C.A. No. 117501

NOVA SCOTIA COURT OF APPEAL

Cite as: Chidren's Aid Society of Halifax v. C.M., 1995 NSCA 178
Freeman, Pugsley and Bateman, JJ.A.

BETWEEN:

CHILDREN'S AID SOCIETY OF HALIFAX	)	
	)	Elizabeth A. Whelton
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Alexander MacIntosh
	)	for the respondent
	)	S.L.
	)	
	)	Christine Carter
	)	for C. M.
	)	
C. M., E.G.	)	
F. M., and S.L.	)	
	)	
Respondents	)	Appeal Heard:
	)	September 19 and
	)	October 3, 1995
	)	
	)	Judgment Delivered:
	)	October 10, 1995

Editorial Notice

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

THE COURT: Appeal allowed and order that the children be placed in the permanent care and custody of the Children's Aid Society per reasons for judgment of Bateman, J.A.; Freeman and Pugsley, JJ.A. concurring.

BATEMAN, J.A.:

This is an appeal by the Children's Aid Society from a decision of a Family Court judge dismissing an application for an order for permanent care of two children.

FACTS:

The respondent, C. M. is the mother of K. M., born August [...], 1991, and R. M., born July [...], 1993.

Commencing in early 1993, K., and, thereafter, both children, were in the temporary care of the Children's Aid Society of Halifax, under a number of care arrangements. Each child was subject to proceedings pursuant to the **Children and Family Services Act**, S.N.S. 1990, c. 5, which proceedings had been consolidated to facilitate the judge dealing with both children at the time of each hearing.

On March 29, 1995 the Children's Aid Society formally notified the court and the parties that the Society would be seeking permanent care and custody of the two children.

On May 16, 1995 the respondent, S.L., was granted leave to apply for the custody of the children, pursuant to **s. 18(2)** of the **Family Maintenance Act**, R.S.N.S. 1989, c. 160 and granted standing as a party to the **Children and Family Services Act** proceeding. The two proceedings were consolidated. S.L.

was an acquaintance and sometime friend of Ms. M. who had previously had care of the children for periods of time. Although initially opposing Ms. L.'s intervention, Ms. M. ultimately supported Ms. L.'s plan.

The matter was heard on May 23, 24, 25, 26, 29, 30 and 31, 1995.

On the 31st day of May, 1995 the judge rendered an oral decision dismissing the application of the Children's Aid Society and, under the **Family Maintenance Act**, granting custody of the children to S. L.. That same day, the Children's Aid Society discovered, in its records, a report from March 1995, that S. L.'s 15 year old son, I., who resided with her, was alleged to have sexually abused two children. The information was not cross referenced to other files in S. L.'s name and, thus, did not come to the attention of the Children's Aid worker during the trial.

As a result of the discovery of this information, on June 1, 1995 the Children's Aid Society made application to the Family Court for a stay in the execution of the oral decision rendered by the learned trial judge on the 31st day of May, 1995 and for leave of the court to adduce this further evidence. The application was opposed by the respondents.

On the 2nd day of June, 1995 the learned trial judge granted the stay. The judge determined that she lacked jurisdiction to hear the additional evidence, having rendered her oral reasons. The judge ordered that the appellant pay costs to the respondents, C. M. and S. L. in the amount of $1,000.00 each.

On June 19, 1995, upon the expiry of the Stay of Proceedings granted by the judge, the Children's Aid Society took the children, K. M. and R. M. into

care and custody pursuant to the provisions of s. 33 of the **Children's Services Act**. By Protection Application and Notice of Hearing dated the 22nd day of June, 1995 the children, K. M. and R. M. were alleged to be children in need of protective services pursuant to **ss. 22(2) (d), (g) & (k)**, of the **Act**. The named respondents were C. M. and S. L.. The interim hearing, which must be held within 30 days, commenced on the 26th day of June, 1995 and was completed on the 14th day of July, 1995. A written decision was rendered by the Honourable Judge Daley on the 17th day of July, 1995.

The children, K. M. and R. M. remain in the temporary care and custody of the appellant, the Children's Aid Society of Halifax.

Grounds of Appeal:

There are numerous grounds of appeal:

(1) Did the Learned Trial Judge err in law in determining that she did not have jurisdiction to hear further evidence following the decision rendered orally on the 31st day of May, 1995 prior to the issuance of an order in relation to the decision?

(2) As to whether or not this Honourable Court ought to exercise its discretion pursuant to **s. 49(5)** of the **Children and Family Services Act** and/or pursuant to **Civil Procedure Rule** 62.22 and receive further evidence?

(3) Did the Learned Trial Judge err in not providing reasons for her decision as required by **s. 41(5)** of the **Children and Family Services Act**?

(4) Did the Learned Trial Judge err in law in her

consideration of the best interests of the children as specified in **s. 3(2)** of the **Children and Family Services Act** in determining that it was in the best interests of the children that they be placed in the care and custody of S. L.?

(5) Did the Learned Trial Judge err in making findings of fact entirely in the absence of supporting evidence, and, in particular, in finding that it was in the best interests of the children, R. M. and K. M., that they be placed in the custody of the respondent, S. L., with ongoing access with the respondent, C. M.?

(6) Did the Learned Trial Judge err in law in dismissing the application of the applicant, the Children's Aid Society of Halifax for permanent care and custody of the children, K. M. and R. M. in favour of awarding custody of the children, K. M. and R. M. to the respondent, S. L., when no application of the respondent, S. L. for custody pursuant to the provisions of the **Family Maintenance Act** and **Family Court Rules** was properly before her?

(7) Did the Learned Trial Judge err in law in awarding costs against the Appellant and in favour of the respondents in relation to the application of the appellant to have further evidence heard following the decision rendered orally on the 2nd day of June, 1995?

Fresh Evidence:

We have before us an application to admit fresh evidence on this appeal. In addition, the appellant submits that the learned trial judge erred in finding that she was without jurisdiction to hear the additional evidence, after rendering her decision, but before the Order was taken out.

The respondents, on the other hand, submit that the learned trial judge was without jurisdiction to hear further evidence by virtue of s.45(1) of the

Children and Family Services Act, and, having rendered her decision.

The relevant section of the **Act** reads:

> 45(1) Where the court has made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed
>
> > (a) where the child was under six years of age at the time of the application commencing the proceedings, twelve months;

The judge having rendered her decision on the last day of the 12 month period, the respondents submit that she had lost jurisdiction to take further steps in the matter. For the purposes of this appeal it is unnecessary to decide that issue.

The power of this court on hearing an appeal of this nature is set out in the **Children and Family Services Act**, s. 49, which reads, in part:

> (1) An order of the court pursuant to any of Sections 32 to 48 may be appealed by a party to the Appeal Division of the Supreme Court by filing a notice of appeal with the Registrar of the Appeal Division within thirty days of the order.
>
> (4) Where a notice of appeal is filed pursuant to this Section, the Minister is responsible for the timely preparation of the transcript and the appeal shall be heard by the Appeal Division of the Supreme Court within ninety days of the filing of the notice of appeal.
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> (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.
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> (6) The Appeal Division of the Supreme Court shall

> (a) confirm the order appealed;
> (b) rescind or vary the order; or
> (c) make any order the court could have made.

Section 49(5) is a "further evidence" provision, contemplating the reception, by this court, of evidence of events occurring after the proceeding in the trial court but before the hearing of the appeal.

This court derives 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.

In **Catholic Children's Aid Society of Metropolitan Toronto v. C.(M.)**, (1994) 2 R.F.L. (2d) 313 (S.C.C.), the court considered the proper approach on an application to admit fresh evidence in an appeal from a child welfare matter. Writing for the court, L'Heureux-Dube, J. said at p. 333:

> The respondent society, on the other hand, argues that the proper approach is that advanced in **Re Genereux and Catholic Children's Aid Society of Metropolitan Toronto (1985),** 53 O.R. (2d) 163 (C.A.), pursuant to s. 43(8) of the **Child Welfare Act**, R.S.O. 1980, c. 66:
>
> 43. . . .
> (8) On the hearing of the appeal and with leave of the county or district court hearing the appeal,

> further evidence relating to matters both preceding and subsequent to the making of the decision being appealed, may be received by affidavit, oral examination or as may be directed by the county or district court.

In that case, Cory J.A. (then of the Court of Appeal), after carefully examining the admissibility of new evidence on appeal when dealing with child welfare proceedings, asserted at pp. 164-65:

> It can be seen that the judge hearing the appeal is granted a very wide discretion with no restrictions imposed. This is remedial legislation dealing with the welfare of children. It should be broadly interpreted. Undue restrictions should not be placed upon it. Specifically, narrow restrictions should not be read into the section when they do not appear in the legislation. *The judge on appeal, bearing in mind that he is dealing with the welfare of children, may determine that he will exercise his discretion and will hear further evidence so long as it is relevant to a consideration of the best interests of the child.* [Emphasis added]

Similar views were expressed in **Children's Aid Society of Renfrew County v. L.P.W.**, (1989), 32 O.A.C. 394 (C.A.), where the Court of Appeal held that the appellate judge could consider fresh evidence on appeal, in the context of an appellate function, but not at a hearing de novo. ...

.....Although I doubt that **Genereux**, supra, intended to depart significantly from the test of **Palmer** and **Stolar**, supra, its approach is to be commended. In my view, **Genereux**, supra, is not only consistent with the jurisprudence of this Court but is better suited to the child-centred focus of the **CFSA**, as it recognizes the importance of having accurate and up-to-date information on children whose fate often hangs on the determination by judges of their best interests. In light of this Court's broad discretion to admit fresh evidence and the wording and the spirit of the statute, **Genereux**,

> supra, is very attuned to the philosophy and objectives of the **Act**. *Although it might be more in line with usual procedures for a court of appeal to base its conclusions on the evidence before the trial judge, the particular nature of appeals in child welfare legislation requires a sufficiently flexible rule, where an accurate assessment of the present situation of the parties and the children, in particular, is of crucial importance. If **Genereux**, supra, has enlarged the scope of the admission of fresh evidence on appeal, it has done so, in the present case at least, with regard to the final arm of the **Stolar** test, that is, whether the fresh evidence may affect the result of the appeal when considered with the other evidence. If that is so, and the fact that the admission of up-to-date evidence is essential in cases such as the one at hand, **Genereux**, supra, should be applied in cases determining the welfare of children.*(emphasis added by this Court)

This approach has been approved and adopted by this Court in **Shelly Guay v. Children's Aid Society of Cape Breton**, C.A 112382, May 23, 1995, as yet unreported.

The Supreme Court, in **C.(M.)** endorsed **Genereux**, notwithstanding that the section of the statute addressing the fresh evidence in **Genereux**, s. 43(8), provided for the admission of fresh evidence "relating to matters both preceding and subsequent to the making of the decision being appealed". Section 69(6) of the successor statute, under consideration in **C.(M.)**, is similar to our s. 49(5) and contemplates the court receiving "further evidence relating to events after the appealed decision".

In **Children's Aid Society of Peel v. W. (M.J.)**, (1995), 23 O.R. (3d) 174 (C.A.) the court addressed the difference in the two statutory provisions. At p.

192:

> Some statutory provisions, such as s. 69(6) of the **C.F.S.A.**, provide for the admission of further evidence. The provisions of s. 69(6) of the **C.F.S.A**. apply only on an appeal from the trial judgment of a provincial court judge to the Ontario Court (General Division). Section 69(6) of the **C.F.S.A.**, unlike s. 43(8) of its predecessor statute, the **Child Welfare Act**, R.S.O. 1980, c. 66, limits further evidence to events "after the appealed decision". One might conclude that the legislature intended to limit somewhat the basis upon which further evidence would be admitted in **C.F.S.A.** proceedings given the absence of any reference to events before the appealed decision consistent with the further evidence provisions of the **Child Welfare Act**.
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> The issue of the admission of fresh evidence in child welfare cases was addressed in **M.(C)**, supra. In that case L'Heureux-Dubé J. approved this court's decision in **Genereux v. Catholic Children's Aid Society of Metropolitan Toronto** (1985), 53 O.R. (2d) 163, 24 D.L.R. (4th) 264. **Genereux** was decided under the **Child Welfare Act**, not long before that **Act** was replaced by the **C.F.S.A**. In **Genereux**, Cory J.A. (as he then was) referred to s. 43(8) of the **Child Welfare Act** which permitted the introduction of "further evidence relating to matters both preceding and subsequent to the making of the decision being appealed". He concluded that the appeal court judge was granted a "wide discretion", in deciding whether or not to admit further evidence. ...
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> *...In **CFSA** cases, more flexible standards for the admission of further evidence must be accepted than are applied in other civil and criminal cases. In family law cases, especially those involving children, it is not necessary to show that the fresh evidence would be practically conclusive.*(emphasis added)
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> The combination of s. 49(5) of the **Children and Family Services Act** and **Civil Procedure Rule** 62.22, when read in conjunction with the case law, gives this court a wide latitude to receive additional evidence in child welfare

matters.

Any fresh or further evidence admitted must, of course, be considered by this Court in the context of exercising an appellate function and not as a hearing de novo. (see **County Children's Aid Society v. L.P.W.**, **supra**.)

The overriding consideration in the **Children and Family Services Act** is the best interests of the child. Section 45(1)(a) of the **Act** requires that the total time period of all disposition orders, for children under six years of age, not exceed one year. The time period for older children is 18 months. Section 49(4) mandates that the appeal be heard within 90 days of the filing of the Notice of Appeal. 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.

In this case, in an effort to provide the mother of these children with every opportunity to develop her parenting skills, the Society extended the maximum times mandated by the **Act** through a series of consent dismissals and re-apprehensions. Sadly, notwithstanding the herculean efforts of the Society to provided her with support, Ms M. was unable to reach a level of adequate

parenting, nor was it foreseeable that she would do so in future. In the result, K., now four years old and the older of these children, has been under the wing of the Courts and the Society since January 29, 1993, some two and one half times longer than anticipated by the **Act**. Protection matters regarding R. M. were commenced December 8, 1993. Born July [...], 1993, R., now 2 1/2 years old, has been subject to protection proceedings for two years.

The learned trial judge was faced with a difficult determination, as evidenced by the following excerpts from her oral decision on May 31, 1995:

> I am satisfied that Ms. M., the children's mother, is unable to parent these two children and I think I can even go so far as to say on the basis of the extensive (sic) before me I find it is highly unlikely that she would ever be in a position to adequately care for and provide and meet all the physical, emotional and social, and psychological needs of her two girls. That, despite extraordinary efforts taken by the Agency to keep this family together or to work towards the reintegration of the family and the failure on the part of Ms. M. to follow through made those efforts come to naught. ...
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> ... Ms. L. is in her mid-thirties. She is a single mother and she is black. She has one son who has presented a serious challenge to her, that is I.. He is currently out of school and he has presented a parenting challenge to her for some period of time. Her other son, G., who is 11 and in grade 4, does not present any kind of challenge to her, either at home nor is there any indication that there are any difficulties with G. in school. There have been difficulties with him academically in terms of some learning, specifically some reading issues and other academic issues. There is evidence, as well, that he has had some difficulty with his hearing and that steps have been taken to remedy that and that it appears that there will be need for further work. ...
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> ... Ms. L. has limited education. She lives in the Northend of Halifax in a community that is essentially comprised of people

of mixed races. It is a black and white community. Ms. L., herself, was in foster care as a child. In her...not only her childhood but in her adult life, the child welfare agencies have been in and out of her family. More recently in relation to I., who recently has been described as "challenging", so much so that he is now expelled from school and as I indicated that was a very extraordinary measure for them to take with respect to someone in grade 7, but in any event that is the status of his current situation. ...

... It is interesting to note that I. in spite of the fact that he has some serious difficulties, that he has not been in any conflict with the law and in spite not only of his not being in school but also the temptations of the neighbourhood that were described by Ms. L.. There is no question that Ms. L. has experienced a good deal of frustration in raising I.. She has, on occasion, asked the Children's Aid Society to take him into care. She has expressed concerns about taking her frustration out on her son, G.. She even went so far as to indicate at one point that she had threatened to put his hand on the stove. ...

... There are some concerns with both plans, I have to say, that have been put before the court. There are certainly concerns with the fact that S. L. has had ongoing intervention with child welfare authorities throughout her entire life, but yet at the same time, all of the evidence is that when the children are with her, that is R. and K. were with her, they did extremely well and that it really was not until the accumulation of the complaints of Ms. M. together with the witnessing of Ms. L. going down the street when R. was in the house that led them to remove them from her care. Certainly the court, in looking at and balancing the two plans that are before the court, has to consider what is quite damning evidence in large respect to difficulties that Ms. L., herself, experienced in parenting and, as well, serious concerns about whether or not C. M. could possibly live up to any kind of custodial arrangement with Ms. L. and perhaps of the two of them I would have to say that the concerns are far greater with respect to Ms. M.'s ability to become involved in or uninvolved in her children's lives in so far as Ms. L. is concerned, that those concerns are far greater in the mind of the court than are any concerns with respect to Ms. L.. ...

> ... When one looks at the two plans, to sum it up in a nutshell, the plan that Ms. L. presents, the court is assured that the children will be placed in a black home, that there will be immediate placement, that the girls will be kept together and there will be minimal disruption. S. L. is familiar to these children. She is a black mother. She will take both the children. I do not think there is any question, certainly in my mind, that any adjustment that these girls will have to undergo would be exacerbated if they had to be separated. She can take them immediately and an immediate placement is something that has been focused on or emphasized by those who have been involved in this long term work with C., and there is the opportunity for children to continue in much the same community and programs that they are accustomed to and there is the opportunity for some contact with their mother. ...
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> ... There are concerns about the long term benefits or detriments with both of these plans, Again, it comes back to not having a crystal ball. There are no guarantees. The concern I have is that what we do not know is, in the court's mind, as worrisome and problematic as what we do know about Ms. L. and the plan that she is putting forward and I am not convinced on a balance of probabilities that the Agency's plan provides any greater assurances for these children than that of Ms. L.. Certainly, the placement with a stranger may not work and would lead to yet another placement. It may be that placement with Ms. L. may not work but it is, in my view, one less move in these children's lives because it is basically a move to a situation with which they have some familiarity. There are no guarantees with either of these and the court has concern with both of them, but I would certainly have to say that on balance I am not satisfied that the Agency's plan provides any greater assurances that the children' best interest are going to be met by that plan than that put forward by the mother...that put forward by Ms. L..

It would be fair to characterize this as a very close case. Without Ms. L.'s intervention, a permanent care order would have issued. There were obvious difficulties with the plan of Ms. L., as identified by the learned trial judge.

I. was a concern.

As is the usual procedure when considering an application to adduce fresh evidence, we have received the proposed evidence in Affidavit form, subject to determining whether to admit it. (see **Shelly Guay v. Children's Aid Society of Cape Breton**, **supra.**)

The allegation of abuse was made by B. C., a nine year old, who's home in Halifax I. sometimes visits. B.C.'s parents are separated and involved in a bitter custody dispute. B. has a four year old sister Br.. On March 13, 1995, the Children's Aid Society of Halifax was contacted by a social worker in New Brunswick, where B.'s father lives, advising that the father had contacted Social Services in New Brunswick and reported that the child Br. had disclosed that she had been sexually abused by her 15 year old babysitter. B. later alleged, on an interview with his school guidance counsellor, arising from the above complaint, that I. L. had "had sex" with Br.. Workers from the Children's Aid Society interviewed B. on March 23, 1995. He said that I. had sexually abused Br. on an occasion when visiting B.'s mother's home in Halifax. B. said that, on that same occasion, I. had made him sexually abuse Br., as well. I. denies that this occurred. Br.has made no further disclosure. She has been examined and shows no physical symptoms of sexual abuse. The Halifax Police have concluded an investigation of the allegation. No charges have been laid.

The respondents oppose the reception by this court of the new

evidence. They submit that it does not meet the test for reception in that, through due diligence, it could have been discovered by the appellant; that it is not conclusive; and that it is not in compliance with the "further evidence" provision of s. 43(5) of the **Children and Family Services Act**, in that the alleged event occurred prior to the learned trial judge rendering her decision. In the alternative, the respondents submit that, as there is an ongoing proceeding in the Family Court before Judge Daley on the issue of the allegations of sexual abuse, the receipt of the evidence by this court would result in a duplication of proceedings.

On the latter point, I disagree. The proceeding before Judge Daley is an application by the Children's Aid Society for permanent care of the children, principally, as between the Society and S. L.. The matter under appeal is a proceeding between the Children's Aid Society and C. M., with S. L. joined as a third party. Judge Daley must approach the matter on the basis that the Order of the learned trial judge granting custody to S. L. was the correct order at the time made. On the other hand, if fresh evidence is admitted, this court must consider whether, had the learned trial judge had before her this additional evidence, her decision might have been different. To use the words of L'Heureux-Dube, J. from **C.(M.)**, "... whether the fresh evidence may affect the result of the appeal when considered with the other evidence."

While it can be said that the Children's Aid Society should have and

could have discovered this evidence during the proceeding, it would not be in the best interests of the children to ignore such important information on a narrow interpretation of the law. There is no suggestion that the Society intentionally withheld the evidence. Indeed, the Society brought it to the attention of the court at the earliest possible opportunity after discovery. Nor is it reasonable to hold that because the alleged event - the sexual abuse - occurred before, not after, the decision of the learned trial judge, it should not be received. That would lead the absurd result that relevant undiscovered events, occurring before the decision, could not be received into evidence by any court.

Volumes of proposed new evidence have been filed with the court in the form of affidavits. Not surprisingly, there is conflict in the evidence proposed by the respondents and that offered by the appellants. Simply put, B. has made the allegation, I. has denied it, and various experts believe or don't believe the allegation. The respondents submit that it would be wrong to accept the new evidence in the form of Affidavits without the benefit of cross-examination. This could only be done, they submit, by this court receiving **vive voce** evidence or remitting the matter to the trial judge, as credibility is central.

Notwithstanding the disparities, there is certain uncontradicted evidence: B. has made this allegation. I. has denied it. The police have investigated. There is no suggestion that the Children's Aid Society played a role in B.'s initial disclosure. Cross-examination would not disturb this evidence. Judge Daley was satisfied, after a three day contested hearing and in

accordance with section 22(2)(d) of the **Act**, that there was a real chance of danger to the two children if they were in S. L.'s care. He could not discount the allegation.

I am satisfied that, in keeping with the test laid down in **Catholic Children's Aid Society v. C.(M.)**, certain additional evidence should be received by this court, but only the uncontradicted evidence extracted from the voluminous material on file - specifically, the fact that there has been an allegation of sexual abuse; the general nature of the alleged abuse as contained in B.'s interview; the fact that I. has denied it; the fact that the police have investigated the allegation; and the fact that no charges have been laid, as well as the contents of Judge Daley's interim decision. This evidence is clearly relevant to the best interests of these children and could have effected the result at trial. We do not admit the remaining evidence filed. The evidence that we do admit is a combination of the evidence which could have been before the learned trial judge and evidence of what has occurred since the discovery of that evidence.

The respondents submit that, in the event this court receives new evidence, the matter should be sent back to the learned trial judge. Such a disposition would once again delay, for an indeterminate time, the placement of these children. As a result of this appeal, they have now been in foster care a further four months. The issue before the trial judge, on a new trial, would be not to conclusively determine whether these allegations are true, but to decide, in the

context of this new evidence, whether the children should be in S. L.'s custody. Is it reasonable to expect that the learned trial judge, if apprised of these allegations of sexual abuse, would have risked placing the children in S. L.'s custody?

The respondents submit that the learned trial judge's decision should not be disturbed in the face of a mere allegation of sexual abuse. They say that it is properly for the trial judge to assess the credibility or believability of this allegation, a task not well suited to a panel of judges. I do not agree, however, that this is a mere allegation of sexual abuse. Nor do I agree that it is resolvable with a determination of the credibility of the complainant. While the trial judge might well engage in a further proceeding as to the evidence surrounding the allegation - it is unlikely that the allegation will be conclusively disproved. And if not disproved, would a judge take the unnecessary chance of placing these children in a home where there is even a suspicion of sexual abuse? It must be remembered that the decision is not whether to remove the children from a parent, but whether the home of this third party, S. L., offers a better alternative than the plan of the Children's Aid Society.

That S. L. has presented as a possible custodian for these children is to her credit. She has had contact with these children for periods of time. The contact has not, however, been continuous. Her relationship with Ms. M. has been troubled. When K. was about 7 months old, she and her mother went to live with Ms. L. for two or three months. They left at Ms. L.'s request. In January

of 1993, Ms. M. signed a voluntary care agreement. Her chosen caretaker was not Ms. L. but another person. Ms. L. looked after K. for a short period of time around R.'s birth. There was some intervening contact. In September of 1993 both children spent a night with Ms. L. when there was a disturbance at Ms. M.'s apartment. From December 3, 1993 until March 16, 1994 the children resided with Ms. L.. Over this time period Ms. M. voiced objections to the Society about the care the children were receiving from Ms. L.. Ultimately, the Society removed the children from Ms. L.'s care due to concerns about the supervision she was providing. For the next year Ms. L. had occasional casual contact with the children when they happened to be in the neighbourhood. In March or April of 1995, through a chance encounter with Ms. M., Ms. L. learned that the Society was looking for a permanent care order in relation to the M. children. At that time she put forward her plan. The children have been in foster care since March of 1994. They have, since April of 1995, had visits from Ms. L..

Both Ms. L. and Ms. M. disbelieve the allegation of sexual abuse. Ms. M. continues to support Ms. L.'s plan. Indeed, Ms. L. was aware of the allegation prior to testifying at trial and did not raise it. In the result, should the children be placed in Ms. L.'s home, there can be no comfort that the children will receive the supervision necessary to remove any concern about possible abuse. Notwithstanding her prior knowledge of the allegations, the plan which Ms. L. put forward at trial did not contain any special arrangements regarding I.'s contact with these children, nor, realistically, could it. In my view it would be impossible

to structure an order under the **Family Services Act** which permits the children to remain in Ms. L.'s care, but protects them from possible abuse. Nor, even should such an order be crafted, would it be possible to enforce such limits. As commented by the trial judge, there are no guarantees. However, known or suspected risks need not be taken.

I am mindful, as well, that an order placing these children in the permanent care of the Society, may, sooner or later, result in a termination of all contact between Ms. M. and the children. Should the children be placed for adoption, there is no assurance that the adoptive family will consent to continued contact between the children and Ms. M.. Counsel for the respondents submit that this loss of contact between mother and children and between the children and Ms. L. is a significant consideration for the court. While I agree that it is an issue to be considered, it is appropriate to ask, how important is this loss of contact when weighed against the overall needs of these children?

Martin P. Whitzman testified before the trial court as an expert in the area of individual, marriage and family therapy. He had been commissioned by the court in an earlier proceeding to do a parenting assessment. He had followed the progress of Ms. M. and the children from April 8, 1993, periodically filing reports. His last report, filed with the court is dated May 11, 1995. He had been asked to comment upon whether it would be in the best interests of the children to maintain contact with their mother if made permanent wards. He said:

K. and R. M. certainly have a relationship with their mother

> and would benefit by having contact with her. Given their age, it is also very important that they have stability and consistency in their lives. Adoption would enable these children to have this stability and consistency they require. A situation where they would be adopted yet still maintain contact with their mother would be ideal as long as this contact did not negatively affect the children or interfere with the adoptive home. It is my opinion, however, that the permanency of the adoptive home should take precedence over the issue of access to their mother.

Mr. Whitzman recommended that the access between Ms. M. and the children should be restricted. In his testimony at trial, he expressed some concern, however, as to whether Ms. M. would be able to operate appropriately in a situation of limited access. In other words, whether she would accept limits being placed upon her access to the children.

The learned trial judge, in her decision granting custody to Ms. L., strictly defined and limited Ms. M.'s access with the children and made such access contingent upon Ms. M. and Ms. L. attending counselling. Subject to review, the learned trial judge limited Ms. M.'s access to the children to a period of two hours on their birthdays, and supervised, with no intervening contact. It is fair to conclude, therefore, that the matter of Ms. M.'s access to the children, was considered, by the learned trial judge, to be of questionable benefit to the children.

The learned trial judge, in making the disposition that she did, was obviously concerned that there be immediate placement of the children together and in a black home. She was not satisfied that the agency could provide an

adoptive placement within a reasonable time frame. She said in this regard:

> I guess if one were to ask me what the bottom line is in making this determination, I would have to say that the assurance of the immediate placement in a black home with the girls being kept together with minimal disruption, and what I really felt was the unconditional love that Ms. L. has demonstrated throughout the history of this matter and I am assured on the basis of the evidence, as best as anybody can be assured, that she will put the best interest of these two children above her own interest or those of Ms. M. and will make decisions in light of that and for those reasons I feel that has tipped the balance in favour of Ms. L.'s plan.

Of course, due to these further proceedings, the children have remained in foster care since the decision of the learned trial judge. The immediate placement envisaged by the judge has not occurred. The unresolved allegations against I. L., which were known to Ms. L. at the time of the hearing but not disclosed, have placed her in an untenable situation. Notwithstanding her disbelief, she did not put the best interests of the M. children first in failing to bring these allegations to light before the learned trial judge, to facilitate full judicial consideration of all relevant details.

Under s. 49(6) of the **Children and Family Services Act**, this court has the authority to make whatever order the learned trial judge could have made. I am satisfied that the fresh evidence, in the context of all of the evidence, not only might have affected the result at trial but is decisive. Had the learned trial judge had before her the "fresh evidence", limited to the unresolved allegation of sexual abuse, I am satisfied that this alone would have been decisive in tipping the scale

in favour of the plan of the Society. The "further evidence" before us is to the effect that Judge Daley was persuaded, after a three day contested hearing, that "there was a real chance of danger to the two children" apparent on the evidence. In so noting, I am mindful that the respondents did not elect to call witnesses at the proceeding before Daley, J. They did, however, vigorously cross-examine the witnesses proffered by the Society. I have considered, as well, that the test applied by Judge Daley, in granting the interim order, is not the same test that we must apply on this appeal. On the other hand, Judge Daley did not have before him, the additional body of evidence about the children and Ms. L.'s home that was heard by the learned trial judge and is now before us.

The additional evidence satisfies me that, in these unique circumstances, this court is in a position to make the appropriate disposition. It is not necessary to return the matter to the trial judge.

In **C.(M.)**, supra, L'Heureux-Dube, J. said at p. 348:

> While cases of this nature necessarily imply the application of statutes and legal norms, they inescapably touch on human emotions and are inextricably linked when the determination of the fate of young children and the natural desire of parents to bring up their children collide. Every judge in this country would probably prefer not to have to make these difficult decisions. But, in the last resort, courts have to decide and, in order to decide, the law as written by legislatures must be their guide.
>
> The law that courts must apply in the present case is the Ontario CFSA which, properly interpreted, mandates a careful balancing of its paramount objective of the best interests of the child with the value of maintaining the family unit and minimizing state intervention...

> ...As I stated earlier, *time is of the essence in proceedings concerning the welfare of children*. Every effort should be made to accelerate hearings of these matters so as to minimize any prejudice to all parties and to avoid that a certain state of affairs occurs.
>
> Obviously, there are no easy solutions to these painful situations. However, with the added insight arising from the fresh evidence before us and in application of the CFSA, the appellant has failed to demonstrate that it is in the best interests of S.M. that she be returned to C.M.'s care. (emphasis added)

Taking into account the considerations set out in ss. 3(2) and 42 of the **Act**, I would find that the plan of the Children's Aid Society, is the only alternative consistent with the best interests of these children. I would admit the fresh evidence; allow the appeal; and order that the children be placed in the permanent care and custody of the Children's Aid Society. There would be no order for access by Ms. M. or Ms. L.. The matter of access would be left to the discretion of the Society. In addition, I would set aside the order for costs against the Society.

J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.