Date: 19980514 Docket: C.A. 144059

NOVA SCOTIA COURT OF APPEAL
Cite as: L.M. v. Children's Aid Society of Cape Breton,
1998 NSCA 120
Roscoe, Bateman and Cromwell, JJ.A.

BETWEEN:

L.M. and B.M.	)	Appellants in person
	)	
Appellants	)	
	)	
- and -	)	
	)	Robert M. Crosby, Q.C.
	)	for the Respondent
THE CHILDREN'S AID SOCIETY OF CAPE BRETON	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	April 17, 1998
	)	
	)	
	)	Judgment Delivered:
	)	May 14, 1998
	)	
	)	

Editorial Notice

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

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Bateman, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction

At the heart of this appeal is a three and a half year old girl named E. She has been in foster care since November of 1996--almost half her life. In October of 1997, the Family Court ordered that she be placed in the permanent care of the Children's Aid Society of Cape Breton without access. On this appeal, the issue is whether that order was properly made in E.'s best interests.

II. Facts and Procedural History:

The identity of E.'s biological father is unknown. Her mother, Mrs. M., has a history of abusive relationships with men and longstanding problems with alcohol and drugs. In August and September of 1995, when E. was not yet a year old, Mrs. M. was involved in prostitution.

In December of that year, Mrs. M. married Mr. M. He has a criminal record including, by his admission, three convictions for impaired driving, convictions for break and enter, fraudulently obtaining food and lodging, escaping custody and a conviction in the United States for grand theft auto.

Alcohol abuse caused conflict between Mr. and Mrs. M. As Mr. M. put it, they fought about Mrs. M.'s drinking and they fought when they both were drinking. The evidence in the record paints a disturbing picture of the environment in which E. lived when she was with Mr. and Mrs. M. There were what Mrs. M. referred to in her

evidence as “yelling matches” and “verbal violence” between her and her husband. Mrs. M. also testified that, while drunk, she removed E. from the home over Mr. M.’s objections and drove in that condition with the child in the car. The evidence revealed that Mrs. M. would sometimes be intoxicated while she was alone with, and supposed to be looking after, E.

After about three months of marriage, Mrs. M. alleged that she and E. were being physically abused by Mr. M. She made statements to the police. She claimed that Mr. M. had assaulted her on three occasions in February (1996). She also told the police that Mr. M. did cruel things to E. such as putting his fingers up her nose and covering her mouth so she could not breath. Mrs. M. later recanted these allegations, saying they were all lies.

Children’s Aid became involved. The ensuing proceedings in the Family Court have a complicated history. The complications arise from two main sources. First, Mrs. M’s position changed during the course of the proceedings. At the outset, the main problem was said to be physical abuse; later, she reported problems arising from sexual abuse and substance abuse. The Agency and the court were misled by Mrs. M. and ultimately did not know what to believe. Second, Mr. and Mrs. M. left Nova Scotia and went to the United States without telling the Agency or the Court, and this made the job of both unusually difficult.

The court proceedings began with an application, dated March 5, 1996, by

the Agency, for a finding that E. was in need of protective services under s. 22 of the **Children and Family Services Act**, S.N.S. 1990, c. 7, as amended, and for an interim supervision order under s. 39. The notice refers specifically to s. 22(2)(b) (which deals with substantial risk of physical harm to the child), but it also sets out s-ss. 22(2)(f) and (g) which refer to emotional harm and risk of emotional harm. The matter was before the Court on March 8 (although the running file, which has been placed before us, shows the date as March 3.) Mrs. M. was represented by counsel, and an order under ss. 39(4)(b) and (c) was made that E. would remain in the care and custody of Mrs. M. subject to the supervision of the Agency and on various terms and conditions set out in the order. To summarize, the order provided that Mrs. M. and E. were to have no contact with Mr. M. without the knowledge and consent of the Agency and that Mrs. M. was to co-operate with the Agency and other authorities so that Mr. M. would have no contact with them. This intervention by the Agency and the Court was based on Mrs. M.'s claims that Mr. M. had physically abused E. and herself.

On the appeal, Mrs. M. (who represented herself) repeatedly claimed that this order was made without her knowledge or agreement. This is not the case. At the hearing in October, 1997, Mrs. M. testified in response to questions from her lawyer as follows:

> Q. No. Now, do you remember coming to Court here and Judge MacLellan making an Order with conditions including no contact with Mr. [M.]? Do you remember that?
>
> A. Yes.
>
> Q. Yes? Do you remember agreeing to that?

A. Yes.

. . . . .

Q. Did you know you were not supposed to be in contact with Bernie [i.e. Mr. M.] after you came to Court?

A. I knew I was not allowed to be around him.

Q. Right.

A. Yeah.

When this testimony was drawn to Mrs. M.'s attention during the appeal hearing, she claimed that the transcript was inaccurate. The transcript filed is certified as accurate by an official Court Reporter and no evidence has been placed before us suggesting that this passage is incorrectly transcribed. This is so even though the appellants asked for and were granted the opportunity to file additional submissions after the appeal hearing. The alleged inaccuracy in this part of the transcript on this important point is not addressed in those submissions. I conclude that Mrs. M. knew about and agreed with the order that was made on March 8. In fact, on that same day, she gave a signed statement to the police claiming that Mr. M. had punched her and threatened her with a baseball bat and that she wanted Mr. M. in jail because she was afraid of him.

Mrs. M. testified that after the March 8 Court appearance, she tried to tell the Agency that she had lied about the alleged abuse but that she was ignored. This testimony, however, does not reflect what really went on, even if only Mrs. M.'s own

evidence is considered.

She testified in cross-examination, for example, that although she recanted her allegations of physical abuse on March 8th, 1996, she told the police a week later that she had been assaulted by Mr. M. again. Mrs. M. filed an affidavit sworn on January 28, 1997, in which she stated on oath that "... she realized that her conduct in taking my child to Florida and reuniting with my husband was wrong and did expose E. to possible harm...". Mrs. M. filed another affidavit, sworn on September 17, 1997, which stated, on oath, that she did not tell the truth about the abuse until July 15, 1997. The evidence also reveals that Mrs. M. cut off telephone contact with Mr. M. in January or February of 1997 while she was in Toronto and he was in jail in Florida by advising the warden of the jail that Mr. M. was threatening her. She also admitted at the hearing that she must have told the Agency at the end of 1996 that she was afraid to return to Nova Scotia to care for E. because Mr. M. would find her.

All of this behaviour is not consistent with Mrs. M.'s assertion that, as early as March of 1996, she attempted to recant but was ignored. Quite the opposite. It shows that she persisted in the allegations until the summer of 1997. As Mrs. M. herself said in her September, 1997 affidavit, it was not until July of that year that she told the Agency what she now claims is the truth.

In late April or early May of 1996, Mr. and Mrs. M., along with E., left Nova Scotia. Mrs. M. arranged to leave her other daughter, J., who had been living with Mr.

M., E. and herself, with Mr. F. , J.'s father. Mrs. M. had previously accused Mr. F. of being an abusive husband in statements to Children's Aid. Mrs. M. now says that these allegations, too, were lies. The effect of this move was to renew contact with Mr. M. which was prohibited by the March 8, 1996, court order and take the child out of the supervision of the Agency stipulated in the order. It also had the effect of severing E.'s contact with her sibling, J., and her extended family. This included Mrs. M.'s sister, S. who, according to Mrs. M., had helped care for the child and lived with her for a time and Mrs M.'s mother, E.'s grandmother.

The matter was next in Court on April 29 for pre-trial. This was adjourned because Mrs. M.'s lawyer had not been able to contact her. The case returned to Court on May 7. Mrs. M.'s lawyer was present but advised the Court that she had not been able to contact Mrs. M. The matter was adjourned to May 22. On May 22, Mrs. M.'s lawyer was again present but without instructions. The evidence filed by the Agency indicated that while Mrs. M. had followed through with some referrals and group meetings, contact with her was lost after the beginning of May and that as of May 22 her whereabouts were unknown. The Court made a finding that E. was in need of protective services pursuant to s-ss. 22(2)(b) and (g), set a date for a disposition hearing and continued in force the same conditions as found in the March 8 order.

The finding that E. was in need of protective services was not subsequently challenged or appealed. It is not the subject of this appeal. The order under appeal is the permanent care order made in October of 1997.

After leaving Nova Scotia in late April or early May (1996), Mr. and Mrs. M. and E. went to the United States. They resided for a time in Boston. There, according to Mrs. M., her drinking increased. They left Boston and went to Florida, arriving around July. Drinking continued to be an issue. There was, in Mrs. M.'s words, "a lot of verbal violence" between husband and wife. There were other problems. The trailer in which they were living was robbed. Both Mr. and Mrs. M. were arrested and jailed. They lived in two different shelters. According to Mrs. M., it was a terrible experience. E. was part of it.

A further pre-trial was held on July 22 and the matter returned to court on August 19. On that date, the Agency filed evidence that Mrs. M. and E. were in Florida. From the affidavit filed by the Agency at that time, it appears that E. had been located by the Agency between July 24 and 30. The Court adjourned the matter without date (*sine die*). It was also ordered that the Agency:

> ... immediately notify the child protection authorities in the jurisdiction of the State of Florida where the Respondents are now residing and provide them with sufficient details of the identity and whereabouts of the Respondents, as well as the relevant documentation filed with the Court, to enable them to contact the Respondents and take all such necessary action to protect the health and safety of the said child.

The Florida authorities, apparently acting on the basis of this August 19 order, as well as the fact that Mrs. M. had been arrested and jailed and that action was necessary to protect the child, apprehended E. on October 30, 1996, at the

Metropolitan Ministries Shelter in Tampa, Florida. The next day, the Circuit Court of the Thirteenth Circuit of the State of Florida, Juvenile Division, made an order for shelter care. At the time of this apprehension, Mrs. M. is noted as saying that she wanted E. to go to her brother in Sydney, Nova Scotia. E. was noted to appear to be a healthy, well nourished child, showing no fear of Mr. M.

The notes from Florida indicate that there was some uncertainty as regards the situation between the Florida and Nova Scotia authorities. The Florida authorities initially characterized the Family Court order of August 19 as a "pick up" order, which I understand to mean an order authorizing the apprehension of the child. After further discussion between the two jurisdictions, it became clear that was not the nature of the order.

An Agency worker, Lynn Billard, traveled to Florida on November 5. E. was turned over to her by the Florida authorities. According to Ms. Billard's affidavit sworn November 13, E. was taken into the care of the Agency and Notices of Taking were left with the Florida authorities for service on Mr. and Mrs. M. Ms. Billard brought E. back to Nova Scotia, arriving on November 6.

The **Act** provides for taking into care in s. 33:

> **33 (1)** An agent may, at any time before or after an application to determine whether a child is in need of protective services has been commenced, without warrant or court order take a child into care where the agent has reasonable and

> probable grounds to believe that the child is in need of protective services and the child's health or safety cannot be protected adequately otherwise than by taking the child into care.
>
> **(2)** On taking a child into care, an agent shall forthwith serve a notice of taking a child into care upon the parent or guardian if known and available to be served.
>
> **(3)** An agent taking a child into care may enlist the assistance of a peace officer.
>
> **(4)** Where a child has been taken into care pursuant to this Section, an agency has the temporary care and custody of the child until a court orders otherwise or the child is returned to the parent or guardian.

The matter returned to the Family Court on November 13, 1996, and was adjourned to November 18, 1996. It was ordered that E. stay in the temporary care and custody of the Agency.

On November 18, the Agency sought and was granted a 3 month temporary care order. A very brief plan was filed. In essence, the Agency's position was that it needed to investigate the plans of the parents and the options for E. At that time, it believed that Mrs. M. was still incarcerated in Florida and that the whereabouts of Mr. M. were unknown.

The matter was the subject of a pre-trial on January 22, 1997 and in Court once again on February 11. Mrs. M. was in Toronto and in touch with her lawyer. The Agency's plan was to attempt to reunite mother and daughter as quickly as possible.

Mrs. M. was planning on taking E. to Toronto. The Court extended the temporary care order for a further month.

Mrs. M.'s affidavit, sworn on January 28, 1997, and filed with the Family Court, stated, in part, as follows:

> 6. THAT **I have separated from my husband, [B.M.], and I intend to commence divorce proceedings against him once I have established the proper jurisdiction in Ontario;**
>
> 7. THAT my husband, [B.M.], is presently incarcerated in Florida and I am not aware of his release date;
>
> 8. THAT **I realize that my conduct in taking my child to Florida and re-uniting with my husband was wrong and did expose [E.] to possible harm and I am extremely sorry that I did so and I know that I will never do that again;**
>
> 9. THAT I am presently attending counselling sessions at 416 Drop-In on Dundas Street and my counsellor's name is Joy Reeves and **I feel that she and I are making some real progress in dealing with the difficulties that I have had, particularly being an abused woman and a victim of violence for most of my life;**
>
> . . . . .
>
> 15. THAT I beg this Court to give me a second chance in caring for my child as I verily believe that I have made appropriate, positive changes in my life and that there will be no risk of harm to my child were she to be returned to me;
>
> (Emphasis added)

At this point, Mrs. M. was giving instructions to her lawyer. There is no suggestion that any sort of jurisdictional argument was being raised by her or on her behalf.

As Mrs. M. testified at the hearing in October, 1997, her real plan was to unite the family with Mr. M. even though she was telling Children's Aid, as she told the Court in her affidavit, that her marriage was over and that she planned to divorce Mr. M. Her sworn statement to the Court in January contained a deliberate falsehood while at the same time promising to obey Court orders and asking for what she called a second chance. As mentioned earlier, Mrs. M. also admitted telling the Agency in late December that she had gone to Toronto because she was afraid that if she returned to Nova Scotia, Mr. M. would find her. This, too, was deliberate deception. The truth was that Mr. M.'s parents had paid her way to Toronto and she was in telephone contact with him while there.

The matter proceeded on the basis that E. would be returned to the care and custody of Mrs. M. There were Court appearances in March and April. Mrs. M. attended the March appearance and re-established access with E. A home study was done in Toronto as part of the plan for Mrs. M. to take E. there. The temporary care order was extended, but with provision for access by Mrs. M. and with the requirement for the Agency to pay the costs of Mrs. M. attending Family Court. Throughout these appearances, there was no suggestion of any jurisdictional objections or other procedural problems relating to the case. The May 22 finding that E. was in need of protective services was not challenged or appealed.

The situation, at least from the perspective of the Agency, changed in June.

Mrs. M. returned to Nova Scotia. Unbeknown to the Agency, she, in fact, had contacted Mr. M. in Florida and asked him to take her to Nova Scotia. He did so and they arrived, together, around June 3. Mrs. M. contacted the Agency, told them she was in Cape Breton and access was arranged. However, the Agency soon afterward became aware that Mr. M. was in the area. Access was suspended while the Agency investigated. Mrs. M. was confronted with the Agency's information about Mr. M. She instructed her counsel to write to the Agency vehemently denying it. The text of that letter, dated June 11 and directed by Mrs. M.'s lawyer to counsel for the Agency, stated:

> Please be advised that I have been contacted by my client, [L.M.], who has indicated to me that due to an anonymous referral, The Children's Aid Society is alleging that she has had contact with her husband, [B.M.] and are therefore refusing to grant her any access to her child, E. I would appreciate receiving written confirmation of this as well as any Affidavits or information you may have which will support the allegation. **I would note that my client is denying this allegation vehemently** and wishes to have her access to her child restored as soon as possible.
>
> (Emphasis added)

There was a court appearance on June 6, at which the temporary care order was again extended and a review hearing set for July 15. By that time, Mrs. M. had fully recanted her allegations of abuse against Mr. M. and the Agency had decided to seek permanent care of E. Hearing dates for the permanent care application were set for October 15, 16 and 17.

A pretrial was held on September 10. Counsel were directed to raise any

jurisdictional issues within 2 days. None were. A further pretrial was held on September 22. No jurisdictional arguments were raised. At these pretrials, Mr. and Mrs. M. were represented by separate counsel.

The permanent care hearing was held on the dates set in October, plus an additional day. Mr. and Mrs. M. were represented by separate counsel, both of whom participated extensively in the hearing. No evidence or argument was addressed to jurisdictional objections. At the conclusion of the hearing, on October 23, 1997, the Family Court ordered that E. be placed in the permanent care and custody of the Agency with no provision for access.

III. The Decision of the Family Court:

MacLellan, Fam.Ct.J. reviewed the procedural history. She noted that it had been agreed that any jurisdictional issues had been waived and that there were no jurisdictional arguments.

The judge found that Mr. and Mrs. M.'s relationship was "incredibly unstable". She instructed herself with respect to the burden of proof in light of the serious consequences of making a permanent care order . As required by s. 42(2), the judge reviewed less intrusive alternatives, including services to promote the integrity of the family. She concluded that the services that had been offered failed either because Mrs. M.'s lies presented the wrong problems or because Mr. and Mrs. M. withdrew

from the services offered. On this issue, the judge concluded:

> In any event, the court has examined that there are no other services that the Agency could have offered Mrs. [M.] and Mr. [M.]. The services have been presented, be it transportation, home studies, counselling recommendations, I cannot think of any other services and indeed some of the services might have lead us to finding out that there was sexual abuse or there was a drinking problem if Mrs. [M.] had engaged with the mental health clinic as requested to do so in 1993 and February of 1996. But she did not.

The judge emphasized that a key question, in relation to s. 42(4), is whether there was continued risk to E. without change in the foreseeable future. On this aspect, she found the Agency's evidence scattered, observing that the Court was "left to pick up some here and some there." She concluded:

> I believe the [M.]s are making efforts now but it is too little, too late; and indeed, they have to have time together to work on: (a) sobriety; (b) their own relationship; and (c) the pregnancy of this new child. This is an incredible amount going on in this home at the present time. The plan they have given is new. Their history is ridden with instability. The court has no assurance whatsoever that any order I could make, if I had the latitude, would be followed. Neither one follows court orders because they state their family is more important than court orders. But what did not following court orders end up with? Being raised in shelters, going to jail and having the child flown back into this country by an absolute stranger. This child was apprehended twice before age three. I have no assurance whatsoever that they will follow any order or any recommendation this court could make.
>
> In any event, I am satisfied that the Agency has met their onus. The evidence is overwhelming both on either version of the facts. I order that [E.] be placed in the permanent care of the Agency.

The judge then turned to the question of access. She expressed strong

concerns about the lack of detail in the plan submitted by the Agency. However, she concluded that there should be no access, stating:

> ...I am satisfied after reviewing all the evidence that there is a plan for the permanent placement of this child for adoption. I am satisfied that risks as set forth still exist. I am satisfied the parental situation is unlikely to change in the foreseeable future. On all the evidence I am satisfied that adoption is clearly in [E.]'s best interests. I am ordering that access is not in her best interest and that access be severed.

The judge ordered that the severance of access be under the direction of a child psychologist.

IV. Issues Raised on the Appeal:

Mr. and Mrs. M. raise 13 issues on this appeal. For the purposes of my analysis, I have consolidated them as follows:

1. Conflict of Interest and Bias of the Judge: The appellants argue that the trial judge was in a conflict of interest and showed bias and therefore should not have heard the case.

2. Evidence, Jurisdiction, Procedure and the Role of Appellants' Lawyers: Under this general heading a number of specific submissions are made. It is argued that certain witnesses called by the Agency lied, that false and misleading evidence was improperly relied on and that affidavits and statements of witnesses not called

should not have been admitted or relied on. Further, it is argued that the evidence did not meet the burden of proof necessary to make a permanent care order. The appellants also submit that there was no jurisdiction to remove the child from Florida to Nova Scotia or for the Family Court in Nova Scotia to hear the case.

3. **Charter** Breaches: The appellants argue that their **Charter** rights under ss. 11(d) and 2(d) of the **Canadian Charter of Rights and Freedoms** have been violated.

4. Breaches of Permanent Care Order by the Agency: The appellants submit that the Agency has not obeyed the permanent care order, in particular by failing to have an assessment of E. by a child psychologist.

V. Role of the Court of Appeal; New Evidence on Appeal:

This appeal comes to us under s. 49 of the **Act**. The subject of the appeal is the permanent care order, not the finding that E. is in need of protective services which preceded it. The most relevant parts of the section are these:

> **49 (1)** An order of the court pursuant to any of Sections 32 to 48 may be appealed by a party to the [Nova Scotia Court of Appeal] by filing a notice of appeal with the Registrar of the [Nova Scotia Court of Appeal] within thirty days of the order.
>
> . . . . .

> **(3)** Where a notice of appeal is filed pursuant to this Section, a party may apply to the [Nova Scotia Court of Appeal] for an order staying the execution of the order, or any part of the order, appealed.
>
> . . . . .
>
> **(5)** On an appeal pursuant to this Section, the [Nova Scotia Court of Appeal] may in its discretion receive further evidence relating to events after the appealed order.
>
> **(6)** The [Nova Scotia 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 best interests of the child is the paramount consideration in all proceedings under the **Act**. This is a broad and multi-faceted concept: see ss. 2(2) and 3(2)(a)-(n). The determination of what the child's best interests require in a specific set of circumstances is the task of the trial judge who has the advantage of seeing and hearing all of the evidence.

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.

The appellants applied at the hearing of the appeal to admit what they called further evidence. The "further evidence" consists of the running file notes from the Family Court in this matter, various file notes from the Agency file, the Agency's case recording report, copies of court documents relating to criminal charges against Mr. M., some employment and immigration documentation, a copy of Mr. M.'s birth certificate, copies of various documents relating to the actions of Florida officials, the Agency plan of November, 1996, an affidavit of Ms. Billard dated July 15, 1997, various items of correspondence from and to lawyers involved in the case, copies of cards and pictures, telephone records, documentation relating to Mrs. M.'s plans in Toronto, documentation relating to Mrs. M.'s contact with various services and support groups from July to October, 1997, Mr. M.'s application for access to E. dated November 10, 1997, copies of correspondence among the Ms, the Agency and the Family Court in December and January (1997-8), affidavit material from February, 1998, filed with the Court of Appeal in connection with interlocutory applications, documentation relating to the Agency's involvement with Mrs. M.'s other daughter, J., an affidavit of Mr. F. filed in a custody proceeding in the Family Court in relation to J. and transcript excerpts from the October 15, 1997 hearing. In addition to all of this material, the factum filed by the appellants contains statements of fact that are not based on the evidence in the record.

While s. 49(5) deals with evidence "relating to events after the appealed order", the Court also has discretion under **Civil Procedure Rule** 62.22 to receive new evidence. Justice Bateman, writing for the Court, in **Children's Aid Society of Halifax v. C.M.** (1995), 145 N.S.R.(2d) 161 (C.A.) at 167 held that this Court has "...a wide latitude to receive additional evidence in child welfare matters", noting that the further evidence must be considered "... in the context of exercising an appellate function...". I agree and adopt her conclusion and her analysis of the authorities in this regard.

No strenuous objection was taken by counsel for the Agency to the Court and Agency file material being placed before us by the appellants and I would admit it. Given that Mr. and Mrs. M. are representing themselves on this appeal, I would give them every procedural latitude. I would, therefore, consider all of the material that they have submitted to us, while exercising appropriate caution in relying on it where the material was not put forward, and, therefore, not tested by cross-examination at the hearing in the Family Court. Rather than attempting to rule individually on the large assortment of items put forward, I will address particular pieces of proposed new evidence in the course of my analysis of the issues.

VI. Analysis:

(a) Alleged Conflict of Interest and Bias of the Family Court Judge :

The appellants argue that the Family Court judge should not have heard the

case because she acted as a lawyer for the Agency prior to her appointment as a judge and had a professional association with counsel representing the Agency in this matter. This, as the appellants put it in their factum "...presents an obvious (not perceived) conflict of interest on the part of the learned judge and lending bias (sic) to the proceeding." These arguments were not raised in the Family Court during the 19 months over which this matter was before Judge MacLellan. They are raised for the first time on appeal.

The appellants have provided no evidentiary basis for their allegations of conflict of interest and it is difficult to understand their argument in this regard. A conflict of interest exists when an individual has duties to be performed or interests to serve that conflict with each other. Simply put, a conflict of interest exists where an individual, improperly, has divided loyalties. There is no evidence of any such thing in this case. The judge had no conflict of interest.

With respect to the allegation of bias, it is common ground between the parties that the trial judge acted as a lawyer for the Agency and had a professional relationship of some description with counsel for the Agency prior to her appointment to the Bench. The record is silent, however, with respect to the nature, extent, duration and timing of these activities.

The total absence of evidence in this regard is significant. The threshold for a finding of real or perceived bias of a judge is high. The onus of demonstrating it lies

with the person who is alleging its existence. There is a presumption that judges will carry out their oath of office: see **R. v. S.(R.D.)**, [1997] 3 S.C.R. 484 per Cory, J. at 552.

The appellants allege that the judge's conduct of the proceeding displayed bias. I do not agree. While the judge conducted the hearing in an, at times, robust manner, she did not say or do anything capable of suggesting to the mind of a reasonable and fully informed person that she was not approaching the case with an open mind. As stated in **Commentaries on Judicial Conduct** (Canadian Judicial Council, 1991) at 12:

> "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."

As for the judge's professional activities prior to appointment, the record, as noted, leaves us in the dark as to their nature, extent, duration and timing. There was no suggestion that the trial judge had previous involvement as Agency counsel with these appellants. The fact that a judge, at some time prior to appointment, acted as a lawyer for a party before the Court or had a professional association with a lawyer before the Court, does not, on its own, give rise to a reasonable apprehension of bias. There is no settled principle that judges must not hear cases involving former clients or former associates in practice. Frequently, judges will allow some period of time to elapse after their appointment before doing so: see **Committee for Justice and Liberty v. National Energy Board**, [1978] 1 S.C.R. 369 at 388. There is no evidence

that such a period did not elapse before the judge heard this case. There is nothing in this record to rebut the presumption that a judge will carry out his or her oath of office to render justice impartially: see also **R. v. Smith & Whiteway Fisheries Ltd.** (1994), 133 N.S.R. (2d) 50 (C.A.) at 60.

(b) Evidence, Jurisdiction and Procedure; Conduct of the Appellants' Lawyers

There are several submissions under this general heading.

With respect to jurisdiction, it is submitted that the Family Court of Nova Scotia did not have jurisdiction because of failure to follow the time limits in the **Act** and that the child was wrongfully apprehended by the Agency in Florida.

It is further submitted that some of the witnesses called by the Agency lied, that false and misleading evidence was improperly relied on and that affidavits and statements of witnesses not called should not have been admitted or relied on.

The appellants also submit that the Agency plan was not adequate to comply with the **Act**.

It is further submitted that the appellants' lawyers at the hearing in Family Court (they were separately represented) failed to properly represent their interests in

these and other aspects of the case.

Finally under this heading is the general submission that the evidence did not meet the burden of proof necessary to make a permanent care order.

This last submission asks us to re-evaluate the evidence — in essence, to retry the case. This is not the proper role of the Court of Appeal. Weighing the evidence and making findings of fact is the job of the judge at first instance, who sees and hears the witnesses. The Court of Appeal can interfere only if persuaded that the Family Court judge made a “palpable and overriding” error in the appreciation of the evidence.

The appellants have directed our attention on this appeal to a myriad of instances in which they say false, incorrect or misleading evidence was given at the hearing or is to be found in affidavit evidence filed during the course of the proceedings. Although I will not deal with all of them in these reasons, I have reviewed all of them.

Many of the submissions relate to affidavit evidence of persons who testified and were cross-examined by counsel for both appellants at the hearing. In several instances, the evidence which is now challenged by the appellants as being false or misleading was supplied by Mrs. M. or is not in any material way different from evidence given by the appellants at the hearing.

For example, complaint is made that Ms. Billard's March 5, 1996 affidavit is incorrect as to Mrs. M.'s allegations of abuse. Of course Mrs. M. later recanted these allegations, but the statements found in Ms. Billard's March 5 affidavit are, in substance, consistent with what Mrs. M. had told the police at the time. It is also objected that the affidavit is false because it refers to Mr. M. having an extensive criminal record. The appellants' factum goes so far as to say that there was nothing there to refer to. However, Mr. M. testified at the hearing in Family Court that he had been convicted of impaired driving on three occasions, break enter and theft, escaping custody, theft, and fraudulently obtaining food and lodging. While what is comprehended by the term "extensive" in relation to a criminal record is subjective, this description of his criminal record is certainly not false or misleading in light of the facts that Mr. M. himself testified to at the hearing before the Family Court judge.

The question on this appeal is not whether every item of evidence submitted throughout the lengthy proceedings in the Family Court was absolutely correct in every detail. The question on the appeal is whether the Family Court judge made any palpable or overriding error in her factual findings. Rather than reviewing the catalogue of alleged inaccuracies put forward by the appellants, it is more useful to consider the principal findings of the Family Court judge in light of the evidence before her and the appellants' submissions.

First, the judge concluded that Mr. and Mrs. M.'s relationship was incredibly unstable. The relationship had been on again/off again over the relatively brief

marriage. Mr. M. made it clear at the hearing that if Mrs. M. started drinking again, he was "out the door." The judge's finding with respect to instability is well supported by the evidence to the point that any other finding on the evidence adduced in these proceedings would have been perverse.

Next, the judge found that less intrusive alternatives had been attempted and failed and would be inadequate to protect the child. The appellants submit that wrong information about their involvement with past support services was relied on in this connection. However, these findings are well supported by two facts about which there can be no dispute.

First, after the interim supervision order was made, Mr. and Mrs. M. took their child out of the jurisdiction, thereby avoiding having to submit themselves to the Agency's supervision. Second, both Mr. and Mrs. M. had made it crystal clear that they placed their own judgment about the welfare of their family ahead of court orders or Agency supervision. For example, Mr. M. said:

> Q. So did you have any concerns with regard to being in violation of the Court's Order?
> A. No.
> Q. Why not?
> A. I figured our family is more important than Children's Aid.
>
> . . . . .
>
> Q. ... but do you remember that you were ordered by that Court to reside at 200 or 200-some L.D.?
> A. Ah, yes.
> Q. You do remember that?
> A. Yeah, yes.

Q. But you lived at T.B.R.?
A. Yes.
Q. Is that because your family is more important than the police and the Provincial Court?
A. Ah, yes.

. . . . .

Q. Your family is more important than Children's Aid? Your family is more important then this court?
A. Yes.

As for Mrs. M., she repeatedly lied to the Agency when she thought it was to her advantage. She also filed false evidence with the Court and violated a Court order to which she had consented.

The judge concluded that she had " ...no assurance whatsoever [Mr. and Mrs. M.] will follow any order or any recommendation this court could make." This finding is amply supported by the evidence and this in turn supports the judge's conclusion that no order she could make short of permanent care would be adequate to protect the child.

Another consideration strongly supports the judge's conclusion. E. was placed in the temporary care of the Agency in November of 1996. Section 45 of the **Act** provides that the total period of duration of all disposition orders, including any supervision orders (where, as here, the child is under 6) cannot exceed twelve months. At the time of the hearing in October of 1997, that twelve month period was about to expire. Even if the judge had been persuaded (which she was not) that other less

intrusive options should have been attempted, there was no time to attempt them. As she put it:

> ..... It has not been presented by counsel for the Respondents that the Agency ought to have done this or tried that. That is not the situation. Rather, it is that everyone was on the wrong road and now we can be on the right road. [This I take it to be a reference to Mrs. M.'s change in her characterization of her problem from physical abuse to sexual and substance abuse.] That may well be true but what is the foreseeable time period remaining for the child [E.]? It's about three weeks. And that is the difficulty. The child is entitled to have some stable plan for her development. It is not a matter of someone not being good or not fair or not nice to mother or father but it is an issue of when does [E.] have an entitlement to get on with her life, and get on with her life in a secure and predictable home.

The Family Court judge found that there was continued risk to E. without change in the foreseeable future. While accepting that both Mr. and Mrs. M. were making positive changes in their lives and that they both deeply care for E., the Family Court judge was justifiably concerned about the history of instability in the family and the allegations of abuse, which while recanted, clouded in a most troubling way the situation facing the judge. She was also most concerned, and in my view properly, by the almost total lack of insight on the part of Mr. and Mrs. M. into the true situation and its implications for E.

With respect to Mrs M., the judge observed: "Her grasp of the problem that she has is superficial"; with respect to Mr. M.: "Mr. M. does not appear to grasp that there are serious problems with this past behaviour and his marriage." These conclusions are strongly supported by the evidence.

In relation to her time with E. in the Salvation Army Shelter in Sarasota Florida, Mrs. M. testified as follows:

> Q. That was what kind of an experience? A good experience, not a very nice experience?
> A. No, it was terrible.
> Q. It was terrible?
> A. Yeah.
> Q. I take it that it was terrible for [E.] as well as for you?
> A. Yeah, it must have been.

This testimony was referred to by the judge as follows:

> It was disconcerting for me to note that in four days of evidence I heard very little and almost nothing from mother at all unless asked directly as to what affect did she think her conduct had on the child? She talked about her hurt, her upset, her pain, but what about this little girl who was with mom and dad in dubious situations in Florida and then they're gone. They're gone. No one talked about that. Mother talked about it was hard on her. And Mr. Crosby asked her on cross-examination, and probably not easy on [E.] either? And she indicated to the effect; 'No I guess not, probably not.' But it was as if it was new thought. This I think is typical of someone who has to deal with [a] number of serious problems.

As for Mr. M., he displayed an equally significant lack of insight. For example, when questioned about the early period of his relationship with Mrs. M. he testified as follows:

> Q. But, even though two months later you were married, you fought about drinking?
> A. Yes.
> Q. You fought about her drinking and you fought about your drinking?
> A. Yes.
> Q. You fought when you were both drinking?
> A. Yes.

Q. And when you were not, she was?
A. Not every time we drank; on occasion, we fought.
Q. And [E.] was with you both at that time?
A. Yes.
Q. And [J.]?
A. Yes.
Q. It couldn't have been a very good time for the kids?
A. **They weren't complaining.**

(Emphasis added)

E. was under two at this point so it is not clear what complaint could be expected.

Further:

Q. Now, throughout your direct evidence with your lawyer you indicated on several occasions that you thought your relationship with [L.] during the early parts of the marriage, and while you were in the United States, you thought it was good?
A. Yes.
Q. Would you agree that there were actually a lot of difficulties in that marriage?
A. Yes.

With respect to assistance with parenting, the following:

Q. Any other inquiries that you feel are necessary with regard to your own personal counselling?
A. Parenting.
Q. Parenting?
A. Yes.
Q. Okay, and have you made inquiries with regard to parenting courses?
A. Not yet.

The past and present instability, the ineffectiveness and unavailability of

Court supervision and the lack of insight by Mr. and Mrs. M. into the situation of E. amply support the judge's finding that there was continuing risk to E. for the foreseeable future.

The judge also found that adoption would be in E.'s best interests. The Agency's plan stated the matter this way:

> The child, [E.] has been in foster care since November 6, 1996, and until June, 1997, she had only a few visits with the Respondent, L.M.
>
> It is the Agency's position that given the age of the child and the period of time she has been in foster care, it is time to make sound long-term decisions based on her emotional and physical needs.
>
> . . . . .
>
> The child, [E.] [(H.)] [G.], is currently in an approved foster home and has been in the same home since first coming into care on November 6, 1996. There will be no changes in this placement until such time as a permanent placement is deemed necessary.
>
> Given the child's young age, adoption prospects are very good. As stated earlier, a Permanency Planning Committee meeting will determine adoption plans when the child is legally free to be adopted.

While noting the lack of appropriate detail in the plan, the judge directed herself with respect to s. 47 which permits the Court to order access "unless the court is satisfied that the permanent placement in the family setting has not been planned." It was clear to the judge that the plan was for permanent placement for adoption. This finding is amply supported by the evidence before her. That being the case, it would have been inconsistent with the plan for adoption to order access. I also conclude that

in finding that adoption was in E.'s best interest, the judge made no error which would permit or justify the intervention of this Court.

To conclude on this aspect of the appeal, I am persuaded that all of the key findings of the Family Court judge are supported by the evidence. In most cases, this support is found in the evidence of the appellants themselves. There is no basis upon which this Court should disturb her findings .

Mrs. M. submits that her counsel did not properly represent her in these proceedings in various ways. She says that in March of 1996, her counsel improperly advised the Court that Mrs. M. was victimized and that she was not made aware of any conditions placed in the order made that day.

These submissions are simply wrong. As discussed above, Mrs. M. testified at the hearing in October of 1997 that she knew about and agreed with the key terms of the March, 1996 order. While the record is silent as to what she did or did not tell her lawyer, it is clear that on the same day as the court appearance of March 8, Mrs. M. made a statement to the police that she wanted Mr. M. in jail because she was afraid of him. Her counsel did not misrepresent the truth as she knew it when she relied on Mrs. M.'s statements to the police.

Mrs. M. complains that her counsel acted without instructions after Mrs. M. left the country with E. The evidence does not support this allegation. We do not know

what Mrs. M.'s instructions to her lawyer were at that time. Unsworn assertions of fact in the factum or in letters are not evidence. There is no evidence that Mrs. M. told her lawyer that she was not to act on her behalf any further before she left the country.

Mrs. M. also submits that her counsel was wrong to consent to or not to oppose the finding that E. was in need of protection in May of 1996. There is no evidence in the record (as opposed to unsworn assertions in the factum) that this finding was not in accordance with her instructions to her counsel. No evidence to this effect was given at the four day hearing in October of 1997. In any case, there was ample uncontroverted evidence before the Family Court in May of 1996 upon which to base the finding made at that time that E. was in need of protection, with or without counsel's consent

Mrs. M.'s suggestions that her lawyer did not make adequate effort to contact her after she, without notice, left the country cannot be accepted. Mrs. M. knew about the March, 1996 order and that the matter was still before the Family Court. It is not her lawyer's fault that Mrs. M. decided to ignore those proceedings from April of 1996 until late December of that year.

There are also jurisdictional arguments put forward by the appellants on this appeal that were not raised in the Family Court. These grounds of appeal cannot be adequately assessed on the evidence in the record. However, on the basis of what we do know, I am not persuaded that there was any loss of jurisdiction by the Family Court,

particularly where Mr. and Mrs. M. continued to be involved without objection with the proceedings in that Court until after the permanent care order was made.

As regards time limits, while they are important and are intended to be respected, this Court has made it clear that failure to adhere to the time limits, where there is good reason for the failure and the best interests of the child require it, does not result in a loss of jurisdiction by the Family Court: see **C.A.S. of Colchester Co. v. H. W.** (1996), 155 N.S.R. (2d) 334 (C.A.) and **Family and Children's Services of Kings County v. H.W.T.** (1996), 156 N.S.R.(2d) 237 (C.A.).

As for territorial jurisdiction, proceedings had already been undertaken in Nova Scotia before the child was removed to the United States and, so far as the record discloses, Nova Scotia was her place of ordinary residence. There is also evidence in the record that when E. was apprehended in Florida, it was Mrs. M.'s wish that she be taken to Mrs. M.'s brother in Nova Scotia. There is authority for the view that once proceedings of this nature have been commenced while the child is within the court's jurisdiction (as these proceedings were), they may be continued even if the child is removed from the jurisdiction and that ordinary residence of the child, rather than presence within the jurisdiction is an adequate basis for the assertion of jurisdiction: see **Re Child & Family Services of Eastern Manitoba and McKee** (1986), 31 D.L.R. (4th) 271 (Man C.A.).

It is impossible to accept Mrs. M's complaints about her lawyer given Mrs. M.'s later behaviour with respect to her lawyer. Mrs. M. resumed contact with the same lawyer upon her return to Canada. That lawyer continued to represent her to the end of the permanent care hearing. So far as the record shows, this happened without complaint from Mrs. M. about her lawyer's conduct during her absence. There was no evidence offered at the October, 1997 hearing that anything that had gone on up to that point was procedurally improper or contrary to Mrs. M.'s instructions. It is too late to raise these sorts of issues now and, in any case, there is no proper factual basis supporting these submissions.

Mrs. M. submits that her counsel did not give her adequate advice in the period around March 17, 1997, about the sort of documentation that she should be putting together for court and that her counsel failed to submit what was available. This submission must be viewed in the context of what was going on at the relevant time. Beginning in January of 1997, Mrs. M.'s plan for E. changed three times. First, E. was to be with her at S.D.'s in Toronto. Next, they would reside with H.D. Then, Mrs. M. would return to Cape Breton. These three plans do not include the real plan, which was not revealed until later, that the family would reunite with Mr. M. in Cape Breton. Mrs. M. filed evidence in Court in late January of 1997 that she was presently attending counseling assisting her to deal with "...the difficulties that [she] had, particularly being an abused woman and a victim of violence for most of [her] life." Later, she was to testify that her most serious problem was alcohol abuse but that her serious efforts to come to terms with that did not begin until after her March, 1997 court

appearance. In the context of these frequent changes of plans, I do not think the record supports the claim that counsel did not adduce evidence about the plans for E. quickly enough.

Mr. M. submits that his lawyer failed him in not carrying out his instructions to file an application for access. He refers to file notes of September 10, 1997. However, the issue of access was considered by the Court at the hearing which began on October 15.

Objection was made to evidentiary matters agreed to by counsel at the hearing. Specifically, it is submitted that the statements made to Constable Vickers should not have been admitted without calling the makers of the statements to testify and that Ms. F., Mr. M.'s former common-law partner, ought to have been called rather than supplying the Court with the brief summary of her evidence that went in by agreement.

No serious issue was taken at the hearing with respect to the contents of the statement made by Mr. B. to Constable Vickers. The other statements made to him were by Mrs. M. herself and S.G., her sister, both of whom testified. As for Ms. F., the substance of her proposed testimony was that Mr. M. enjoys a good relationship with both his former common-law partner and his son by that union, that he has ongoing access to his son and that there was no violence involved in that relationship. These facts were stipulated and accepted as facts by agreement. In other words, this evidence was not simply put forward, it was accepted as proven fact. There is no

suggestion that this witness had anything of substance to add to the facts placed before the court or that her testimony, if heard, could have been more favourable than the stipulated facts.

All of these were tactical decisions made by counsel. There is nothing in the record tending to show that they were improper decisions or that the handling of this evidence gave rise to any injustice.

The appellants also submit that the Agency plan was inadequate and that their counsel failed to challenge its adequacy.

A plan is required by statute: see s.41(3). Where, as here, permanent care is sought, the plan must include (among other things) an explanation of why the child cannot be adequately protected while in the care of the parent, a description of past efforts to do so and a description of the arrangements made or being made for the child's long-term stable placement: see s. 41(3)(d) and (e).

The plan submitted addressed these factors. Although the appellants submit in their factum that "[d]uring the course of all court hearings and pre-trials, the Agency has failed to provide any plan for E.", this is not the case. Neither is it the case, as the appellants submit, that the Family Court judge found there was no plan. A plan was submitted to the Family Court and entered as an exhibit at the hearing. The Family Court judge expressed reservations about the level of detail and the sufficiency of the

evidence in relation to it. However, she also concluded, on all of the evidence before her "...that adoption was clearly in E.'s best interests."

With respect to whether the plan complied with s. 41(3), we must consider the substance rather than the form. In doing so, I am satisfied that the plan submitted met those requirements. As stated by Chipman, J.A. for this Court in **Family and Children's Services of Kings County v. D.R. et al** (1992), 118 N.S.R.(2d) 1 (N.S.S.C.A.D.) at 9 -10 : " It is the substance that counts, and as long as the Agency plan and the Family Court judge address and evaluate the applicable factors in s. 41(3), as they apply to the circumstances of the case, that section of the **Act** has been complied with. ... Moreover, even if a plan were found wanting, the Family Court judge must exercise other available options than returning the child to the parent or guardian, if that course is not in the best interests of the child. That is the paramount consideration in all proceedings and matters pursuant to the **Act.**"

While counsel at the hearing before her did not specifically raise technical arguments in relation to the adequacy of the plan, the substantial issues about whether the Agency had justified a permanent care order without access were addressed by counsel in their cross-examinations of the Agency witnesses, the evidence adduced on behalf of Mr. and Mrs. M. and in closing submissions. The Family Court judge, both in her questions to witnesses and in her reasons for decision, demonstrated anxious consideration of the relevant factors. I do not, therefore, accept the appellants'

submissions that their counsel's dealing with this matter at the hearing gave rise to any injustice.

In summary, I conclude that the Family Court judge did not err in her appreciation of the evidence or in the conclusions she reached. I would not give effect to any of the evidentiary, procedural or jurisdictional arguments raised by the appellants.

(c) Charter Breaches:

The appellants submit in their list of issues that their rights under ss. 11(d) and 2(d) of the **Canadian Charter of Rights and Freedoms** were violated. This was not argued in the Family Court.

In this Court, no argument was presented with respect to s. 11(d). That section of the **Charter** deals with the rights of persons charged with an offence. These child protection proceedings were not of that nature and s. 11(d) does not apply to them.

Some submissions were advanced in relation to s. 2(d). However, those submissions are not clear as to what allegedly violated the appellants' right to the fundamental freedom of association. Reference is made in the appellants' submissions to provisions in orders prohibiting contact between Mr. and Mrs. M.

There is reference to a Provincial Court order of February 12, 1996 and to the Family Court order of March 8th, 1996. Neither of those orders is under appeal. This appeal relates to the permanent care order of October, 1997. It is not appropriate, therefore, to deal further with these **Charter** arguments which have no bearing on the legality of the order under appeal.

(d) Breaches of permanent care order by the Agency:

This ground of appeal concerns the judge's order in relation to the involvement of a child psychologist in the severing of access. The order provided

> 2. There shall be no provision for access for the Respondents to the said child. The Applicant shall, however, engage the services of a child psychologist to assist the parties in discontinuing the present access arrangements between the Respondent, [L.M.] and the child, [E.A.H.] and between the child, [E.A.H.] and her sister, [J.].

In her reasons for judgment, the Family Court Judge said:

> ... On all the evidence I am satisfied that adoption is clearly in [E.'s] best interests. I am ordering that access is not in her best interest and that access be severed.
>
> Because I have little detail on [E.], I am going to order that it be done on the auspices of a child psychologist. Access continue with mother and child to wean the child off in a manner that is appropriate to cause the least disruption to the child. I am sure people have been looking after [E.], they just have not been called to advise how she is going to react to not seeing her mother or sister again. While I find it is in her best interest that access be severed, how it is severed will be

> under the direction of a child psychologist. If further input of the court is required, I will provide same.

It is not submitted that this order was in error if the permanent care order without access is upheld on appeal. What is submitted is that the Agency has not complied with this part of the judge's order. Access was not severed because of the existence of this appeal. Therefore, it was not in violation of the order not to have the child psychologist in place before access was to be severed.

In any event, this is not a matter for appeal to this Court. The point raised relates to the implementation of the Family Court order. The Family Court judge indicated in her reasons that she was available to deal with issues arising from its implementation. It would not be appropriate for this Court to intervene in this aspect of the matter.

VII. Disposition:

For these reasons, I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Roscoe J.A.

Bateman, J.A.

C.A. No. 144059

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

L. M. and B.M. Appellants - and - THE CHILDREN'S AID SOCIETY OF CAPE BRETON Respondent	)	REASONS FOR JUDGMENT BY: CROMWELL, J.A.