C.A. No. 124892

NOVA SCOTIA COURT OF APPEAL
Cite as: S.G. v. Children's Aid Society of Cape Breton, 1996 NSCA 97

Clarke, C.J.N.S., Bateman and Flinn, JJ.A.

BETWEEN:

S. G. # 2	)	
	)	Darcy L. MacPherson
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Lorne MacDowell
	)	L. J. Halfpenny MacQuarrie
	)	for the Respondent
CHILDREN'S AID SOCIETY OF CAPE BRETON	)	
	)	
Respondent	)	Appeal Heard:
	)	April 19, 1996
	)	
- and -	)	Judgment Delivered:
	)	May 8, 1996
K. T. and Y. T.	)	
	)	
Third Parties	)	

THE COURT: Appeal dismissed without costs per reasons for judgment of Bateman, J.A.; Clarke, C.J.N.S. and Flinn, J.A. concurring.

Editorial Notice

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

BATEMAN, J.A.:

This is an appeal by the mother from an order of a Family Court judge who declined to terminate an order for permanent care of her son.

Background:

The respondent, the Children's Aid Society of Cape Breton, initiated proceedings May 18, 1993, for a finding that J. B. G. H., also known as J. G., born December , 1992, was in need of protective services pursuant to s. 32 of the **Children and Family Services Act,** S.N.S. 1990, c. 5, as amended. He was alleged to be at substantial risk of physical harm and emotional harm, and to be suffering from physical and emotional harm caused by exposure to repeated domestic violence. The appellant mother, S. G. and the father, B. H., were involved in a tempestuous and sometimes violent relationship which included substance abuse by both.

There were interim hearings on May 26, 1993 and June 22, 1993 as a result of which conditions were placed upon the mother's continued care of the child. On August 16, 1993, the mother consented to a finding that the child was in need of protective services. Interim supervision by the Agency continued culminating in the apprehension of the child on November 2, 1993. The mother had repeatedly failed to comply with the conditions of her continued care of the child. On November 3, 1993, the court ordered that the child be placed in the temporary care of the Agency, to be reviewed on December 20, 1993. On that date the court ordered continuation of the Agency's care, with the child to be returned to the mother's care on February 1, 1994. The child was returned, as ordered, however, the child was again taken into the Agency's care on May 20, 1994. On May 26, 1994, the parties agreed that the child would remain in the Agency's care until a review hearing was held on August 22, 1994. The mother had access with the child, who was living with a foster family. Pursuant to the time frames mandated by the **Children and Family Services Act**, final disposition was to be rendered on or before November 3, 1994.

The review hearing commenced in August as scheduled and continued intermittently until conclusion on October 31, 1994. On October 6, 1994, the mother, who was pregnant, left for

Ontario. She had been advised by the Agency that on the recommendation of a psychologist, Dr. Carolyn Pye, who had undertaken an assessment of the mother for the disposition hearing, the Agency would be apprehending her then unborn child at birth. Having left the jurisdiction, she did not participate in the conclusion of the disposition hearing.

On October 31, 1994, the judge found the J. G. to be in need of protective services and made an Order for permanent custody, without access by the mother. His written reasons are dated December 2, 1994. The judge assigned considerable weight to the report of Dr. Pye who opined that the mother "showed a severe personality disorder, anti-social psychopathic type, with significant likelihood of substance abuse. . . . Treatment prospects for someone with [the mother's] profile of test results are extremely poor."

The mother appealed the decision of the Family Court judge within the 30-day period required by the **Act**. On that appeal, she asked this court to receive further evidence, in particular, evidence of her circumstances since moving to Ontario. The appeal was heard on March 29, 1995 and a decision rendered on May 23, 1995, dismissing the appeal, which decision is reported as **S.G. v. Children's Aid Society of Cape Breton** at (1995), 142 N.S.R. (2d) 57. The court declined to receive the further evidence, finding that, while it was in conflict with the evidence presented at trial, it was opinion evidence from persons whose qualifications were not before the court and that those persons had had a limited period to observe the appellant. The appeal was dismissed.

The mother immediately sought leave, pursuant to **s. 48(6)** of the **Act,** to apply to terminate the permanent care order. That application included a request that the leave application and subsequent termination proceeding be heard by a Family Court judge other than the judge who had presided at the disposition hearing. On July 10, 1995, that request was granted by the original judge.

Following a three day hearing in September of 1995, the mother was granted leave to apply to terminate the permanent care order. The evidence from the prior proceedings, including that on the leave application, formed part of the record in the termination proceeding. That hearing was held November 27, 28, 29 and 30, 1995. The judge rendered his decision on January 5, 1996. It is

from that decision that the mother now appeals.

Power on Appeal:

The power of this court on hearing an appeal under the **Children and Family Services Act** is contained in **s. 49(6)** which provides:

> (6) The Court of Appeal shall
>
> (a) confirm the order appealed;
> (b) rescind or vary the order; or
> (c) make any order the court could have made.

The law applicable to a review was set out by Chipman, J. A., for the court, in **Family and Children Services of Kings County v. D.R. et al** (1993), 118 N.S.R. (2d) 1 (C.A.) at p. 13:

> . . . I emphasize the unique advantage possessed by the trial judge in carrying out the duties mandated by the **Act**. The Family Court judges presiding at trial are best suited to strike the delicate balance between competing claims to the best interests of the child. *In the absence of error in law or clearly wrong findings of fact, this Court is neither willing nor able to interfere*. See **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 12 N.S.R. (2d) 258. (emphasis added)

In **Nova Scotia (Minister of Community Services) v. S.M.S.** et al (1992), 112 N.S.R. (2d) 258 (C.A.), Chipman, J.A., writing for the court commented at p. 258:

> The function of an appellate court in matters such as are before us today was described by Cooper, J.A. of this court in **Children's Aid Society of Colchester County v. MacGuire and Boutilier**, (1979) 32 N.S.R.(2d) 1. He stated beginning at p. 7,
>
> > It is no doubt true that an appeal court should not interfere with findings of fact made by a trial tribunal unless they are clearly wrong. The trial judge must have made a "manifest error" or some "palpable and overriding error" - see **Talsky v. Talsky** 7 N.R. 246 [1976] 2 S.C.R. 292 at p. 294 and **Stein et al v. The Ship "Kathy K." et al**, 6 N.R. 359, [1976] 2 S.C.R. 802 at p. 808. It has, however, been

said on many occasions that an appeal court is free to draw its own inferences from proven facts . . .

A trial judge in dealing with the custody of an infant is called upon to exercise a discretion which it is recognized will only be interfered with if he has gone wrong in principle or overlooked material evidence. It was put thus by Viscount Simonds in the following passage in **McKee v. McKee** [1951] A.C. 352, Privy Council, at p. 360:

> Further, it was not and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

The Nature of A Termination Proceeding:

Section **48** of the **Act** provides, in part:

> (8) On the hearing of an application to terminate an order for permanent care and custody, the court may
>
> (a) dismiss the application;
>
> (b) adjourn the hearing of the application for a period not to exceed ninety days and refer the child, parent or guardian or other person seeking care and custody of the child for psychiatric, medical or other examination or assessment;
>
> (c) adjourn the hearing of the application for a period not to exceed six months and place

> the child in the care and custody of a parent or guardian, subject to the supervision of the agency;
>
> (d) adjourn the hearing of the application for a period not to exceed six months and place the child in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency; or
>
> (e) terminate the order for permanent care and custody and order the return of the child to the care and custody of a parent or guardian or other person.
>
> (10) Before making an order pursuant to subsection (8), the court shall consider
>
> (a) whether the circumstances have changed since the making of the order for permanent care and custody; and
>
> (b) the child's best interests.

In **Telfer v. Family and Children's Services of Annapolis County** (1982), 50 N.S.R. (2d) 136 (S.C.A.D.) Jones, J. A., for the court, wrote at p. 154:

> I agree that on an application for termination the primary consideration must be the best interests of the child. *A judge must be satisfied the parent's circumstances have changed so there is no longer any need for protection and that the parent is a proper person to care for the child, and when the application is made that it is in the best interests of the child to terminate the order.* (emphasis added)

While in **Telfer** the Court was considering the test to be applied under the former **Children's Services Act,** S.N.S. 1986, c. 8, **s. 48(10**) of the current **Act** amounts to legislative expression of that test.

In **C. M. v. Catholic Children's Aid Society of Metropolitan Toronto and Official Guardian** (1994), 2 R.F.L. (4th) 313 (S.C.C.), the society sought an order of Crown wardship without access for the purposes of adoption, in relation to a child who had been in the care of the society. This was a status review proceeding pursuant to the **Child and Family Services Act**,

R.S.O. 1990, c. C.11, a proceeding analogous to a termination hearing. The trial judge ordered that the child be returned to the mother. That order was affirmed on appeal to a judge of the Ontario High Court (General Division). On further appeal to the Ontario Court of Appeal, the child was made a Crown ward, without access. The Court of Appeal rejected the proposition, adopted by the trial judge, that the child must be returned to the parent unless the society could demonstrate that there was some continuing deficiency in the parenting capacity of the natural parent.

On further appeal to the Supreme Court of Canada, L'Heureux-Dube, J., writing for the court, endorsed the approach of the Court of Appeal. At p. 342 she wrote:

> The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection or from circumstances which have arisen since that time. As the Court of Appeal said: [at p. 110, 47 R.F.L.]:
>
> We agree that a children's aid society, as the representative of the state, must continue to justify its intervention by showing that a court order is necessary to protect the child in the future.
>
> Regardless of the conclusion reached at this first stage, *the need for continued protection encompasses more than the examination of the events that triggered the intervention of the State in the first place*. As the Court of Appeal further noted:
>
> > We do not agree, however, that this means, in the absence of proof of some deficiency in the present parenting capacity on the part of the natural parent, that the child must be returned to the care of the natural parent. *A court order may also be necessary to protect the child from emotional harm, which would result in the future, if the emotional tie to the care givers whom the child regards as her psychological parents, is severed. Such a factor is a well recognized consideration in determining the best interests of the child which, in our opinion, are not limited by the*

> *statute on a status review hearing*.
>
> This flexible approach is in line with the objectives of the Act, as it seeks to balance the best interests of children with the need to prevent indeterminate State intervention, while at the same time recognizing that the best interests of the child must always prevail. In this regard, I agree with the conclusions reached by Professor Phyllis Coleman in "A Proposal for Terminating Parental Rights: 'Spare the Parent, Spoil the Child'" (1993), 7 Am. J. Fam. L. 123, at p. 133:
>
> > *Focus on parental fitness is inappropriate in many termination cases. Rather, when the child is young, emphasis should be on needs and interests of the child.. . . [P]arental rights should be terminated if . . .it is determined it would be in the best interests of the child to terminate*.
> > (emphasis added)

These principles are equally applicable to a termination proceeding under the **Children and Family Services Act**, as is expressly recognized in **s. 48(10)**.

Section 48(10)(b), in requiring the court to consider the child's best interests, implicitly refers the court back to **s. 3(2)** which provides:

> 3(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> > (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
> >
> > (b) the child's relationships with relatives;
> >
> > (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
> >
> > (d) the bonding that exists between the child and the child's parent or guardian;
> >
> > (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to

> meet those needs;
>
> (f) the child's physical, mental and emotional level of development;
>
> (g) the child's cultural, racial and linguistic heritage;
>
> (h) the religious faith, if any, in which the child is being raised;
>
> (i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
>
> (j) the child's views and wishes, if they can be reasonably ascertained;
>
> (k) the effect on the child of delay in the disposition of the case;
>
> (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
>
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
>
> (n) any other relevant circumstances.

Under the scheme set out in the **Act**, a permanent care order is generally granted only after a series of attempts by the agency to support or facilitate the rehabilitation of the parent, and the failure of rehabilitation to occur within a reasonable time frame. Such was the case here. Appropriately, once a permanent care order has been made, in the termination proceeding, there is a shifting of focus, to the best interests of the child, not in the context of the child and a hypothetical care giver, offered as an alternative to the parent, but in the context of the new environment the child has come to know.

Grounds of appeal:

The appellant raises the following grounds of appeal:

1. In assessing J. G.'s best interests, did the Honourable Trial judge err in law by failing to put sufficient weight on the importance of the principles enunciated in the law indicating the importance of family?

2. Did the Honourable Trial Judge err in law in accepting the psychological opinion evidence of Dr. Carolyn Humphreys and Dr. Andrew Lynk concerning J. G.'s attachments?

3. Did the Honourable Trial Judge err in law in delivering his decision prior to receipt of supplementary written argument from counsel for the appellant?

4. Did the Honourable Trial Judge err in law in refusing interim access to the appellant?

Analysis:

(a) The Decision on Appeal:

The decision of Judge James Wilson of the Family Court is thoughtful and thorough. He correctly instructed himself in the law, expressly acknowledging the relevance of **s. 48** of the **Act** as well as the preamble and the definition of the best interests in **s. 3 (2);** he confirmed that the evidentiary burden is on the appellant in a termination proceeding and referred to the leading decisions in this area; he acknowledged that the court must balance the considerations set out in the **Act,** as was recognized by the Supreme Court of Canada in **C. M., supra.** He outlined a brief history of the appellant as follows:

> S. G. is presently 28 years of age. She was raised in Ontario and left her family of origin at 15. She was married in June of 1990 to the son of the family with whom she had been living since age 15. The marriage lasted only six months. She then entered into a relationship with a man where drinking, drug experimentation and partying were the main occupation. This lifestyle resulted in legal difficulties for both of them. In the summer of 1991 S. G. met J. G.'s father, B. H.. She became pregnant and had an abortion. She also experienced criminal difficulties for fraud related offences and was sentenced to 90 days in jail which she served in late

> '91, early '92. After her release from jail she moved in with her sister. In May of '92 S. G. and B. H. moved to Cape Breton. After spending some time with B. H.'s family they obtained their own residence in November of '92. The child J. G. was born in December of '92. The evidence is uncontradicted that B. H. had serious substance abuse problems at this time. S. G. denies abusing drugs or alcohol while she was pregnant but does admit to use of prescription drugs and some moderate use of alcohol. It was in this context of substance abuse and resulting spousal violence that the family became involved with child protection authorities in early '93.
>
> The child protection issues became more acute when the applicant and B. H. failed to abide by the condition of their supervisory orders. The details of these events are set out in Judge Darryl Wilson's decision rendered October 31, 1994. The presenting problems included substance abuse, spousal violence, failure to abide by the terms of court orders and lying to or misleading different helping agencies or officials. In short, the difficulties which caused the agency to become involved showed no improvement and probably got worse over the next year. By May of '94 J. G. was placed in temporary care and the agency developed a plan. Evidence was presented through the summer and fall of 1994 which resulted in the permanent care order of October 31, 1994.
>
> As indicated earlier one of the conditions in the early supervisory orders was that the parents live separate and apart because of the history of spousal abuse. The evidence is that these orders were contravened and there was more than one incident reported in the file where B. H. would unlawfully enter S. G.'s apartment and/or assault her. A final incident occurred in April of '94 which resulted in B. H. being incarcerated in May of '94. Subsequent to his period of incarceration he entered into long term substance abuse treatment and continued with that until June of '95.

The judge then looked at the appellant's current circumstances to determine whether there had been a change, as required by **s. 48(10)(a)** of the **Act**. The appellant, upon leaving Nova Scotia, had established residence in her mother's house, in [...], Ontario, obtained employment and was attending [...] College on a part-time basis. She gave birth to her second son, J. H., in the fall of 1995 and he remained in her care. The Family and Children's Services in St. Catharine's were satisfied that she was adequately caring for J. H.. On June 25, 1995, she commenced a therapeutic relationship with Dr. Briggs, a psychologist. Dr. Briggs differed with the opinion of Dr. Pye, in that

she concluded that the appellant's past difficulties were attributable to poor judgement during an aberrant couple of years, rather than a personality disorder.

The judge noted that while those were positive developments, there were some areas of concern. These included the fact that the appellant became pregnant in the spring of 1995 after a one night encounter and aborted that pregnancy. Additionally, B. H. had moved to St. Catharine's upon his completion of substance abuse treatment, was attending the same church as the appellant and was having contact with their son, J. H..

Judge Wilson wrote:

> Addressing these changes is particularly difficult in light of the expert evidence before the court. Dr. Pye's report is thorough and virtually uncontradicted at the disposition hearing. It is based on thorough psychometric testing cross referenced with collateral sources. It is in some measure corroborated by the evidence of Dr. Sharma at the original trial and Dr. Shulka at the leave application.

He discussed the conflicting psychological assessments and said in that regard:

> In my opinion the significance of this decision is too important to ride solely on the credibility of conflicting psychological assessments. I am satisfied that there have been sufficient positive changes in circumstance to enable the court to consider J. G.'s best interest.

He then turned to factors relating to J. G. - he has lived with the foster family since May of 1994; the foster family wishes to adopt J. G.; there is some concern that he may have mild cerebral palsy, which won't be clear until he is older; the foster family includes four siblings, three of whom are still at home; there is conflicting evidence as to J. G.'s attachment to the appellant at the time leading up to the apprehensions and permanent care order; J. G. is attached to his foster family, including his foster mother; both Dr. Humphreys (who had undertaken an assessment of J. G.'s attachment to his foster family) and Dr. Lynk (his pediatrician) opined that removal of J. G. from his foster family would put him at great risk of future emotional and psychological damage.

He concluded on this evidence:

> But even Dr. Briggs is prepared to admit . . . that for a period of two or three years S.'s behaviour was so significantly

> aberrant as to give rise to serious child protection concerns. It was during this time that both parents failed J. G. J. G.'s placement in and attachment to his foster home is a direct consequence of that failure. It was at this point that the best interests of J. G. and the wishes of the parents separated. That the applicant may now have her life on a better course and desires a second chance to parent J. G. is not the only issue. To terminate this Order is to subject J. G. to the equivalent of the sudden death of his family and gamble his future on the prospect that his once inadequate parent has now recovered to the point where she can meet the extraordinary demands of what is likely to be a severely traumatized child. To do so would be to disregard the paramountcy of the child's best interests in favour of parental interests. The evidence in support of the child's best interests is against termination.
>
> In the final analysis, only time will tell which personality diagnosis of S. G. is more accurate. While I am prepared to find positive encouragement for S. G. in some events over the past year, the overall weight of the evidence compels me to the conclusion that J. G.'s best interests are served with him remaining with his foster family under circumstances that will provide for his long term placement in a family where he is now established and feels secure. It is unfortunate the so called "aberrant years" occurred at such a critical time, but that is the fact. The parents are required to live with the consequences, just as J. G. is entitled to experience life in a secure and nurturing environment.

(b) Grounds 1 and 2:

> In assessing J. G.'s best interests, did the Honourable Trial judge err in law by failing to put sufficient weight on the importance of the principles enunciated in the law indicating the importance of family?
>
> Did the Honourable Trial Judge err in law in accepting the psychological opinion evidence of Dr. Carolyn Humphreys and Dr. Andrew Lynk concerning J. G.'s attachments?

Dr. Humphreys was retained by the Agency to assess J. G.'s attachment to his foster family and the consequences to him of removal at this time in his life. Dr. Humpreys concluded that J. G. was firmly attached to his foster family, that it was his psychological family and that removal would put him at risk.

It is established law that the weight of evidence is for the trial judge. He quoted extensively from the report and evidence of Dr. Humphreys He did not misconstrue that evidence,

which was supported by the evidence of Dr. Lynk, J. G.'s pediatrician. This evidence was unshaken on cross-examination.

S. G. objected to the admission at trial of Dr. Humphrey's report, on the basis that it was biased. Her counsel acknowledged before this court, however, that the issue is not one of admissibility but weight. As I understand the appellant's submission, she takes issue in that Dr. Humphreys did not directly assess J. G.'s attachment to his birth mother. The appellant had sought an order for interim access in conjunction with the application for leave. The Court declined to order access. As a consequence, Dr. Humphreys could not observe J. G. in the care of his mother, in order to determine the state of their relationship. Counsel for the appellant submits, as well, that the report is flawed in that, notwithstanding Dr. Humphreys inability to directly assess the relationship between the appellant and J. G., she should have spoken to the appellant and others about the appellant's relationship with J. G. In not doing so, submits the appellant, she exhibited bias. Dr. Humphreys did conclude, from anecdotal reports of certain of those persons who had observed mother and son together prior to access terminating, that there was little attachment. The appellant submits that Dr. Humpreys exhibited further bias in this regard in that she only received evidence on this issue from the child care workers, rather than from witnesses proffered by the appellant. The appellant called witnesses at trial to testify that she had a close attachment to J. G..

The judge acknowledged that there was conflicting evidence on this issue:

> There is conflicting evidence before the Court about J. G.'s attachment to his birth mother. While the birth mother maintains she had a good, close and loving relationship with J. G. there is other evidence to suggest the bond was not as strong or positive.
>
> . . . The evidence is that he is now much closer to the foster mother, seeks her out, and is reluctant to be separated from her. . . .
>
> Dr. Carolyn Humpreys was retained by the respondent to assess the quality of J. G.'s attachment. This would include his attachment to his birth mother (based upon reports to the assessor) as well as attachment to his current placement based upon the assessor's observations. Counsel for the applicant has argued strenuously that this report is biased against the applicant because the assessor did not observe J. G. with his mother. Under the terms of the existing Family Court order the applicant has no access to J. G. and as a result it was impossible to carry out that assessment. In accepting this report,

> the court ruled that the most current information with respect to J. G.'s attachment must take precedence over the risk to the child of reintroducing him to his mother for a period of time for the purpose of obtaining a more balanced report. One of the consequences of the original permanent care order to the applicant is that contact with the child was lost.

The judge in his decision reviewed, in detail, the evidence of the attachment between the foster family and J. G. J. G. had been in the continuous care of the foster mother since May 20, 1994, when he was 16 months old. Prior to that time he had been in temporary care from November 3, 1993 until February 1, 1994. All contact with his mother ended when she left for Ontario on October 6, 1994. By the conclusion of the hearing, he had not had contact with his mother for over a year of his young life. She had not been his principal caretaker for almost two years. The judge's decision turned, not on J. G.'s lack of attachment to the appellant, but rather on the extent of his attachment to the foster family and the consequences to him of its severance. Dr. Humphreys' opinion in this regard was uncontradicted and independent of her assessment of the attachment to the appellant. The result might have been different had J. G. had a limited attachment to the foster family; had he been in care for a shorter period of time; had he been older; or had the foster family not presented as adoptive parents. But the determination had to be made on the facts as they existed.

It must be remembered that the passage of time is always relevant in child welfare proceedings. The preamble to the **Act** contains the following recital:

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

Clearly, the thrust of the **Act** is to facilitate the settlement of a child within the relatively short time periods prescribed by the **Act** and perceived to be consistent with the best interests of the child. J. G. had been in this home for almost two years. He was already "settled" although the legalities of his situation had not been finally determined. It was appropriate to weigh his attachment to the foster family in the context of his age at the time of apprehension and the passage of time relative to that age. The risk of harm to J. G. upon a removal from the foster family was heightened

in that he had already, at an early age, and on more than one occasion, experienced removal from the appellant, his then primary caretaker.

The risk to J. G. in his removal from his psychological family, which was the focus of the judge's decision, existed, irrespective of the appellant's improvement as a parent. In **C. M., supra**, L'Heureux-Dube, J., wrote, in regard to the psychological bond between a child and a foster family, at p. 345:

> Within the realm of best interests, perhaps the most important factor in the present case, as probably in many others, is regard to the psychological bonding of a child to her or his foster family. . .
>
> Among the factors in evaluating the best interests of a child, the emotional well-being of a child is of the utmost importance, particularly where the evidence points to possible long-term adverse consequences resulting from the removal of the child from his or her foster family and the return to his or her birth parents. The focus of maintaining family units is only commensurate as long as it is in the best interests of the child, otherwise it would be at cross-purposes with the plain objectives of the Act, as Wilson J. noted in **R.(A.N.) v. W. (L.J.)**, supra, at p. 185:
>
> . . . it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. As has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations.

It was a relevant factor, as well, that as the foster family wished to adopt J. G., he would not be experiencing another move.

In this appeal proceeding the appellant has, to an extent, attempted to call into question the original decision on the permanent wardship, and in particular, the reliance by the Family Court judge upon the report of Dr. Carolyn Pye. That decision has withstood the scrutiny of this court on the previous appeal. No reversible error was made. In addition, the appellant has focused substantially upon the gains that she has made as a parent. That is but one part of the equation. The emphasis must be upon J. G.'s best interests, taking into account his current circumstances, which

result from the appellant's past mistakes. The task is not one of assigning blame, but rather recognizing the reality of J. G.'s situation as it now exists.

I do not accept the appellant's submission that the report of Dr. Humpreys exhibited bias, nor that the judge erred in the weight which he assigned to the report. This allegation was raised before the trial judge in the context of the appellant's objection to the admissibility of Dr. Humphreys' report. The report was admitted by the trial judge. As outlined above, the focus of the appellant's argument before this court is not one of admissibility but of the weight the judge assigned to the report. Having reviewed the evidence before the court, and re-weighed it to the limited extent mandated upon appeal, I cannot infer that the evidence of Dr. Humpreys exhibited bias, nor that an inference of bias should arise from the fact that she did not contact the appellant to assess the state of J. G.'s attachment to her, prior to the loss of contact.

In assessing J. G.'s best interests, the judge did not fail to pay adequate regard to the importance of the family, which is but one factor to be weighed, consistent with the direction of the court in **C. M., supra**.

(c) Ground 3:

> Did the Honourable Trial Judge err in law in delivering his decision prior to receipt of supplementary written argument from counsel for the appellant?

At the conclusion of the hearing the judge said:

> Okay I am going to receive briefs from each of you by December 11th. If you want to make responses you will advise my office how you are going to do that by the 15th of December, and if I hear there is to be no further responses I will proceed to decide on the basis of what I have by December 15th.

Both counsel filed lengthy post trial submissions. Counsel for the respondent, by letter to the judge dated December 14, wrote:

> My office received a call from Darcy MacPherson from Hungary indicating he will not be back in the area until December 20th and will want some time to reply to the briefs.

> I would note that I will review the briefs and would request that I be given until the end of next week to provide a brief response to areas that I may not have covered.
>
> I have spoken to David Raniseth and he requests the same time.
>
> Mr. MacPherson is also requesting that he be given time to file a response. *I will copy Mr. MacPherson with this correspondence and ask his office to ensure he will be in touch with you with respect to a date by which he will file his response.* (emphasis added)

The decision was delivered January 5, 1996, counsel for the appellant having made no further contact with the trial judge. Counsel for the appellant submits that the trial judge was in error in rendering his decision before receiving a further submission from him. He provides no explanation as to why, after his return from Hungary on December 20, 1995, he did not advise the trial judge of his intention to submit a brief nor why he did not file the brief in the following two weeks, preceding the delivery of the decision. He cites no authority for this ground of appeal. He does not refer to deficiencies in the decision which he alleges are attributable to the judge's failure to receive his submission in reply. The appellant's post-trial brief was comprehensive. The letter from counsel for the respondent is clear. Counsel for the appellant, upon his return, was to advise the judge as to when he would be filing a reply. He did not do so. It was not incumbent upon the judge to wait indefinitely for the reply, nor to contact counsel for the appellant in this regard. The trial judge did not err in delivering his decision prior to receiving a brief in reply, nor do I accept that the appellant suffered any disadvantage in this regard.

(d) Ground 4:

> Did the Honourable Trial Judge err in law in refusing interim access to the appellant?

In conjunction with the application for leave to terminate, the appellant requested an order for interim access to J. G.. The focus of that request for access was to facilitate an assessment of J. G.'s attachment to his mother. The judge on the disposition hearing had ordered that there be no

access. In this regard he said:

> The burden is on the parent to show that access is in the best interests once an order for permanent care and custody is made. [**Minister of Community Services v. S. M.** (1992) 41 R.F.L. (3d) 321 (N.S.C.A.)]. J. G. is almost two years old. He has been in foster care on two occasions in the past year. The agency's plan for J. G. is adoption. Any access order would impede his adoption placement. S. G. has since left the jurisdiction of this court and is unable to exercise access at this time.
>
> I find that a court order for access is not appropriate and not in J. G.'s best interests and therefore I deny the applications for access.

In **C. M., supra**, L'Heureux-Dube, J. noted that, at a subsequent proceeding, the original protection order is presumed to have been properly made at the time. She wrote at p. 342:

> It is clear that it is not the function of the status review hearing to retry the original need for protection order. That order is set in time and it must be assumed that it has been properly made at that time. In fact, it has been executed and the child has been taken into protection by the respondent society. The question to be evaluated by courts on status review is whether there is a need for a continued order for protection.

The order denying access, as a part of the protection order, is presumed to be the right order at the time made and consistent with J. G.'s best interests.

The judge quite properly determined that it would be inappropriate and premature to consider the appellant's request for access, at least until her application for leave was heard. The leave application was heard in September of 1995.

A memorandum of a Pre-trial conference held on October 18, 1995 states:

> Mr. MacPherson requested authorization from the court to have his client and J. G. assessed by a qualified professional for purposes of commenting on their relationship. Specifically Mr. MacPherson asked that his client have access for the purpose of doing this assessment. The request was denied at this point in view of the present order but Mr. MacPherson reserves the right to make a similar application at a later point in the proceeding *when the court may have before it sufficient evidence to grant a request for assessment pursuant to Section 48(8)(b) of the* ***Children and Family***

Services Act. (emphasis added)

On November 29, counsel for the appellant again requested access for the purpose of an assessment. In response the judge said:

> . . . [U]nder section 48(c), clearly one of the things that I can order *at the end of the evidence is further assessments, but if the evidence should warrant it* then that's one of the options, and I think it is in that context that . . . so your motion is still alive and I am not ruling on it at the moment. (emphasis added)

The matter of access arose again when counsel for the appellant objected to the admission of Dr. Humphreys report, alleging that it was biased in that it did not contain a direct assessment of J. G. in the company of the appellant. On this issue the judge said:

> . . . Counsel for the applicant has argued strenuously that (Dr. Humphreys') report is biased against the applicant because the assessor did not observe J. G. with his mother. Under the terms of the existing Family Court order the applicant has no access to J. G. and as a result it was impossible to carry out that assessment.

The appellant submitted before this court that the judge erred in that he did not ever deal with the access request, or, alternatively, in concluding that he could not order access.

The judge's power to address access, on a termination hearing, is derived from **s. 48** of the **Act**:

> (7) On the hearing of an application to vary access under an order for permanent care and custody, the court may, in the child's best interests, confirm, vary or terminate the access.
>
> (8) On the hearing of an application to terminate an order for permanent care and custody, the court may
>
> > (b) adjourn the hearing of the application for a period not to exceed ninety days and refer the child, parent or guardian or other person seeking care and custody of the child for psychiatric, medical or other examination or assessment;
> >
> > (c) adjourn the hearing of the application for a period not to exceed six months and place

> the child in the care and custody of a parent or guardian, subject to the supervision of the agency;
>
> (e) terminate the order for permanent care and custody and order the return of the child to the care and custody of a parent or guardian or other person.

As is evidenced by his comments throughout the trial, the judge was aware of the access request. The appellant's application for interim access was intended for the purpose of an assessment. The judge specifically addressed that issue in his questioning of Dr. Humphreys on November 29, 1995:

> THE COURT: I just have a couple of questions doctor. Is it possible to do an attachment assessment specifically in J. G.'s case and his mother, when there's been no contact for over a year.
>
> A. It would be very, very hard, I mean that's one you rely on retrospect to (sic) data because J. G. doesn't have a verbal memory of his mother, so he doesn't have a word for her. After a year you would be dealing with so much in terms of just rebuilding a relationship, you couldn't get data on attachment initially, you would be getting data just on reestablishing a relationship basically. I mean you would have to be basically reestablishing a relationship and then measuring attachment, but it would be like, I mean you would have...you can't do them independently you would have to have J. G. back with his mother and then you could kind of look at the attachment over time that was being created. You can't do it on what the attachment was when he was removed.
>
> Q. It would take some time to build up some kind of relationship and then try to assess that. It's not a matter of putting them together.
>
> A. That's right.
>
> Q. Are there risks to J. G. in doing that kind of thing?
>
> A. I would say so.
>
> Q. And they are?
>
> A. Well the risk is that he would be removed from his current home and you would have eh, to do that kind of assessment you would have to have him living almost full time with his

> natural birth mother. The immediate risk is that he would be removed from a secured base that he currently has and...you couldn't do it by just office visits and that kind of thing.
>
> A. Anything arising from that? (Counsel indicate no)

The mother had not had access to the child at that point for in excess of a year. There was evidence before the judge that to reunite the appellant and the child for the purpose of an assessment would pose risk to the child. While **s. 48(7)** does contemplate a change to the access provision in the disposition order, access can only be ordered if in the best interests of the child, the paramount consideration under which all decisions are made. There is no specific authority under **s. 48** for the judge to order "interim access". It is not necessary to decide, for the purposes of this matter, whether an order for interim access may be made, save in the context of a disposition under **s. 48(8),** involving the adjournment of the termination hearing. In a termination proceeding such as this, where a child has been removed from the care parent and with an order that there be no access, it would be dangerous and, indeed, in error for the judge to order access, absent clear and convincing evidence that it was in the best interests of the child to do so. Such evidence was not presented. The judge made no error in this regard.

Disposition:

I would dismiss the appeal but without costs.

J.A.

Concurred in:

Clarke, C.J.N.S.

Flinn, J.A.

C.A. No.124892

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

S. G. # 2

Appellant

- and -

CHILDREN'S AID SOCIETY OF CAPE BRETON

Respondent

- and -

K. T. and Y. T.

Third Parties

REASONS FOR JUDGMENT BY:

BATEMAN, J.A.