Docket: CA 159173
Date: 20000301

NOVA SCOTIA COURT OF APPEAL

[Cite as: D.A.B. v. Family & Children's Services of Kings County, 2000 NSCA 38]

Chipman, Bateman and Cromwell, JJ.A.

BETWEEN:

B. (D.A.)	)	In Person
	)	
Appellant	)	
	)	
- and -	)	
	)	
FAMILY & CHILDREN'S SERVICES OF KINGS COUNTY, N.B.H., M.M.H., and S.A.T.	)	Don MacMillan, for Family and Children's Services
	)	
Respondents	)	N.B.H. and M.M.H.(In person)
	)	
	)	
	)	Appeal Heard:
	)	February 18, 2000
	)	
	)	
	)	
	)	Judgment Delivered:
	)	March 1, 2000

Editorial Notice

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

THE COURT: Appeal is dismissed as per reasons for judgment of Bateman, J.A., Chipman and Cromwell, JJ.A., concurring.

Publishers of this case please take note that s.94(1) of the **Children and Family Services Act** applies and may require editing of this judgment or its heading before publication. Section 94(1) provides:

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

Bateman, J.A.:

[1] This is an appeal by DB, biological father of MGT, from an order of Judge Robert Levy of the Family Court placing MGT in the permanent care and custody of Family and Children's Services of Kings County. The order was made pursuant to the **Children and Family Services Act**, S.N.S. 1990, c. 5.

BACKGROUND:

[2] MGT was born on December *, 1998 *(editorial note- removed to protect identity*) to ST and DB. The parents, who were not married, had separated in October. A brief attempted reconciliation in December failed. Their relationship had been a turbulent one marked by reciprocal physical and verbal fighting. Their last common living place was an unheated dirt floor garage without plumbing. There, they lived in a loft above the main floor where cars were stored and repaired. According to ST's evidence, the garage was not weather tight and was in dangerous repair. Its unsuitability as a living place was a factor contributing to the breakup. As her due date approached, ST became increasingly worried about finding appropriate accommodation for the baby. DB did not share that concern. Upon separating from DB, ST moved temporarily to a women's shelter before relocating to an apartment.

[3] After a difficult birth, ST remained in hospital until December * (*editorial note- removed to protect identity*). Upon her discharge her mother, SM, stayed with her to help with the baby. When SM returned to her own home eleven days later, ST was overwhelmed. She felt that she could not care for the baby and called upon her sister,

MH, for assistance. MH, who is married to NH and with a blended family of five children, took MGT to her home to give ST an opportunity to decide what she wished to do. MGT has remained in the care of MH and NH since then.

[4] ST had great difficulty accepting that she could not care for MGT. Over the winter and spring of 1999 she decided, more than once, that the baby should come to live with her. She reconciled for a period with DB. In February of 1999, during a period when ST had concluded that MGT should be placed for adoption, DB applied for custody under the **Family Maintenance Act** R.S.N.S. 1989 c.160 as amended.

[5] On March 9th , the Agency made application for an interim protection order. The order sought was granted on March 12th . ST had again decided that she would make plans to care for the baby. MGT remained, however, in the care of MH and NH. The Agency set up supervised access visits for ST and DB. As the access was in Dartmouth where MGT was living with the H family, the Agency helped with the cost of transportation.

[6] Generally throughout these proceedings, DB has deferred to ST's periodic quest to retain custody, rather than advancing a plan of his own. The DB/ST relationship remained intermittent over the spring. At some points it was their plan to raise MGT together as a family unit, at others, ST would have primary care of MGT with access to DB. DB sometimes spoke of pursuing his claim for custody. While initially open to giving ST time to decide about MGT's future, as the matter unfolded, MH and NH felt

that the return of MGT to ST or to DB was not in her best interests. They favoured the Agency plan of adoption.

[7] There were further interim hearings or pre-trials on March 24; May 17; June 7; August 16 and 30. The final disposition hearing was scheduled for September 7, 1999. By mid-August, ST had decided, for the final time, that she could not parent MGT. She was willing to consent to the Agency's plan that MGT be adopted. DB, however, opposed the plan and sought custody. It was his intention to raise MGT on his own. ST did not support that option, nor did MH and NH who had been joined as parties to the proceeding.

[8] Participating in the September 7th and 8th 1999 hearing were DB, representing himself, NH, acting for himself and MH, and the Agency counsel.

[9] On June 7, 1999, Judge Levy found that MGT was in need of protective services pursuant to s.22(2)(k) of the **Act** which provides:

> 22(2) A child is in need of protective services where
>
> (k) the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;

[10] This finding is not under appeal.

[11] On September 8th , Judge Levy ordered that she be placed in the permanent

care and custody of the Agency without access. It is from that disposition that DB appeals.

GROUNDS OF APPEAL:

[12] DB appeals on the basis the judge erred in ordering permanent care:

> (i) in that DB has done nothing which would disentitle him to custody of MGT, and;
>
> (ii) in failing to deny a s.42 order in view of the fact that the Agency did not provide sufficient services to DB to assist him in assuming care of MGT.

LEGAL REPRESENTATION:

[13] Although not stated as a ground of appeal, DB has complained to this court that he has been wrongly denied the assistance of legal counsel, both here and in the court below.

[14] At the time of his application for custody, DB reported to Melissa Keddie, Social Worker with Family and Children's Services of Annapolis County, that he was earning $150 to $350 per week driving taxi. Although there is some suggestion in the record that he at times attempted to retain counsel, he acknowledges that he ultimately decided not to hire a lawyer for the legal proceeding in Family Court.

[15] DB applied to Nova Scotia Legal Aid for funded counsel on the appeal. His request was denied as he had received (on November 4, 1999) a $30,000 settlement

on a personal injury claim relating to an accident some years ago. He appealed the decision denying Legal Aid funding. By letter dated December 23, 1999, DB was advised that the Appeal Committee of the Nova Scotia Legal Aid Commission would be meeting on January 18, 2000 to consider his appeal and that he was "welcome to attend in person at that time to present your reasons why you feel that this decision should be changed". He was asked to telephone and confirm whether or not he would be in attendance. The appeal hearing was rescheduled for January 20, 2000. DB was informed of this by letter dated January 4th , again advised that he was welcome to attend and was asked to telephone to confirm his intention in that regard. He did not respond nor attend the appeal. Finally, by letter dated January 24, 2000, DB was advised that on January 20th the Appeal Committee had met to consider his appeal. The letter said, as well:

> The Appeal Committee did not make a decision on your appeal, they wanted to see if you were interested in making another appointment by phone or in person before reaching a final decision on your appeal. You can reach me at (902) 420-6586 to let me know.

[16] Again, DB did not respond. He advised this court that he did not attend the appeal nor respond to the correspondence because he was frustrated with the process and not prepared to explain his circumstances to the Appeal Committee.

[17] By letter dated October 28, 1999 DB was informed by the Registrar of this Court of the recent decision by the Supreme Court of Canada in **New Brunswick (Minister of Health and Community Services v. G. (J.),** [1999] S.C.J. No. 47, a copy of which was enclosed in the letter. It was suggested that he "read this decision

carefully to ascertain whether or not you meet the criteria to apply to the court for the appointment of counsel to represent you on your appeal."

[18] On December 30, 1999, Chipman, J.A., in Chambers, heard DB's application for appointment of counsel. DB advised the Court that he would be attending his appeal hearing before the Legal Aid Committee which was then scheduled for January 18, 2000. He further advised the Court that he had indeed received a $30,000 insurance settlement but had recently spent the money to purchase a home and was thus without funds to retain a lawyer. Justice Chipman found that DB had not brought himself within the requirements of the Supreme Court direction in **New Brunswick v. G.(J.)**, **supra**, and dismissed the application for appointment of counsel. He encouraged DB to continue with his appeal to the Legal Aid Committee.

[19] We are not satisfied, in these circumstances, that DB lacked the means to retain counsel or that he has been denied state-funded counsel through Nova Scotia Legal Aid. He is not entitled to have counsel appointed by this Court.

FRESH EVIDENCE:

[20] DB has asked this Court to receive fresh evidence on the appeal. One piece of the evidence sought to be admitted is an “Affidavit” from his former common law partner, SS, who is the mother of their two children. The “Affidavit” is actually a letter signed by S.S. before a Commissioner of Oaths.

[21] DB asks, as well, that we consider the fact that in November of 1999, after the order on appeal, he received a personal injury settlement and has purchased a house in Lawrencetown, Nova Scotia, which would provide appropriate accommodation for MGT. He has submitted, as well, an affidavit to which are attached copies of his other children’s report cards.

[22] This Court can receive “further evidence” pursuant to s.49(5) of the **Act** which states:

> 49(5) On an appeal pursuant to this Section, the Appeal Division of the Supreme Court may in its discretion receive further evidence relating to events after the appealed order.

[23] We have jurisdiction, as well, to receive "fresh evidence" under **Civil Procedure Rule 62.22**, the relevant section of which reads:

> (1) The Court or a Judge on application of a party may on special grounds authorize evidence to be given to the Court on the hearing of an appeal on any question of fact as it or he directs.

[24] In **Children's Aid Society of Halifax v. C.M. (1995)**, 145 N.S.R.(2d) 161

(C.A.) and **Children's Aid Society of Cape Breton v. L.M.** (1998), 169 N.S.R. (2d) 1 this Court considered the law in relation to applications to admit fresh or further evidence and concluded that we have a wide latitude to receive additional evidence in child welfare matters but that any such evidence must be considered in the context of exercising our appellate function.

[25] Considering first the "Affidavit" letter, SS says therein that while she and DB lived together with their two children, now aged nine and four he was an attentive and loving father who helped with the care of the children. He has since exercised access and pays support whenever needed.

[26] DB's relationship with SS and his children was canvassed in the *vive voce* evidence at trial and documented in the reports and notes of the Agency which form part of the record. That evidence is at odds with the contents of the "Affidavit" letter. According to the March 1, 1999 report of Melissa Keddie, a social worker with the Agency, titled, "Assessment of DB", by DB's own report he and SS separated in 1996. During his relationship with ST "I let a lot of things go. I wasn't seeing my kids." FB, a reference provided by DB to Ms. Keddie, reported to her that DB did not properly supervise the two children when he would visit FB with them. Ms. Keddie contacted SS about DB and reported:

> I phoned [SS], mother of [DB]'s two other children: [CB], age nine years; and [CHB], age four years. [SS] said that the children have a great time with their father when he takes them, but he is not reliable. He was supposed to have the children today (February 28th) from 1:00 p.m. to 7:00 p.m. He phoned from Kentville saying he was at [ST's] place and would be at the [SS] home at 3:00 p.m. He did not show up or phone. It was 8:30 p.m. when I phoned [SS]. [DB] is supposed to have the children on Tuesdays from 10:00 a.m. to 7:00 p.m. Most

> Tuesdays he does not take the children at all. At times, he will pick both children up at 7:00 p.m. or 2:30 p.m., after [CB] is out of school. He says that he has no gas to pick up [CHB] earlier. At times, [DB] will pick up the children at 7:00 p.m. then bring them back at 10:00 p.m. or later. "He has always been late with everything he does. He operates on his own sense of time. His excuse for not getting the children these days is that he is going through too much with the baby," [SS] said. [DB] is supposed to pay $50.00 a month child support. He hasn't paid this in years, [SS] said. He tells [SS] that he can't afford to pay, I was told. [SS] and [DB] have spoken a lot about baby [MGT] and about [DB]'s application for custody. [SS] is very concerned that [DB] does not go to see the baby. She spoke with [DB] at length about the importance of spending time with [MGT] so that he would not be a stranger to her. [DB] was involved with the children when they were small and was very good with both of them. "He has a lot of patience for kids," [SS] told me. [SS] is concerned that [MGT] may be neglected if she was in [DB]'s care because [DB]'s priorities were always "working on cars and running around." There might be a big turnaround in him," [SS] said.

[27] ST testified at the trial that during her relationship with DB there was substantial conflict between him and SS. Much of it took place in front of their two children. DB would often refuse telephone calls from SS or the children. SS would send the children to DB's door unannounced. He might see the children two or three times a week for a period, then only every couple of weeks and then not for months. When he would appear again for access after not seeing the children for a while he and SS would argue. It was ST's understanding that DB was not seeking access but that SS was forcing it upon him. She referred, as well, to the children not being properly supervised when with their father. In particular, she felt the garage where they were living was a dangerous place where the children were at risk of falling through holes in the loft area and were permitted to play under the cars on which DB was working. This evidence was unshaken on cross-examination by DB.

[28] The "Affidavit" letter from SS, in my view, should not be admitted as fresh evidence. It is not reliable. Additionally, SS was available to testify at trial, although

she did not, and provided information to the Agency inconsistent with the contents of the letter.

[29] Neither would I admit the affidavit containing copies of the children's report cards. This evidence is not relevant to these proceedings. The children are not in the primary care of DB. Their school progress has no bearing upon his suitability to parent MGT.

[30] I will consider DB's acquisition of a home in the context of the other issues raised on appeal.

STANDARD OF REVIEW:

[31] The power of this Court on 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.

[32] On such an appeal we must recognize "the unique advantage possessed by the trial judge" as Chipman, J. A. wrote for this 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. (see also **Children's Aid Society of Colchester County v. MacGuire and Boutilier** (1979), 32 N.S.R.(2d) 1 (N.S.C.A.))

[33] Cromwell, J.A. wrote for the unanimous court in **Children's Aid Society of Cape Breton v. L.M.** (1998), 169 N.S.R. (2d) 1:

> [para41] When there is an appeal from the trial judge's decision, it is not the proper role of the Court of Appeal to retry the case. As has been said by this Court many times, the trial judge's decision in a proceeding of this nature should not be set aside on appeal unless a wrong legal principle has been applied or there has been a "palpable and overriding" error in the appreciation of the evidence: see *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 112 N.S.R. (2d) 258 (C.A.) at 268 and *Children's Aid Society of Colchester County v. Maguire and Boutlier* (1979), 32 N.S.R.(2d) 1 (S.C.A.D.) at 7 - 8.

ANALYSIS:

[34] While the purpose of the **Children and Family Services Act** is "to protect children from harm, promote the integrity of the family and assure the best interests of children", the paramount consideration is always the best interests of the child. (s.2 of the **Act**). As Gonthier J. wrote in **New Brunswick (Minister of Health and Community Services) v. M.L.,** [1998] 2 S.C.R. 534 at p.599:

> [para 47] . . . This Court has held, however, that preserving the family unit plays an important role only if it is in the best interests of the child (*Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, *supra*). This Court has also held on numerous occasions that pursuing and protecting the best interests of the child must take precedence over the wishes and interests of the parent (*King v. Low*, [1985] 1 S.C.R. 87; Young v. Young, [1993] 4 S.C.R. 3). In *Catholic Children's Aid Society of Metropolitan Toronto*, *supra*, at p. 191, L'Heureux-Dubé J. stated: "Thus, the value of maintaining a family unit intact is evaluated in contemplation of what is best for the child, rather than for the parent. In order to respect the wording as well as the spirit of the *Act*, it is crucial that this child-centred focus not be lost".

[35] It is in this context we consider DB's appeal from the Family Court Order.

[36] In his oral decision rendered at the completion of the hearing on September 8, 1999, Judge Levy made several findings about DB that were relevant to whether it

would be in MGT's best interests to be placed in his care:

> (i) He had great difficulty getting things organized;
>
> (ii) He became frustrated and fed up, wanting nothing to do with the Agency;
>
> (iii) He would not cooperate with the inquiries by the Agency into his parenting capacity;
>
> (iv) He has no plan for MGT;
>
> (v) He is impractical and ineffectual in terms of getting things done;
>
> (vi) He does not recognize that he needs help, would not accept it if offered and could not follow through in any event;
>
> (vii) He could not make a safe and nurturing environment for a child of this age in a reasonable period of time;

[37] Our task is to determine whether Judge Levy applied a wrong legal principle or made a palpable and overriding error in his appreciation of the evidence. In the context of DB's complaint that the Agency provided inadequate support, we must consider, as well, whether Judge Levy misapplied the law when he concluded that the Agency had fulfilled its obligation.

[38] As to the Agency's obligation to provide services, the **Act** provides:

> 13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.

> (2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:
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> (a) improving the family's financial situation;
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> (b) improving the family's housing situation;
>
> (c) improving parenting skills;
>
> (d) improving child-care and child-rearing capabilities;
>
> (e) improving homemaking skills;
>
> (f) counselling and assessment;
>
> (g) drug or alcohol treatment and rehabilitation;
>
> (h) child care;
>
> (i) mediation of disputes;
>
> (j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;
>
> (k) such matters prescribed by the regulations. 1990, c. 5, s. 13.
> (Emphasis added)

[39] Section 42(2) requires that the Judge, before granting an order removing the child from the care of a parent or guardian, be satisfied that the Agency has complied with s.13:

> **42(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.

[40] It is DB's submission that Judge Levy found that the Agency had not provided services pursuant to s.13 and, accordingly, erred in granting the order for permanent care. Relevant to this issue Judge Levy said:

> ...I have to say this, that I noted in the evidence the absence of expressed statements or evidence from the Agency that they looked you straight in the eye, toe to toe, and said, [DB], what can we do to help? It may be there but boy I didn't see it. And it may be that it would be a fool's errand to ask them to do it. I am not saying it wouldn't be and it is certainly not fatal to their case. I'm just saying that I noted that and I'm aware of the obligation on all of us but I can't fall, at the end of the day, I can't countenance the idea of placing the child with you [DB]...
> (Emphasis added)

[41] DB looks to the highlighted remarks in the passage above in support of his claim that Judge Levy found that the Agency failed to provide services.

[42] The extent of the Agency's obligation pursuant to s.13(1) to provide services must be assessed in the context of the circumstances of the parties. There is no suggestion here that the Agency failed to provide appropriate assistance to ST to promote and facilitate her resuming care of MGT. In spite of those services ST recognized that MGT's best interests were not consistent with a return to her care.

[43] According to the affidavit of Rhonda Elgar, Agent of Family and Children's Services of Kings County, the Agency's first contact with the matter was in response to a call from MH on January 29th, 1999. MH advised Ms. Elgar that MGT had been in her care since January 11th. MH further recounted that on January 27th ST had decided that she wanted to reconcile with DB and resume care of MGT. MH returned MGT to ST but before the night was over ST had again decided that she could not parent MGT and asked DB to take MGT and leave her home. After receiving the call from MH, Ms. Elgar called ST's home and was advised that DB and ST were discussing matters. She called back later that same day and was told by DB that they had decided that MGT

should return to the MH/NH home. DB said that he would be seeking custody of MGT. Ms. Elgar advised DB that if his plan was to reside in Annapolis County with MGT he should contact the Agency there for support. She asked him to call her when he felt he had a plan for the child.

[44] Agency records reveal that DB did contact the Annapolis Agency on February 2nd and spoke with social worker Melissa Keddie. DB advised that he and ST were separated and that he wished to raise MGT, although he had some self doubts about getting a plan together. Ms. Keddie suggested that DB seek legal counsel. On February 5th DB contacted MH and told her that he would pick up MGT the next day. MH telephoned Ms. Elgar because she was concerned that DB did not have a suitable place for MGT nor a plan for her care. DB had applied for custody of MGT and ST had apparently signed papers at Family Court giving DB custody with access to ST. That same day Ms. Keddie visited DB at his home and told him that MGT should remain with the H family until DB's circumstances were assessed by the Agency. On February 8th , ST advised Ms. Keddie that she was concerned about DB's situation and had told the Family Court that she had changed her mind about turning over custody to him. She was particularly worried about DB's volatile temper, reckless driving and use of marijuana as well as the fact that he did not have proper accommodation for MGT and had not adequately supervised his children from a previous relationship. The Annapolis Agency decided to assess DB regarding his plans to parent MGT. Ms. Keddie visited DB at his residence on February 11th and documented the following:

a) [DB] said that he had just returned from the Annapolis Agency offices

where he had hoped to meet with her.

b) [DB] related when asked about his plan that he had decided to apply for assistance and look for a larger apartment. The worker asked him about how much he would receive on assistance and when would he be eligible. [DB] said he did not know. He was encouraged to inquire.

c) [DB] was informed that Ms. Keddie wished to do an assessment and that would include police and child abuse register checks, references and a detailed plan from him which would include details about a babysitter.

d) [DB] again talked about [VS], [the babysitter whom he had said would look after MGT when he was working], as his plan for child care and was then told by Melissa Keddie that she had spoken to [VS] and [VS] had "flatly refused" to care for the child and said she had already informed [DB] of this.

e) [DB]'s apartment was "again freezing cold", and he said that he had not turned on the heat.

f) [DB] said he had not seen [MGT] for a week nor had he called to ask about her saying as it was too hard on him emotionally.

[45] On February 15th Ms. Keddie had further contact with ST who said that DB did not have a plan for MGT, that neither she nor DB would be suitable full time parents to MGT and that DB had not contributed to MGT's care since birth. On February 19th , ST asked for an overnight visit with MGT but was still torn about her feelings - she agreed to wait until she had more time to think about it. Over the latter part of February, ST's ambivalence about long term care of MGT continued. The completed assessment of DB dated March 1st raised several issues of concern. Ms. Keddie concluded:

> I have no doubt that [DB] would like to raise [MGT] and that he does not want his daughter to be placed for adoption. My assessment of his situation has raised many serious concerns, however. I first met [DB] at Agency offices on February 2, 1999. From February 2nd until my third meeting with [DB] on February 25th, [DB] had not developed a plan for MGT's care. I believe that [DB] fully intended to pick up [MGT] at the [H] home on February 6th and to bring her to his home. My visit to his home on February 5th to tell him that he could not do this until his situation was assessed was the only reason that he did not go up to get her, I believe. [DB]'s plan to do so with no preparation for her, no plan for her care

> for a long time and his having had no contact with her, shows poor judgment and impulsiveness on his part, I feel. [DB] does not appear to react well to stress. His criminal convictions are of concern. His statement that his relationship with [ST] "messes me up in the head" and then his continuing with this relationship seems unwise. His pattern of sporadic access to his own children is of concern as is his failure to show up when he has scheduled a visit with the children. I believe it would be very difficult for [DB] to adjust from his present life of being on the road all the time and being his own boss to being tied at home with a baby. I can't imagine that [DB] could easily find a babysitter to care for a colicky baby sixty-six hours a week, mostly nights and weekends. I believe that finances would be a problem for [DB]. He appears disorganized in financial and personal matters. [DB] appears to have little understanding of how difficult full time, single parenting of an infant can be.

[46] ST continued to equivocate on her wishes for MGT. On March 7th she advised Ms. Keddie that she intended to keep MGT, raise her and to go to marriage counselling with DB to make "a family unit". On March 24th, 1999 Judge Levy granted an Order, confirming a March 12th finding that there were reasonable and probable grounds to believe that MGT was in need of protective services, granting supervised access to ST and DB and requiring, *inter alia*, that DB and ST each cooperate with a parental assessment. Supervised access had been arranged by the Agency for DB and ST, commencing on March 19th in Dartmouth.

[47] Dr. Susan Hastey agreed to conduct the parenting assessment with the initial appointment scheduled for May 4th . Dr. Hastey's written report is dated June 24, 1999. She cautioned, that DB did not attend all scheduled appointments and therefore his assessment is incomplete. She noted that DB "presented in clinical interview as guarded and defensive. He was not able to stay on topic at times and at other times perseverated on some topics for extensive periods of time. "[DB] has difficulty sequencing time and events and did present as an individual who had some confused

thought processes." The results of the *Child Abuse Potential Inventory* test administered on May 4th were "invalid". DB's Lie Scale exceeded the cut-off score. "...[H]is scores present in a manner often referred to as "faking-good" presentation. Such individuals are unable to admit to a reasonable number of faults and problems." While she could not further interpret the Inventory due to these difficulties, the one area that achieved a result above the cutoff score indicated "general difficulties with social relationships". This area was in keeping with DB's presentation as "an individual who externalizes responsibility for difficult or failed relationships. It also supports "[DB's] presentation as an individual who attributes difficulties in his life as having been caused by others." His response on the *Personal Problems Checklist for Adults* was defensive as well. It was a presentation which indicates that DB "has little, if any, motivation to change either individual behaviors, groups of behaviors or his general attitude toward life and specifically relationships. Given this lack of motivation, it is unlikely that [DB] will be able to maintain relationships which require an average amount of reciprocity." Results of the *Parenting Satisfaction Scale* led Dr. Hastey to conclude that "[DB's] lack of insight into the nature of relationships and the nature of child development and the responsibility of a parent in regard to the emotional and physical needs of their children is extremely poor and does not bode well for [DB's] future parenting." The *Minnesota Multiphasic Personality Inventory-2* produced reliable results. Dr. Hastey's analysis of these test results included the following comments: "Individuals with similar profiles are often uninterested in and unwilling to enter into a discussion of their problems."; "Apparently sociable and rather exhibitionistic, this individual seems to manage conflict by excessive denial and repression."; "Individuals with this profile tend to exhibit a

neurotic pattern of adjustment"; "The client will probably be resistant to mental health treatment because he has little psychological insight and seeks medical explanations for his disorder."

[48] Drawing on the results of the objective tests administered, the information obtained in her interviews with DB and the background information provided by the Agency, Dr. Hastey identified the following issues as "pertinent to the parenting capacity" of DB:

> 1. [DB] was generally not cooperative in the assessment process. His level of defensiveness does not allow for an appropriate level of self-disclosure necessary to objectively evaluate his parenting capacity.
>
> 2. Test results which are valid do indicate that [DB] has difficulty in taking the perspective of others. He has difficulty in genuinely empathizing with the problems of others and he has a significant level of difficulty in taking responsibility for the effect that his behaviour and attitude has on others.
>
> 3. Collateral information in combination with interview presentation lead this Assessor to believe that a Drug Dependency Assessment of [DB] is a necessary prerequisite to his having any access with the child, [MGT]. [DB] was not open in disclosing his use of pain killers or the frequency of this use. [DB] was also not open in discussing his past or present use of marijuana. This is a pattern indicative of a possible substance abuse issue and warrants further inquiry and investigation prior to his having any further involvement with the child, [MGT].
>
> 4. Test results indicate that [DB] is not accepting of the level of parenting provided to his children by [SS] and yet he is not stating a need to address any deficits the children may have as a result of these deficiencies by

> improving his own parenting abilities or by being more consistent in his availability to these two children. This shows a significant lack of responsibility on the part of [DB].

[49] Dr. Hastey explained in her testimony before Judge Levy that DB failed to show for his last assessment appointment, did not sign collateral releases allowing her to speak to certain individuals about him and did not participate in the final two home based access observations with ST and MGT. At the time that she conducted the assessment he was not presenting a plan as a primary care giver but was deferring to ST's. Dr. Hastey was, therefore, not assessing DB as a primary care giver. Were that to be her focus, however, based upon the information available to her, she made the following observations: that DB has a limited ability to address the emotional needs of a child; she had serious concerns regarding his ability to support other individuals emotionally, financially or socially; he minimizes and denies problems; he believes issues will take care of themselves; and he does not appreciate that time is important in settling MGT's circumstances. In summary, it was Dr. Hastey's opinion that DB should not have primary care of MGT.

[50] The anecdotal evidence offered by various witnesses including MH, ST and the Agency personnel confirmed many of Dr. Hastey's conclusions. In particular, DB's unwillingness to find suitable accommodation leading up to MGT's birth, which contributed to the separation from ST; his lack of regular access with his two older children; his lack of financial responsibility; his failure to properly supervise the children when in his care; his inability to develop a plan of care for MGT; his impulsiveness in

planning to remove MGT from the MH/NH home, although not having appropriate accommodation or supplies for her; his conviction that caring for a baby would be simple and, in particular, his lack of insight into any personal responsibility for his or MGT's circumstances.

[51] The starting point for the Agency's provision of appropriate services is the identification of areas of concern. The assessments by Melissa Keddie and Dr. Hastey were critical to this process. The fact that DB refused to fully cooperate with Dr. Hastey spoke volumes both as to his commitment to the process and his lack of insight into the difficulties confronting him. It also bore upon the likelihood that DB would avail himself of services if offered. The Agency's obligation to offer services is limited to "reasonable measures". In view of DB's refusal to fully cooperate with Dr. Hastey, his failure to accept the areas of concern identified by Melissa Keddie and his revealed inability to recognize himself as contributing to the problem, it is difficult to imagine what further services could reasonably have been offered by the Agency.

[52] Nor do I agree with DB's submission that Judge Levy was of the view that the Agency had not fulfilled its mandate under ss.13 and 42(2). Judge Levy was expressly mindful of his obligation under s.42(2) of the **Act**. He said at the outset of his decision: ". . . I draw specific attention to Section 42(2) of that **Act**." And at a later point:

> . . . So I look at the question of best interest. I temper that by reference to **Section 42**. I temper that by an understanding of the need to preserve and promote the integrity of the family. I don't think that **Section 42** however is meant or can be read to say that one pits a parent's desire for a chance to effectively parent, against the circumstances of the child and the child's best chance for a stable and nurturing environment.

[53] Judge Levy clearly found that DB had refused to cooperate with the Agency. He said:

> You get frustrated. You get fed up. You don't want anything to do with the Agency or the horse it rode in on, at all. You get, you complain about the Agency not helping you but the first step in any process like that is to say, all right let's go find out what the problem is. Let's look at the parenting capacity. And you walk out. Okay, so we can't find out. We do have a sense that maybe it would be a good idea that you do something on ah, at least look into the question of substance abuse or alcohol or drugs. No sir, not gonna do it. So you tell me - no, I'm not asking you to respond - I'm asking rhetorically, what the heck is the Agency supposed to do? You don't want anything to do with them. You get frustrated and fed up with them. They try to set up some parenting capacity assessment to find out how best they can help and you're out of there like a shot because you're frustrated.
>
> . . .
>
> Man, you know, I'd be all over the Agency like scum on a pond to get access to your child and I find it hard to accept that you're down there beating on their doors looking for help and not hearing from them. Not at the same time you make it abundantly clear here that you really don't want anything from them, other than perhaps fuel money. . . . I just don't think that you recognize that you need help, that you would accept help if it was offered or that you could follow through . . .
> (Emphasis added)

[54] And further:

> I'm basically not accepting that the Agency ultimately owed you any more than it gave you and I'm not accepting that you would or are capable of accepting any more help than they offered in any event. **…**

[55] Indeed, services were provided including counselling and assessment through Dr. Hastey and Melissa Keddie and supervised access. Lisa McKee, Agency worker, referred ST and DB to the protection team for anger management intervention and relationship counselling. DB testified that he did not need anger management counselling, a drug assessment nor a parenting capacity assessment.

[56] DB's response to the services recommended by the Agency is best illustrated

by reference to certain parts of his testimony. Counsel for the Agency, on cross-examination of DB, referred to the recommendations in Dr. Hastey's report:

> Q. These are recommendations that [DB], the father of [MGT], undergo a substance abuse assessment through the Drug Dependency Commission?
>
> A. Yes.
>
> Q. Did you ever do that?
>
> A. I did not.
>
> Q. Did you ever contact anybody....
>
> A. No.
>
> Q. To set that up?
>
> A. To set it up? Ah, I guess when it comes right down to it I, no I did not.
>
> . . .
>
> Q. Okay, Ah, Number 6, that [DB] follow any and all recommendations made as a result of such assessment. Well we don't know what that is because you didn't go right?
>
> (no audible answer)
>
> Q. And that any access to the child [MGT], by [DB] be contingent upon his completions of the recommendations number 5 and 6. Well you had already quit going to see her right? You hadn't seen the child since June 9th?
>
> A. Well I was aware of these, these two here and that just.
>
> Q. You knew the Agency was gonna recommend that you go through this program or that you not see the child? It's right there in black and white.
>
> A. Before, aft, yeah.
>
> Q. Yeah.
>
> A. I guess I didn't go for the substance abuse thing, no.
>
> Q. No and you never went back to see your child after that date?
>
> A. Not after June 24th.
>
> . . .
>
> Q. An you certainly didn't think that you needed a parenting capacity assessment? You've already said that. You didn't even finish it?

A. I, no actually I didn't.

[57] And in response to questioning by NH:

Q. Can you think of anything [DB] that you do need?

A. My daughter yes.

Q. Yeah. That's it.

A. Yeah.

Q. You don't think there's anything else you need. You just need your daughter?

A. To start....

Q. And then everything's gonna be fine?

A. We'll take it from there yes.

Q. Yeah, exactly. That's exactly it, isn't it? You want to get your daughter and take it from there?

A. That's about all I can do I guess.

Q. Sure. You don't need anything before that? You think you're ready?

A. I think I am, yes.

[58] DB's failure to appreciate MGT's interests is perhaps no more starkly illustrated than by the fact that he unilaterally terminated access with her in June of 1999. Pursuant to the Family Court order of March 12, 1999, DB and ST were entitled to supervised access twice weekly. MH and NH offered additional access at their home. On cross-examination by NH he said:

Q. [DB], since June? Since June 9th you haven't seen the baby. You haven't made any effort to see the baby?

B. Regretfully I will say that yes.

Q. [DB]....

A. It's true.

Q. This isn't; you haven't done it?

A. That is true.

Q. Yeah.

A. I'm fed up.

[59] Notwithstanding this testimony, at a later point in his evidence DB testified that between June 24 and July 12, 1999 he had exercised secret access with MGT at ST's home, unknown to the Agency. During that time, Jacqueline Sanford, an access facilitator from the Agency was taking MGT to ST's apartment and leaving her in ST's care for three or four hours. In response to questioning by Agency counsel, DB said:

> A. When, when these visitations were supposed to take place yes. I, I was fed up with the Agency and I thought to myself, I mean, [ST] had everybody else believing and she certainly had me believin' that she was to get custody on the 16th and I thought why should I drag myself through a whole, a whole, a whole big uproar travelin' back and forth to Halifax to this, to two more occasions with Mr. (sic) Hasting (sic) and why should I ah do all this stuff and ah, when I could visit the baby anyways without the Agency knowing, without having to put up with them guys and havin' them standin' over top of me and ah, within three weeks to four weeks time [ST] was supposed to get, or four or five weeks time [ST] was supposed to get, or four or five weeks time [ST] was supposed to get the baby back anyways and that was going to be it.

[60] ST testified on rebuttal that DB did not exercise access at her apartment during this period.

DISPOSITION:

[61] The totality of the evidence supports Judge Levy's conclusion that the Agency had met its obligations under s.13(1) of the **Act.** Further, I would find that he

made no error justifying appellate intervention in concluding that a permanent care order without access was appropriate.

[62] As to the proposed fresh evidence, the fact that DB has now acquired a house, even if accepted as further evidence, would not have had any impact on the result at trial. The fact that DB did not have suitable accommodation was but one of a myriad of apparently insurmountable obstacles to his successful parenting of MGT.

[63] I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Chipman, J.A.

Cromwell, J.A.