible family placement with one of the grandmothers; and the question of whether the Agency had offered adequate remedial services to the parents.

THE STANDARD OF REVIEW

[14] The standard of review was concisely stated by Cromwell J.A. (as he then was), for the Court in **Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58; [2005] N.S.J. No. 132 (Q.L.):

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a

> palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: [citations omitted].

[15] In **McPhee v. Canadian Union of Public Employees**, 2008 NSCA 104, Cromwell J.A. (as he then was), elaborated on the function of an appellate court:

> [16] The main role of the Court of Appeal is to make sure that the trial judge applied correct legal principles: see, for example, **Housen v Nikolaisen**, [2002] 2 S.C.R. 235 at para. 9. If the trial judge misstates the law, or applies it in such a way as to show that he or she relied on a wrong legal principle, the appellate court must intervene and find that a legal error has been committed.
>
> [17] With respect to questions of fact and mixed questions of fact and law that do not reveal any underlying error of legal principle, the role of the appellate court is entirely different. An appeal to the Court of Appeal is not an opportunity for three judges to retry the case on the basis of a written transcript. Finding facts and drawing evidentiary conclusions from them are roles of the trial judge, not the Court of Appeal: see **Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121. An appellant cannot challenge a trial judge's findings of fact simply because the appellant does not agree with them . . .
>
> [18] Appellate intervention on questions of fact is permitted only if the trial judge is shown to have made a "palpable and overriding error": see, e.g. **Housen, supra** at para. 10. Sometimes the standard has been expressed in different words, such as "clear and determinative error", "clearly wrong" and "hav[ing] affected the result." (emphasis added): see, e.g. **H.L. v. Canada (Attorney General)**, [2005] 1 S.C.R. 401 at para. 55; **Delgamuukw v. British Columbia, supra** at paras. 78 and 88. However expressed, courts of appeal must accept a trial judge's findings of fact unless the judge is shown to have made factual errors that are clear and which affected the result.
>
> [19] This deferential approach on appeal applies to all of the trial judge's findings of fact, whether or not based on the judge's assessment of witness credibility and whether based on direct proof or on inferences which the judge drew from the evidence: see, e.g. **Housen, supra** at paras. 10-25; **H.L., supra** at para. 54.

[20] This deferential approach also applies to the judge's findings which apply the law to the facts - that is, to questions of mixed law and fact - unless the finding can be traced to a legal error: **Housen, supra** at paras. 26-37.

[21] The trial judge, as the trier of fact, must sort through all the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision, including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the apparent unreliability and so forth. The trial judge may find that some apparent errors of a witness have little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.

[22] Making these judgments is the job of the trial judge. The Court of Appeal should not and will not substitute its own judgment on these matters. An appellant alleging an error of fact must show that the trial judge's finding is clearly wrong.

[23] Not every error in findings of fact permits appellate intervention. As Lamer, C.J.C. said in **Delgamuukw, supra** at para. 88:

> ... it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. **The error must be sufficiently serious that it was "overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue**". (emphasis added)

Where credibility is in issue, only errors that fundamentally shake the appeal court's confidence in the trial judge's findings of fact justify appellate intervention.

[24] I have gone on at length about the standard of review of factual findings. I have done this because most of the appellants' submissions on appeal relate, not to any misstatement by the judge of the relevant legal principles, but to his findings of fact or his application of correct legal principles to those facts.

(Emphasis added)

ANALYSIS

[16] In addition to the child who is the subject of these proceedings, the mother has two other children. One, a daughter, is six years old. She has lived virtually

all of her life with the maternal grandmother. Due to substance abuse issues the mother has been unable to have that child in her care.

[17] Prior to the birth of S.D. the mother was addressing her drug dependency through an organized methadone program. Although her methadone dose was decreasing she had not completed that program at the time of the birth. Consequently, the baby went through methadone withdrawal. In November, 2007 (S.D. having been born in March) the mother gave birth to another child, who was 23 weeks premature. By that time she was on an even lower methadone dose. According to the mother both were planned pregnancies.

[18] The younger child's medical situation, arising from the premature birth, required her to remain in hospital from November, 2007 to June of 2008. She was apprehended in May 2008. The Agency's concerns about her safety stemmed from the injuries sustained by S.D. When released from the hospital she was placed in temporary foster care. She was the subject of a separate child protection proceeding before another judge. That proceeding has recently concluded and she has been placed in the permanent care of the Agency (decision reported as **Children's Aid Society of Cape-Breton-Victoria v. L.D.**, 2010 NSSC 61; [2010] N.S.J. No. 69 (Q.L.)).

[19] The mother's explanation for the injuries to S.D. is that she had weak bones at birth. She says that weak bones are common in premature babies. The father adopts the same explanation. This was not supported by any medical evidence at trial. The parents' counsel did refer to a journal article about a "brittle bones" theory in newborns. The "brittle bones" theory, so-called, was discredited by the medical experts who were cross-examined about it.

[20] While the radiologist who testified at the protection hearing could not precisely date the timing of the injuries, it was her opinion that they must have occurred in the month that S.D. was in her parents' care after release from hospital. This conclusion was based upon the amount of healing in the fractures present at the time of their discovery.

[21] The evidence at the final disposition hearing was that the parents had a confrontational relationship with many of the Agency workers. Remedial services were offered to the parents. Some were undertaken, others were refused.

Sometimes the parents found their own services which they maintained were the equivalent of those offered by the Agency.

[22] Neither parent felt they needed remediation. Where services were accessed, they did so only because it was required by the Agency. The judge observed that the mother had not availed herself of any services until nine months before the final hearing, by which time the child had been in temporary care for well over a year.

[23] The father believed that the Agency and others were conspiring against the parents and that the medical experts had lied in court. Psychologist Michael Bryson, in his initial report (February 2008), recommended interim placement of the child with the parents, only if the court found that the parents had not been responsible for the injuries. In his final report (March 2009) he opined that both parents, while not without strengths as caregivers, are impulsive, lack insight and have aggression problems. In his oral evidence Mr. Bryson testified that the parents did not accept that the child's injuries occurred while in their care. The mother had explained to him that such fractures are common in premature babies.

[24] It was Mr. Bryson's opinion that the parents needed to work at improving their parenting ability, addressing in particular the aggression, impulsiveness and lack of insight. He could not say how long this would take. He opined that, until they acknowledged their problems, the parents would have little motivation to make changes. He expressed concern about the parents' ability to abstain from substance abuse on a long term basis. Quite apart from the unexplained injuries to S.D., Mr. Bryson could not recommend return of the child until their parenting and personality issues were resolved.

[25] The father had undertaken anger management counselling. However, in June of 2009, the parents had involvement with the police in relation to an incident with the mother's younger sister. The parents were angry and abusive with the police which resulted in them both being placed under arrest. The importance of this incident, as explained by the judge, was as a graphic illustration of the parents' continuing inability to control their impulsiveness and anger, even in the face of these proceedings. It was apparent that whatever remedial services they had undertaken had not made an impact.

[26] The key issue for the judge was the parents' failure to offer any explanation for the child's injuries or to even acknowledge that the harm occurred while she was in their care. They clung to an innocent theory for the injuries that was unsupported by the medical evidence. This, coupled with the concerns about the parents' personalities revealed by the Bryson report and the evidence of their blaming, anger and aggression toward the Agency, led the judge to conclude that there was no prospect of improvement within a foreseeable time frame (s. 42(4)). While the **Act** values and promotes family unity, it does so in the context of a child's sense of time. Thus, the **Act** sets a maximum time frame of 12 months, for very young children, from first to final disposition (s. 45(1)(a)).

[27] Here the statutory time lines were exhausted. Indeed, with the consent dismissal and reapprehension, two years had elapsed since S.D. was taken into care. The only options open to the judge were permanent care or a dismissal of the proceedings (s.42(1)(a) or (f)). The judge found that it was in the child's best interests to be placed in the permanent care of the Agency.

[28] I will address the errors that the parents say were made by the judge, dealing first with those areas emphasized by their counsel at the hearing.

The Polygraph Results

[29] At the outset of these proceedings the Agency had apparently suggested that the parents submit to a polygraph test. They refused. A year later, each parent voluntarily undertook a polygraph examination.

[30] By motion dated November 5, 2008, which was long after the protection finding, the appellants sought to introduce results of the polygraph tests into evidence. After hearing submissions from the parties, the judge accepted into evidence the fact that the parents had taken the tests. However, the judge was not satisfied that the polygraph results were relevant to the issues remaining to be decided. The question for the court in the final disposition was not whether the parents had caused the injuries to the child, but whether the court was satisfied that they could protect her from harm. The judge concluded that the fact that the parents had now submitted to polygraphing was relevant only to the argument that the parents were not co-operating with the Agency by reason of their refusal to be polygraphed.

[31] The parents challenge this evidentiary ruling, saying that the judge should have admitted the results of the polygraph tests to bolster their evidence that they were not responsible for the injuries suffered by the child. Effectively the parents were wanting to use the polygraph results to challenge the protection finding, long after it had been made. The simple answer is that the polygraph results were not relevant to the issues before the court at the time their admission into evidence was sought. On September 10, 2007, at the conclusion of the protection hearing, the judge found that the child had come to harm while in the care of her parents. That finding was not appealed. The parents had the option of undergoing polygraph testing before the protection hearing and elected not to do so. They then sought to introduce the evidence to retroactively challenge the results of that hearing. The judge rightly rejected that application.

[32] At trial the parents did not suggest that the polygraph results be accepted by the court as proof that the parents were not responsible for the child's injuries, but as a piece of evidence to be weighed with the other evidence. As the judge observed, even had the polygraph evidence been admitted at the time of the protection hearing, the results would not have been determinative of the issue before the court, which was whether the child sustained the injuries while in her parents' care. In any event, the judge concluded that there was no procedure for admitting the results mid-trial, in order to challenge the protection finding after the fact.

[33] The parents say that the judge's ruling on this issue illustrates that they had no prospect of the child being returned in the absence of a "confession" that they had harmed her. Consequently, they say, it was irrelevant whether they participated in the services recommended by the Agency. Unfortunately, the parents continue to frame these proceedings as a contest between them and the Agency. The evidence was that this child suffered injuries while in their care. The injuries could not have occurred accidentally resulting from the normal care taking activities associated with a newborn. This is not to suggest that either parent intentionally set out to harm the child. It might be that one of the parents inadvertently, or during a momentary lapse, used the degree of force that would have caused these injuries. The problem arose, not from their failure to admit responsibility, but because neither would accept that the child was injured in their care. As I have said, the mother had developed the unsupported theory that S.D.'s

metaphyseal lesions are common in premature babies. The father accepted that explanation. The parents would not contemplate a scenario that might explain how S.D. was injured in their care. As the judge said in her reasons, it was hoped that, with services, they might have come to accept that S.D. was indeed injured in their care and have reflected upon what caused those injuries. Without that insight, neither the Agency nor the judge could be satisfied that she would be adequately protected from harm if reunited with her parents.

Failure to Consider an Extended Family Placement with the Paternal or Maternal Grandmothers/ The Application by the Paternal Grandmother, J.S., for Custody

[34] The parents say that the Agency did not properly investigate placement with either grandmother, each of whom had expressed a willingness to the Agency to have S.D. in her care.

[35] The judge addressed placement with J.S., the paternal grandmother, in her reasons. The Agency opposed such a placement. This was, in part, because the father lived with J.S. Also problematic was the uncontradicted evidence that neither grandmother believed that S.D. had sustained the injuries while in the care of the parents. Consequently, the Agency did not believe that either grandmother accepted the need to supervise the parents' contact with the child. The judge agreed.

[36] The Court's obligation to consider family placement was canvassed in detail by this Court in **T.B. v. Children's Aid Society of Halifax**, 2001 NSCA 99. Saunders J.A. wrote, for the Court:

> [30] Justice Cromwell's words [in **Family and Children's Services of Kings County v. B.D.**, [1999] N.S.J. No. 220, at para 15] should not be interpreted as imposing either upon the agency or the court a statutory burden to investigate and exhaust every conceivable alternative, however speculative or fanciful. He spoke of *reasonable* family or community options. Neither the agency nor the court is obliged to consider unreasonable alternatives. Their statutory obligation is nothing more than to assess the reasonableness of any family or community alternatives put forward seriously by their proponents. By "reasonable" I mean those proposals that are sound, sensible, workable, well conceived and have a basis in fact.
>
> (Underlining mine)

[37] As I discuss above, it was the Agency's position that it could not ensure that the child's exposure to the parents would be supervised if placed with J.S. The judge was not obliged to accept the Agency's position. It was open to the parents to have either or both grandmothers testify at the final hearing and put forward a plan of care that would safeguard the child. Neither did so. As Saunders J.A. further observed in **T.B.**, *supra*:

> [52] The agency has a statutory duty to take reasonable measures to provide services to families and children that promote the integrity of the family (s. 13 CFSA). The court has its own responsibility to take into account such measures and alternatives as are applicable in the circumstances of the case, before removing the child from the care of a parent or guardian (s. 42(2) CFSA). Thus the court and the agency share a responsibility to see that *reasonable* family or community options are considered. But the burden of establishing the merits of the alternative proposed are squarely upon the proponent. It is the proponent who must satisfy what I would term a burden of persuasion. Only when specific arrangements have been conceived and put in place by the proponent can the viability of that proposal be assessed.
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> [53] Quite apart from the statutory component, there are sound practical and policy reasons for fixing the proponent of a family placement with the burden of persuasion that I have described. The things that motivate alternative proposals for family placement in child custody matters may be as varied as the factors which prompted the family crisis in the first place. In many cases, a relative's offer to provide shelter, love and support to another parent's child will be driven by a genuine affection and willingness to help. But in other cases, offers of assistance may be prompted by harsh, yet subtle catalysts, including threats or other forms of coercion by those whose power or control over the proposed custodian may go well beyond the current judicial proceeding. This reality may be quite difficult to discern; all the more reason to expect that the individual who volunteers to serve as an alternative family placement, be obliged to demonstrate that the proposed plan is workable, well motivated and worthy of serious consideration.
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> [54] The agency is not required to investigate each and every family placement proposal. The burden of persuasion is upon those advocating a competing plan to advance the most compelling and sensible alternative they can muster.
>
> [55] There is an obligation upon the person advocating a competing plan to present some cogent evidence with respect to it. In that way, the merits and viability of the proposal will have some foundation in fact which might then be

> adequately assessed by the trial judge. Should time permit and circumstances warrant, it may well be that the plan put forward as a worthwhile family placement option will require further investigation, perhaps in some cases a complete home study report. However, not every possible placement alternative will require such a response.
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> (Emphasis added)

[38] I am not persuaded that the Court erred in rejecting a placement with extended family in these circumstances or that the Agency was inappropriately dismissive of the option to place the child with either grandmother. There was no evidence before the judge that such a disposition was a reasonable alternative.

[39] The parents now say in their written material that the Agency and Court were wrong in finding that the father lived with his mother, J.S. However, throughout the proceedings there were repeated references by both parties, in affidavit and oral evidence, to that being the living arrangement. The father could not live with the child's mother without risking loss of her social assistance benefits. He would stay over no more than four nights of the week. This same information was provided by the parents to assessor Michael Bryson. In any event, whether the father lived with his mother or not, the concern remained that the grandmothers would not adequately supervise the parents' contact with the child because they did not believe SD would be unsafe in their care.

[40] In addition, the parents ask this Court to consider as "fresh evidence" the application they say was filed on April 16, 2008 by the paternal grandmother, J.S., for custody of S.D. They argue this application should have been joined with the disposition hearing. They say this was not done due to the failure of the grandmother's solicitor. The parents now ask this Court to order a new hearing that would consider the Agency's permanent care application along with the custody application by the paternal grandmother. At the time of the proceedings below the parents were clearly aware of J.S.'s willingness to have S.D. in her care. They did not ask that her application be joined with the child welfare proceedings. In any event, as I have already noted, the trial judge addressed placement with J.S. in her reasons. The fact that J.S. had filed a separate application for custody which was not joined or considered at the disposition hearing does not constitute fresh evidence as asserted by the parents. The judge was not satisfied that placement with J.S. would be adequate to protect S.D. I see no error in how the trial judge dealt with this aspect of the disposition hearing.

The Agency Failed to Provide the Parents with Adequate Services and the Judge Failed to Properly Recognize the Services They Did Complete

[41] While the parents now say that the Agency did not provide them with adequate services they do not identify a particular service which should have been offered or would have effected change. Indeed, the judge found that they were resistant to remediation and did not take advantage of all of the services recommended by the Agency.

[42] At pages 8 through 15 of her reasons the judge details the different services offered to the parents, which of those services had been accepted and which rejected. Throughout the proceeding the parents were resistant to services, did not see a need for remediation and, to the extent that they engaged in services, did so simply to appease the Agency. It rings hollow for them to now complain that the services offered were not adequate to address their problems.

[43] The parents complain, as well, that the judge failed to take into account the services that they had completed. In her reasons for judgment, the judge recognized and discussed the fact that the parents had undertaken some counselling. She concluded that it was too little too late and had not remedied the concerns which were present at the time the child was found to be in need of protection. As Michael Bryson testified, the parents continued to have anger management issues and to lack insight. Their long term ability to abstain from substance abuse was precarious. They were secretive with the Agency about the services they did undertake and misrepresented their participation. Services are not provided as an arbitrary test of a parent's commitment to change. As we said in **L.L.P. v. Nova Scotia (Minister of Community Services)**, 2003 NSCA 1:

> [25] The goal of "services" is not to address the parents deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the **Act**. If a stable and safe level of parental functioning has not been achieved by the time of final disposition, before returning the children to the parents, the court should generally be satisfied that the parents will voluntarily continue with such services or such other arrangements as are necessary for the continued protection of the children, beyond the end of the proceeding. Ultimately, parents must assume responsibility

> for parenting their children. The **Act** does not contemplate that the Agency shore up the family indefinitely.

[44] Given the parents' dismissal of their need for remediation, their resistance to co-operating with the Agency's offer of services and their apparent lack of progress in addressing the risk factors, the judge had no option but to order permanent care at the expiration of the statutory time lines.

[45] The parents submit that it was the child's injuries which precipitated the apprehension. It was only because of Agency involvement that psychological testing was done which revealed the parenting deficits - impulsivity, lack of insight and anger management issues. They submit that the existence of these factors alone would not have been sufficient to warrant apprehension of the child. This is likely true. What they fail to recognize is that when a child is injured while in the care of parents who present with this collection of unrecognized and unresolved risk factors, it is a reasonable inference that there is a connection between the risks and the child's injuries. When those caregivers give no explanation, based on evidence, from which the court may assess the likelihood of repetition, then the question becomes what placement option is available to the Court which will have the best prospect of protecting the child from the risk of future harm. The answer here is clear - permanent care.

[46] I will briefly review some of the additional complaints raised in the parents' written material.

The Decision Effectively Prohibited the Parents from Ever Having Care of A Child

[47] This proceeding was about this one child. The judge found that the child could not be safely returned to their care. The parents' status with other children will be dependent upon their circumstances as they exist in future. The Order in this proceeding does not prohibit them from having care of any other child. Their future circumstances are within their control.

The Agency Changed Its Position From Temporary Care to a Permanent Care Order

[48] At the outset of the proceedings the Agency had hoped that with remedial services and a recognition by the parents that the child had been injured while in their care, the parents and child could be reunited. The parents resisted services and those in which they did engage appeared to have no remedial effect. They maintained the innocent, unsupported explanation for the child's injuries, accepting no responsibility for failing to keep her safe while in their care. The change in the Agency's plan of permanent care reflected its concern that S.D., who had been found in need of protection, remained so and would not be adequately supervised or protected from harm if returned to the parents care. The judge agreed.

The Recommendation of Michael Bryson to Return the Child to the Parents

[49] In his first report, Mr. Bryson recommended temporary return of the child only if the court found that the parents had not been responsible for her injuries. In his final report, Mr. Bryson could not recommend return of the child until their identified risk factors were addressed. He could not predict a time frame within which that would occur, if at all. He did not recommend that the child be returned to the parents.

Judge Failed to Consider the Lack of Direct Evidence That the Parents Had Caused Injury to the Child

[50] Once again, the parents are seeking to challenge the protection finding on this appeal from the final disposition order. As I have said before, the protection finding was not appealed and is not open to review on this appeal from the disposition order.

[51] In any event, the medical evidence was that the child suffered non-accidental leg fractures while in the care of her parents. This evidence was accepted by the trial judge in finding the child in need of protection. The issue was not whether the parents had themselves caused the injury but whether they had failed to protect her from harm. The fact of the injuries spoke of their inability or unwillingness to protect the child. As I have discussed above, they each exhibited significant personality features that spoke of ongoing risk.

[52] The fact that the parents refused to recognize that the child suffered injury in their care coupled with their unwillingness to meaningfully engage in remediation

of their risk factors, left the judge with no alternative but to order permanent care. The statutory time line was exhausted. Ongoing oversight of the parents by the Agency was not an option.

DISPOSITION

[53] I would dismiss the appeal without costs.

Bateman, J.A.

Concurred in:
Fichaud, J.A.
Beveridge, J.A.