NOVA SCOTIA COURT OF APPEAL

Citation: ***S.R. v. Nova Scotia (Community Services)***, 2012 NSCA 46

Date: 20120511
Docket: CA 357076
Registry: Halifax

Between:

S.R.

Appellant

v.

Minister of Community Services

Respondent

Restriction on publication: Pursuant to s. 94(1) of the *Children and Family Services Act*, S.N.S. 1990, c. 5

Judges: Beveridge, Farrar and Bryson, JJ.A.

Appeal Heard: February 17, 2012, in Halifax, Nova Scotia

Held: Appeal is dismissed per reasons for judgment of Bryson, J.A.; Beveridge and Farrar, JJ.A. concurring.

Counsel: Oliver Janson, for the appellant
Peter C. McVey, for the respondent

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

<u>Publishers of this case please take note</u> that s. 94(1) of the *Children and Family Services Act,* S.N.S. 1990, c. 5 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] S.R. appeals the August 11, 2011 oral decision of Family Court Judge Robert Levy and his order of September 1, 2011, in which her daughter, S.C., was placed in the permanent custody and care of the Minister of Community Services ("Agency").

[2] During oral submissions before this court it became apparent that some of the trial evidence was not transcribed and did not appear in the appeal books. A supplementary appeal book was filed. The court invited and received supplemental written submissions.

Background

[3] S.R.is currently 29 years old. She has had five children by various partners. The first was born in 2001, the last in 2009. All have been placed in permanent care. S.C. is S.R.'s fourth child. She was born in 2006.

[4] A child protection proceeding was commenced shortly after S.C. was born. A provisional order was granted in favour of the Agency in March 2007. This initial proceeding was dismissed by termination order in October 2007.

[5] A family law proceeding followed in which S.C.'s father was ultimately successful in obtaining primary care under the *Maintenance and Custody Act*. Notwithstanding this outcome, S.C. was in the *de facto* custody of S.R. when the present protection proceeding was commenced on December 8, 2009. On December 10, 2009 an interim order was granted by Melvin J.F.C., who found that there were reasonable and probable grounds to believe S.C. was in need of protective services.

[6] On March 1, 2010, S.C. was taken into care by the Agency pursuant to s. 39(5) of the *Children and Family Services Act*, S.N.S. 1990, c. 5. This followed an assault on S.R. by S.C.'s father.

[7] On March 3, 2010, Judge Levy varied the interim order under s. 39(9) of the *Act*, continuing interim care and custody in favour of the Agency but providing access for her parents. On March 11, 2010 the court extended the time for holding a protection hearing under s. 40 of the *Act*.

[8] On April 15, 2010, S.C. was found to be in need of protective services. Interim care and custody was given to S.R. on these terms:

(a) S.R. was to maintain a stable residence for herself and S.C.;

(b) S.R. was to be the primary caregiver of S.C. at all times with alternative caregivers to be approved by the Agency;

(c) S.R. was to participate in the following support services:

1. Daycare for S.C.

2. Therapy with Psychologist, Elaine Boyd-Wilcox

3. An assessment with Psychologist, Sheila Bower-Jacquard

4. Obtain assistance from a Family Skills Worker

5. Other services as may be recommended by the Agency

[9] In July 2010 a supervision order was granted by Judge Levy providing that S.C. would remain in the care and custody of S.R., on the same terms and conditions as set out in the April order.

[10] On October 20, 2010, pursuant to s. 43(3) of the *Act*, the Agency again took S.C. into care for non compliance with the terms of the April 15, 2010 supervision order. The Agency made application for an order for temporary care and custody under the *Act*. That order was granted on October 28, 2010 by Judge Levy with access to S.C. by her parents. The order was effectively continued on December 2, 2010 by Family Court Judge Gibson. The Agency gave notice that it intended to apply for an order for permanent care and custody of S.C..

[11] On February 24, 2011, Judge Levy granted a further order for temporary care and custody pending trial of the Agency's application for permanent care. The maximum date for a disposition review required by ss. 43(4) and 45(1)(a) of the *Act* was exceeded by July 8, 2011. Between February 24, 2011 and July 25, 2011, the Agency's application for a order for permanent care and custody was rescheduled several times and adjourned apparently by agreement between counsel. The trial occurred on July 25 and August 11, 2011. Judge Levy rendered an oral decision at the conclusion of submissions on August 11.

Trial Decision

[12] The trial judge's decision was relatively brief. Salient excerpts are:

> (1) There's the primary principal of the legislation is, obviously, protecting the well being of a child and fostering the well being of a child. It's in that sense, Justice Bateman articulated, that the only consideration on a disposition hearing is the best interest of the child.
>
> (2) I think it's also clear that section 42(2) makes it clear, and I take it this applies to the final disposition as well, that the Court shall not make an Order removing the child from the care or, as I read it, keeping the child from the care of a parent or guardian, unless the Court is satisfied that less intrusive measures, including services to promote the integrity of the family, have been attempted and failed, have been refused, or would be inadequate. So I think there's a twin consideration there. If nothing has changed, if the basic grounds for the Agency's concern, the Minister's concerns have not improved materially, and I mean materially, then in that case, given that there has been a finding of need of protective services, and temporary care and custody orders, unless those concerns have evaporated sufficiently at least, if not completely, the Court can't be satisfied that the child will do well under the care of the parent. The Agency cited a number of concerns back in October of 2010 when they re-apprehended the child and I think there are some valid points raised by Mr. Janson that maybe those concerns were historical in nature and not necessarily applicable at that time and he would argue, certainly not since, not now.
>
> . . .
>
> (4) ...And I think there has been some development and has been some maturity. And I would agree that there is a dearth of evidence that the

> child in fact was suffering, although she was exposed to the potential, back at the time of the apprehension. And I suspect that there have been some changes made, as I say, or I find that there have been some changes made.
>
> (5) The one thing that I just am having trouble with and I cannot dismiss it as inconsequential, is her relationship with D.M., who I haven't met. I don't know. It strikes me as being indicative of, or consistent with, the evidence of a pattern of unfortunate associations that she has had over time. Or what appears to be unfortunate associations. This man was...and I know there was a different perspective put on it today...I think S.R., with respect, was dissembling today on her whole relationship with D.M. I think she was trying desperately to put a good face on a bad situation. Or what, to me, would appear to be a bad situation. ...
>
> (7) ...if I could misquote Gloria Steinham in this context, I'll say that S.R. has a need for the men in her life like a fish needs a bicycle. It's just not something that I think she's able to control at this point. She hasn't crossed that bridge. I agree that a lot of the Agency concerns are...have been dealt with and have been dealt with in a manner that is to your credit S.R. But I just don't have the sense that you're able to control your own life to the point where you could be counted on to count yours and S.C.'s life together. . . . I don't think S.C.'s best interests rest with going home with you and I, with some embarrassment, quote that hackneyed phrase: to give you one more chance would be to give S.C. one less chance.

Issues

[13] S.R. appeals the trial judge's order arguing that:

1. He did not provide a statement of evidence on which he based his decision as required by s. 41(5(b) of the *Act*.

2. He erred in assessing the evidence in granting permanent care and custody to the Agency.

3. He did not properly weigh the evidence, by failing to acknowledge the progress that S.R. had made.

4. He gave too much weight to S.R.'s present relationship when ordering permanent care.

Standard of Review

[14] Whether the trial judge's decision complies with s. 41(5)(b) of the *Act* is a question of law. But an error of law on this point would not be fatal unless the evidence failed to sustain the decision (per the analysis under issue 1, below). As for the 2nd, 3rd and 4th issues – the standard is palpable and overriding error, (*L.I. v. Mi'kmawFamily and Children Services of Nova Scotia*, 2011 NSCA 104, para. 29; *The Children's Aid Society of Cape Breton-Victoria v. A.M.*, 2005 NSCA 58, para. 26).

Issue 1 - Duty to give reasons

[15] Although framed as a breach of s. 41(5) of the *Act*, S.R.'s argument fundamentally challenged the adequacy of the trial judge's reasons.

[16] Under s. 41(5) of the *Act* a judge is required to state the evidence on which he relies and his reasons for removing a child from the care or custody of a parent:

> 41 (5) Where the court makes a disposition order, the court shall give
>
> (b) the reasons for its decision, including
>
> (i) a statement of the evidence on which the court bases its decision, and
>
> (ii) where the disposition order has the effect of removing or keeping the child from the care or custody of the parent or guardian, a statement of the reasons why the child cannot be adequately protected while in the care or custody of the parent or guardian.

S.R. submits that Judge Levy did not fulfill his obligations under s. 41(5)(b) because he did not review the evidence nor did he elaborate on why he granted the Agency's order.

[17] In a series of cases, the Supreme Court of Canada has recognized the importance of reasons in various settings: e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39; *R. v.*

Sheppard, 2002 SCC 26; *R. v. Braich*, 2002 SCC 27; *R. v. Walker*, 2008 SCC 34; *F.H. v. McDougall*, 2008 SCC 53; *R. v. R.E.M.*, 2008 SCC 51. Their import can be summarized thusly:

(a) the need for, and adequacy of reasons, is contextual and depends upon the adjudicative setting, (*Sheppard*, para. 19);

(b) reasons inform the parties – and especially the losing party – of why the result came about, (*R.E.M.*, para. 11);

(c) reasons inform the public, facilitating compliance with the rules thereby established, (*Sheppard*, para. 22);

(d) reasons provide guidance for courts in the future in accordance with the principle of *stare decisis*, (*R.E.M.*, para. 12);

(e) reasons allow both the parties and the public to see that justice is done and thereby enhance the confidence of both in the judicial process, (*Baker*, para. 39);

(f) reasons foster and improve decision-making by ensuring that issues are addressed and reasoning is made explicit, (*Baker*, para. 39; *Sheppard*, para. 23; *R.E.M.*, para. 12);

(g) reasons facilitate consideration of judicial review or appeal by the parties, (*Baker*, para. 39);

(h) reasons enhance or permit meaningful appeal or judicial review, (*Sheppard*, para. 25; *R.E.M.*, para. 11).

[18] In this case, the need for reasons is informed by both the s. 41(5)(b) statutory requirement and the purposes of the *Act* more generally. The latter is addressed by the *Act* as a whole and the sections governing disposition orders more particularly. Significantly, disposition orders include supervision, temporary care and custody, as well as permanent care and custody. So the statutory requirement for reasons should serve all these purposes. Looked at more broadly, both the *Act*'s expressed purpose (s. 2) and s. 42 speak of the child's best interests. Presumably, as well, the

decision should accord with, if not necessarily address specifically, the purposes embodied in the recitals to the *Act*. In the specific context of a permanent care and custody order, reasons should inform the parties; permit review or consideration of termination of the order pursuant to s. 48, as well as facilitating consideration of an appeal by the parties and if appealed, permit meaningful appellate review.

[19] At common law, the inadequacy of reasons does not automatically trigger appellate intervention. "Poor reasons may coincide with a just result" (*Sheppard*, para. 22). As Chief Justice MacDonald said in *McAleer v. Farnell*, 2009 NSCA 14, citing *R.E.M.*:

> [15] For this reason, our role on appeal is not to criticize the level of detail or expression. Instead it is to determine if the functions noted above have been fulfilled to the point where a meaningful appeal is available:
>
> > ¶53 However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. ***More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.*** [Emphasis added]

[20] In this case, the trial judge was constrained by the statutory requirements of s. 41 to recite evidence relied upon and reasons why S.C. cannot be adequately protected while in her mother's care. Assuming, without deciding, that Judge Levy's reasons are inadequate, what remedy is available? The *Act* is silent. One needs to consult the jurisprudence. In this respect I agree with the Alberta Court of Appeal in *C.A.S. v. Alberta (Director of Child Welfare)*, 2003 ABCA 233 at para. 13-14:

> **13** However, the justice found the reasons inadequate because they prevented her from assessing whether the trial judge's conclusions were supported on the evidence and whether he had considered material evidence. Although she acknowledged that there is no obligation on a trial judge to refer to all of the evidence, in this case the trial judge did not comment on any of the evidence. Moreover, the justice found that given the profound nature of a permanent

> guardianship order and the interests of the family and the public, the trial judge was compelled to provide reasons for his decision.
>
> **14** But the justice erred in law in failing to consider whether despite sparse reasons, the evidence produced at trial was sufficient to support the orders, even considering the mother's testimony. Moreover, she failed to address important child welfare principles concerning children's need for stability and prompt decisions on matters affecting them.

Alberta does not have an equivalent to our s. 41(5), but the following review of Nova Scotia jurisprudence reveals no meaningful difference on this point.

[21] This Court commented on the sufficiency of reasons in *Family and Children's Services of Annapolis County v. J.D. & R.R.*, 2004 NSCA 97:

> [39] Although it would have been preferable for the trial judge to make specific findings of fact after he recited the evidence in great detail, in this case, he obviously drew his conclusions from the facts he recited. In particular, I refer to the passages cited previously in ¶14, *supra*, leading up to his statement that in spite of Judge Wilson's conclusions of "chronic substance abuse and complex psychological profiles, the Agency concluded the child (M.D.) was safe with her mother from September 17, 2001 ... until apprehension on March 11, 2003." He then went on to state: ...

[22] Importantly, in *J.D.*, the Court of Appeal found that the trial judge had erred in law by failing to consider the Agency's plan. Accordingly, the Appeal Court did so in light of all the evidence and found that the requirements of the *Act* had been met, despite the failure of the judge to address the plan.

[23] Similarly, in *Family and Children's Services of Queens County v. L.C.*, [1996] N.S.J. No. 187 (C.A.), at para. 30, the court commented on the insufficiency of the trial judge's reasoning in connection with s. 42 of the *Act*:

> **30** Here, the trial judge provided reasons, the issue is one of sufficiency of those reasons considering the directions contained in the Act. The crux of the matter is that although the trial judge provided reasons for the finding that the children were at risk while in the appellant's custody, he then arrived at the conclusion that it was therefore necessary to order a permanent committal to the Agency without explaining why other alternatives would not be in the best interests of the children. What is missing is an analysis of why possible less intrusive measures might have provided the protection required. ...

[24] The Court of Appeal concluded that failure to address 42(2) did not compromise the trial judge's decision:

> **31** Although the trial judge did not specifically state that these preconditions had been met, or why, in his view, there was no other option for the care of the children than to grant the permanent care order, it is obvious in this case that the Agency provided numerous services to the appellant pursuant to s. 13 and that despite the various and extensive professional efforts to teach the appellant to look after her children, ultimately, all the less intrusive methods failed to provide adequate protection for the children.

[25] In *L.C.*, the Court of Appeal reviewed the evidence to satisfy itself that an order for permanent care should issue, despite some omissions in the trial judge's reasoning:

> **27** The first five grounds of appeal must, in my opinion, be dismissed. There is overwhelming evidence that supports the conclusions reached by the trial judge. Although the trial judge did not provide, with precision, his reasoning in drawing some of his conclusions it is not evident that he acted on any wrong principle or disregarded any material evidence. I have examined and assessed the evidence carefully and agree with the ultimate findings of fact made by the trial judge that the appellant was unable to properly care for her children at the time of the disposition hearing. The passage quoted from Niedermayer, J.F.C. by the trial judge demonstrates that he was mindful of the proper test and that it was not necessary for the Agency to prove lasting physical injury to the children, nor were the good intentions of the parent a sufficient basis for exposing them to the substantial risk of further harm from lack of supervision or adequate parenting.

[26] To similar effect is *Nova Scotia (Minister of Community Services) v. S.M.S. et al.* (1992), 112 N.S.R. (2d) 258; [1992] N.S. J. No. 238 (App. Div.) at paras. 39 and 40.

[27] In *Nova Scotia (Minister of Community Services) v. B.M.* (1998), 168 N.S.R. (2d) 271 (N.S.C.A.), Pugsley J.A. speaking for the court said:

> **25** 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.

He continued:

> **49** 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.

The Appeal Court made a finding that the children were in need of protective services as defined by s. 22(2)(b) of the *Act*.

[28] It is not necessary to make a final determination of whether Judge Levy's decision fulfills the requirements of s. 41(5)(b) of the *Act* because:

(a) a breach of s. 41(5)(b) requires the appeal court to consider whether the evidence sustains the trial judge's decision (*L.C.; J.D.*);

(b) in this case, S.R.'s other grounds of appeal invite the court to do precisely that.

[29] In *Braich*, Justice Binnie elaborated on the *Sheppard* "sufficiency of reasons" principle:

> 31 The general principle affirmed in *Sheppard* is that "the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case" (para. 33). The test, in other words, is whether the reasons adequately perform *the function* for which they are required, namely to allow the appeal court to review the correctness of the trial decision.

This Court endorsed Justice Binnie's comment in *R. v. Abourached*, 2007 NSCA 109 at paras. 54 and 55. Here, Judge Levy's reasons are adequate to permit meaningful appellate review.

Issues 2, 3 and 4 - Did the judge err in assessing and weighing the evidence when granting the Agency permanent care? Did he err in failing to acknowledge S.R.'s progress – or in giving too much weight – to her recent relationship?

[30] S.R. argues these issues together, correctly submitting that they are essentially concerned with the judge's assessment of the evidence. S.R.'s fundamental argument is that the judge placed too much weight on the evidence concerning her new boyfriend. She also submits that insufficient consideration was given to her progress since S.C. was taken into temporary care. It will be helpful to preface the specific grounds of appeal with a reminder of the legal requirements of a disposition hearing.

[31] Section 41 of the *Act* provides:

> **Disposition Hearing**
>
> 41 (1) Where the court finds the child is in need of protective services, the court shall, not later than ninety days after so finding, hold a disposition hearing and make a disposition order pursuant to Section 42.
>
> (2) ***The evidence taken on the protection hearing shall be considered by the court in making a disposition order.***
>
> (3) The court shall, before making a disposition order, obtain and consider a plan for the child's care, prepared in writing by the agency and including
>
> (a) a description of the services to be provided to remedy the condition or situation on the basis of which the child was found in need of protective services;
>
> (b) a statement of the criteria by which the agency will determine when its care and custody or supervision is no longer required;
>
> (c) an estimate of the time required to achieve the purpose of the agency's intervention;
>
> (d) where the agency proposes to remove the child from the care of a parent or guardian,
>
> > (i) an explanation of why the child cannot be adequately protected while in the care of the parent or guardian, and a description of any past efforts to do so, and

> (ii) a statement of what efforts, if any, are planned to maintain the child's contact with the parent or guardian; and
>
> (e) where the agency proposes to remove the child permanently from the care or custody of the parent or guardian, a description of the arrangements made or being made for the child's long-term stable placement.

[Subsection (4) of s. 41 is not relevant in this case and the pertinent portion of subsection (5) is reproduced in paragraph 16, above.]

[32] Given the passage of time in this case, the following subsections of s. 42 describe the order that could be granted in this case:

> **Disposition order**
>
> 42 (1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:
>
> (a) dismiss the matter;
>
> . . .
>
> (f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.
>
> (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.
>
> . . .
>
> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out

> in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. *1990, c. 5, s. 42*.

[33] Cromwell J.A. described the trial judge's obligations at a disposition hearing in *Nova Scotia (Community Services) v. A.S.*, 2007 NSCA 82:

> [11] Under appeal is a permanent care order made at a final disposition hearing. There is no dispute about the judge's role at that disposition hearing: he had to determine whether the child continued to be in need of protective services and, if so, to make an order in the child's best interests: see, for example, **Catholic Children's Aid Society of Metropolitan Toronto v. C.M.**, [1994] 2 S.C.R. 165; **Children's Aid Society of Halifax v. T.B.**, 2001 NSCA 99, 194 N.S.R. (2d) 149 (C.A.) at para. 26; **Nova Scotia (Minister of Community Services) v. D.W.S.**, [1996] N.S.J. No. 349 (Q.L.), 168 N.S.R. (2d) 27 (F.C.) at paras. 320 - 324; **Nova Scotia (Minister of Community Services) v. F.A.**, [1996] N.S.J. No. 447 (Q.L.) (F.C.) at paras. 21 - 22.
>
> . . .
>
> [17] The second critical part of the context relates to the effect of the findings earlier in the process that the child was in need of protective services. At the final disposition hearing, it is not the judge's function to reconsider these earlier determinations: those previous findings must be accepted at face value. They are assumed to have been properly made at the time they were: **G.S. v. Nova Scotia (Minister of Community Services)**, 2006 NSCA 20, 241 N.S.R. (2d) 148 (C.A.) at para. 19. At the final disposition hearing, the judge is to consider whether the need for protective services continues at that time. As Chipman, J.A. put it in **Nova Scotia (Minster of Community Services) v. S.E.L. and L.M.L.**, 2005 NSCA 55, 184 N.S.R. (2d) 165 (C.A.) at para. 20: "... Once a finding of the need for protection has originally been made, there is still the requirement ... to consider whether the child is or is no longer in need of future protection. Children's needs and circumstances are continually evolving and these ever changing circumstances must be taken into account."
>
> [18] In summary, ***two of the key issues at the final disposition hearing are to determine whether the child remains in need of protective services and what order is required in the child's best interests***. The issue of the ongoing need for protective services is not to be considered in a vacuum, but in light of the previous findings of the court which must be taken as having been right at the time they were made. The nature of the order required in the child's best interests must take into account the time limitations in the statute. [Emphasis added]

[34] Although the onus of establishing that a child remains in need of protective services is always on the Agency, this must take into account previous findings of the court. In *A.S.*, Justice Cromwell explains:

> [52] The judge was clearly alive to the requirement for him to determine whether the child remained in need of protective services. He made a clear finding in this regard at paragraph 7 of his reasons where he indicates that the agency had met its burden to show "throughout the proceeding" that the child remained in need of protective services under s. 22(2) of the **CFSA**. [Emphasis added in original]
>
> [53] ***The judge's reasons reflect that he essentially was looking for positive change in the appellant's ability to parent the child. This was the right approach given the number and the recency of the findings that the child continued to be in need of protective services.*** As noted, there had been several such findings, all with the appellant's consent and none challenged in any way. The appellant was represented by counsel throughout. In addition, the transition orders specified, with the appellant's consent, that her non-compliance with the orders would be grounds for the agency to take the child back into care. After the second attempted transition failed, the child was again taken into care and a further temporary care and custody order was made. At that time, the appellant consented to the order, including a provision that the Court found there to be reasonable and probable grounds to believe that the child was at substantial risk of harm pursuant to s. 22(2) of the **CFSA**. As discussed earlier, the judge was not only entitled, but obliged, to consider that these orders were correct at the time they had been made. [Emphasis added]

[35] In *S.M.S.*, *supra*, Chipman J.A., speaking for the court, referred to the trial judge's failure to address certain statutory requirements and the appearance he may have given of shifting the onus to the respondent. He said:

> **[32]** The appellant first submits that Judge Niedermayer erred in failing to address the requirements of s. 42(4) of the **Act** by shifting the burden to the appellant and failing to consider adequately her capacity to change with the assistance of racially and culturally appropriate services.
>
> . . .
>
> **[34]** While it is true that Judge Niedermayer did not specifically refer to this section and state that he had applied the principle therein in reaching his decision, this conclusion is implicit in the review of the evidence and the findings of fact in that decision. His findings of egregious neglect and of actual damage, perhaps

> irreparable in the case of the older children and certain to befall the younger ones if they followed the pattern of the older siblings, is ample to support the conclusion that he was satisfied that the circumstances justifying the order were unlikely to change within the time limits set out in s. 42(4) of the **Act**.
>
> . . .
>
> **[37]** The appellant points to one or two places near the conclusion of her evidence where Judge Niedermayer questioned her. His questions were prefixed with a comment to the effect that he wanted to be convinced that the appellant had the capacity to adequately parent her children. These questions were in the context of the finding on June 4, 1991 that the children were in need of protection and the appellant's admission that she had been unable to parent the children, but that she would improve, and that it would be a while before she could handle all six. She gave a time limit of from one to two years before this could happen. In this context, the questions of the judge cannot be taken to be a shifting of the primary onus which, of course, rested on the Minister to show that the circumstances were unlikely to change within the required time period. The evidence up to that point was overwhelming; changed circumstances were unlikely. The respondent had established a prima facie case for permanent care orders. Failure of the appellant at that point to adduce credible evidence to meet that case would render her susceptible to an adverse determination. See Sopinka, Lederman and Bryant, **The Law of Evidence in Canada** (1992), pp. 57, 60-65, 72-73.
>
> **[38]** In this context, Judge Niedermayer's line of questioning did not amount to a shifting of the burden which always rested upon the respondent. I would reject this ground of appeal.

[36] The trial judge’s reasoning was less than a model application of the criteria in the *Act* to the evidence before him. But in fairness, Judge Levy was literally speaking to S.R. in the courtroom and attempting to explain to her in a personal and direct manner why he was not prepared to allow S.C. to return to her care.

[37] The immediate focus of his concern was her most recent relationship, captured in the following phrase:

> I’m think (sic) that ... that makes her out to be particularly vulnerable to unfortunate relationships which she is entirely welcome to pursue, but I worry about S.C. in that context.

The impact of her partners on S.R. and on S.C. is discussed further below, but with respect to this issue, the judge was identifying what compromised S.R.'s parenting skills and thereby risked her daughter's safety.

S.C.:

[38] In her June 24, 2011 report, Cornelia Melville, an Early Childhood Psychologist, described S.C.'s development:

> S.C. presented as a young girl with average intelligence, displaying behaviours often associated with early trauma, deprivation, neglect and abuse. Her current developmental profile and social/emotional profile certainly fits into the diagnosis of Reactive Attachment Disorder and Disruptive Behaviour Disorder. Her attachment is disinhibited and diffused attachment manifested by excessive familiarity with relative strangers and lack of selectivity of attachment figures. In addition, S.C. displays disorganized and agitated behaviours, irritability and sudden outbursts of anger and aggression. In addition, there is evidence that there was possibly sexual violation or abuse in her past.

[39] Ms. Melville's recommendations were:

> 1. To try and support and provide a consistent, nurturing, long term care giving placement where S.C. can experience boundaries in a positive manner. This is imperative in fostering and forming stable attachments.
>
> 2. Providing routines, consistency, and predictability with expectations that are age appropriate and social/emotionally appropriate focusing on addressing and meeting her needs not on her being in an environment where she needs to dominate in order to have her needs met.

[40] Ms. Melville said that S.C. was "developmentally appropriate" but displayed "...behaviours that we see associated with disorders of attachment and disorganized attachment and she also meets the criteria for disruptive behaviour disorder". Ms. Melville felt that S.C.'s needs were being met while S.C. was in foster care with R.C. and her family. Psychologist Sheila Bower-Jacquard supported Ms. Melville's observation, contrasting S.C.'s favourable development while in foster care with her regressive behaviour in the care of S.R.. If S.C. were removed from a stable environment, Ms. Melville testified:

> **A.** The more our responses to the child's needs [are] hit and miss, the more we entrench the child in the diagnostic problems that we already have. Which means they . . . their attachment disorders become more ingrained. They trust less. They . . . in her particular situation, she . . . her controlling and aggressive behaviours could potentially increase . . . in that . . . that which she feels she needs to have control over the most, she doesn't. So she will take control over everything else.
>
> So we . . . we actually potentially risk her diagnosis becoming qualitatively more significant.

[41] The direct and cross-examination of R.C. confirmed that S.C.'s visits with her mother were destabilizing. It would take a couple of days before she would begin again to listen to her foster mother, go to bed on time, and be less aggressive to her foster brother.

S.R.'s Progress:

[42] The Agency worried that S.R. lacked the parenting skills that would provide S.C. with a safe, domestic environment. But at least initially, the Agency hoped that with assistance, S.R. could develop the necessary skills to parent S.C.. In her parental capacity assessment report of July 17, 2010, Psychologist Sheila Bower-Jacquard explained why she was consulted:

> ...the Agency is questioning whether or not S.R. could parent one or both of the children. Their concerns related to her immaturity and intellectual delays, poor parenting skills (lack of supervision, medical neglect, lack of stimulation and discipline), violence in the home – particularly with partners, and a lack of residential stability.

[43] At that time Ms. Bower-Jacquard recommended:

> ...In other words, while S.R. has made some good gains and may be able to parent one child, the demands of two children would likely exceed her skills and resources. . . . Hopefully, S.R. will be able to sustain the gains she has made and continue to progress. Overall, S.R. may have the ability to provide care for S.C. and should be given this opportunity given their bond, but I suspect this will be challenging for her and will likely require her to have significant support.

[44] Ms. Bower-Jacquard elaborated:

> 10. S.R. makes the necessary changes to provide a stable, nurturing and predictable home environment (see handout). This would include ensuring that she does not have others living in her home and that she does not get overly involved in pleasing or fixing the problems of male partners (ie. supervising visits and allowing homeless friends to live with her);

[45] In the fall of 2010, S.R. failed to follow through with her therapist, Elaine Boyd-Wilcox. Ms. Boyd-Wilcox concluded that S.R. was "not invested in therapy" and was essentially avoiding seeing her because she was not happy with the advice she was receiving from her. Consequently, for this and other reasons, S.C. was taken back into Agency care on October 20, 2010.

[46] S.R. also argued that the trial judge did not give her credit for positive changes since 2010. In fact, the trial judge did acknowledge some progress – he spoke of "some development and . . . some maturity". He praised S.R., "...you have made progress and more power to you." But that progress was marred by her relationship with D.M. and poor decision making with respect to that relationship, consistent with a previous pattern of preferring her partner to her daughter with negative consequences for S.C.. The judge was entitled to – and indeed obliged to – take that pattern into account when assessing S.R.'s suggested "progress" (s. 41(2) of the *Act*). S.R.'s relationships with men can only be described as chaotic. In the spring of 2011, she had relationships – or at least was in contact – with three different men. One was in a relationship with a girlfriend and she was attempting to "fend him off". She was also re-involved with a previous boyfriend from whom she accepted a ring. At the same time, she was allowing D.M. to stay in her apartment after repeated, unauthorized entries by him. S.R. recognized that by breaking into her apartment D.M. was behaving inappropriately. But she would not confront him with this behaviour although she acknowledged she should have.

[47] The Agency had earlier concluded that S.R. was not able to provide a safe and stable domestic environment and took S.C. into care in October 2010. In a follow up report of December 13, 2010, Ms. Bower-Jacquard opined:

> ...It is my opinion that the Agency has provided S.R. with significant support over the years and she has had the benefit of a number of supports and services; however, she has not been able to provide adequate care for her daughter consistently.

> Review of the information gathered in this updated assessment strongly suggests that S.R. is not able to manage her lifestyle to provide a consistent, predictable, loving, stable and nurturing environment. Thus, in my opinion, ***S.R. is not able to meet S.R.'s cognitive, emotional, behavioural, academic and social needs adequately which places S.C. at risk; thus I recommend that the Agency consider permanent care for S.C.***. [Emphasis added]

[48] Ms. Elaine Boyd Wilcox counselled S.R. for a number of years. She despaired of S.R.'s progress:

> **Q.** As her therapist, Ms. Boyd Wilcox, are you satisfied that S.R. is sufficiently grounded to be able to provide an appropriate, safe, consistent, long-term environment for S.C.?
>
> **A.** At this point I'm afraid I'm not, no.
>
> **Q.** When might she be able to do so?
>
> **A.** I don't know.
>
> **Q.** Within six months?
>
> **A.** I think that would be unlikely given the time that's been spent to this point trying to make interventions that haven't really gotten her where she needs to be.
>
> **Q.** You've read ... Sheila Bower-Jacquard's reports.
>
> **A.** Yes.
>
> **Q.** Has your experience as a therapist with S.R. brought anything to your attention different than the position set out in Ms. Bower-Jacquard's last report?
>
> **A.** No.
>
> **Q.** More particularly, Ms. Bower-Jacquard recommended that the child be placed in the Agency's permanent care.
>
> **A.** Uh-hum.

D.M.:

[49] The judge was satisfied that S.R.'s relationships with men had been bad for S.C.. This repeated itself with D.M.. On the one hand, D.M. played no role in her care plan for S.C.. On the other hand, it was clear that he was playing an important role in S.R.'s life. Indeed, S.R.'s counsel initially filed an affidavit from D.M. in support of her position. This affidavit was not formally tendered in evidence and D.M. did not testify at trial. These appeared to have been tactical decisions by S.R.'s counsel. The judge found that S.R. was dissembling regarding her relationship with D.M. and minimizing his intrusive, unsupportive behaviour.

[50] Although S.R. faults the trial judge for his focus on D.M., that focus finds context in S.R.'s own history and concerns previously identified about the impact of her partnership choices on S.C.. For example, in her July 17, 2010 report, Sheila Bower-Jacquard offered:

> ...To be successful S.R. will need to find a way to use services, seek advice, and manage her lifestyle; otherwise the Agency will likely need to intervene and apprehend S.C. Given the significant services that S.R. has participated in there are very few options left. I hope that she can find a way to understand that having a relationship is normal, but it is not acceptable to have the needs of the relationship interfere with her daughter's needs.

[51] During cross-examination, Ms. Boyd Wilcox expressed concern about S.R.'s relationship with D.M.:

> ...what I witnessed in the interaction between the two of them was concerning to me in terms of his controlling nature and the things he was saying to her. . . . There was all kinds of stuff about, you know, you shouldn't let them do that to you, and the agency shouldn't be able to do that. And all stuff that's not really supportive of her.

[52] Ms. Boyd Wilcox was worried about D.M.'s influence over S.R. She thought that his influence would prompt S.R. to be less forthcoming with the Agency. She had direct evidence of that in S.R.'s failure to be candid about her relationship with D.M.. His ability to transform himself from an unwanted visitor, breaking into her apartment, to new boyfriend, vindicates the professional and judicial anxiety about D.M.'s influence and S.R.'s judgment.

[53] The evidence of Ms. Boyd Wilcox, quoted above, sustained the trial judge's concerns. All of this would not matter if it had no effect on S.C. But it did, as Ms. Bower-Jacquard and Ms. Boyd Wilcox both observed. In *A.S.*, Justice Cromwell emphasized the impact of a mother's difficulties on her child:

> [58] The appellant submits that the judge erred in directing his attention to her difficulties rather than to the question of whether it had been shown that her son needed to be removed from her care. Respectfully, the two cannot be so neatly separated. ***To have ignored the appellant's difficulties would have been to assume away one of the problems which led to the child being in care in the first place***. [Emphasis added]

[54] S.R.'s relationship with D.M. was reminiscent of S.R.'s earlier inability to control relationships and their deleterious effect on the household. In the fall of 2010, S.R. and S.C. lived in a two-bedroom apartment which was adequate for their own use. However, S.R. was unable to control the use of that apartment by others. She had a number of adults living with her from time to time including her then boyfriend, S.D.; her brother, W.; W.'s girlfriend "J."; as well as another friend, D. She used her limited resources to assist all of them to her detriment. Her telephone was disconnected because she could not pay that bill. Her landlady cautioned her about having other persons living in the apartment. The Agency also gave her counselling in this regard. In the end, she and S.C. were evicted. This was a breach of one of the terms of the April 2010 order placing S.C. in S.R.'s care.

[55] Throughout the spring of 2011, S.R. attended access sessions with S.C. accompanied on various occasions by two different men, resulting in adverse effects on S.C.'s behaviour. Quite inappropriately, S.R. would discuss these relationships in S.C.'s presence.

[56] Despite the fact that she had formed a new relationship with D.M. S.R. was not immediately forthcoming with the Agency. She claimed she was simply "dating" D.M., although he stayed with her "every other night". S.R. was not successful in making D.M. understand that he could not live with her if S.C. was returned to her. Although not part of her care plan for S.C. and allegedly only a boyfriend, D.M. attended meetings with S.R. and her lawyer, her psychologist and her support professional. He also attended at the Agency's offices. D.M. had a criminal record but did not disclose this to S.R. despite inquiry by her.

[57] The importance and impact of poor relationship choices by S.R. on S.C. were also addressed by Cornelia Melville who said that S.C. needed a long term, trusting relationship with a consistent male figure. She testified that:

> ...having a long term relationship with a consistent male figure that she feels she can build a trusting relationship with is what she needs more than anything else to start establishing that recover[y].

The evidence was that S.C. had begun to achieve a trusting relationship with her foster parents.

[58] S.R. also admitted that she allowed her former common law partner, S.D., and a friend to use her apartment for drinking in the weeks leading up to the hearing, in July and August of 2011. With respect to Agency support, she conceded that she had attended many budgeting and nutrition workshops in the past but that she hadn't taken them "seriously before".

[59] S.R.'s latest efforts at improvement were strikingly coincident with the trial schedule. Between the first day of the hearing in July and the resumption of the hearing in August, she testified, "I'm realizing more and more what my daughter means to me" – this in response to questions that she had to get D.M. out of her apartment since the beginning of trial evidence in July.

[60] While acknowledging some progress by S.R., the trial judge was clearly struck by the poor decisions still being made by her, despite years of support by the Agency. He simply wasn't satisfied that S.R. had reached the point where she could make mature decisions about her future in S.C.'s best interest. That concern was supported by the evidence and professional opinions of Ms. Bower-Jacquard, Ms. Boyd Wilcox and Ms. Cornelia Melville. He concluded that an order for permanent care was in S.C.'s best interests. The evidence supported this outcome.

[61] I would dismiss the appeal.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.