NOVA SCOTIA COURT OF APPEAL
Citation: ***Children's Aid Society of Cape Breton-Victoria v. J.C.***, 2005 NSCA 161

Date: 20051213
Docket: CA 251964
Registry: Halifax

Between:

J. C. and A. C.

Appellants

v.

Children's Aid Society of Cape Breton-Victoria

Respondent

Restriction on publication:	**Pursuant to s. 94(1) Children and Family Services Act.**
Judge(s):	Cromwell, Saunders & Oland, JJ.A.
Appeal Heard:	November 23, 2005, in Halifax, Nova Scotia
Held:	Appeal dismissed, as per reasons for judgment of Saunders, J.A.; Cromwell & Oland, JJ.A. concurring, in part.
Counsel:	Mary Frances Roach MacDonald, for the appellants Robert M. Crosby, Q.C., for the respondent

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

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

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

Reasons for judgment:

[1] Sadly, earnest and sustained interventions by the Agency to develop proper parenting skills for the appellants and protect the safety of their two small children, proved futile. On June 28, 2005 Justice M. Clare MacLellan of the Nova Scotia Supreme Court (Family Division) granted orders of permanent care and custody of the children K.C. and her brother J.C. to the Children's Aid Society of Cape Breton-Victoria pursuant to s. 42(1)(f) of the **Children and Family Services Act**, S.N.S. 1990, c. 5, as amended. MacLellan, J. also ordered that after an "appropriate weaning-off process" the parents were to be denied access. The trial judge found that adoption of these two children ought to be pursued and expressed the firm hope that they would be adopted together.

[2] The parents now appeal from that decision.

[3] For the reasons that follow I would dismiss the appeal.

Background

[4] Owing to the unique circumstances of this case, in particular the cognitive deficits, intellectual challenges and other hurdles faced by the appellants, I feel obliged to undertake a more comprehensive review of the background than would otherwise be the case.

[5] A.C., age 25 (Mrs. C.) and J.C., age 34 (Mr. C.) are the married parents of K. (who will turn three on December *, 2005) and J. (who turned one on November *, 2005). Both children have been in the temporary care of the Agency since November 25, 2004, shortly after J.'s birth. Although J. has never lived with his parents, K. was in their care for the first 23 months of her life. (* *Editor's note-dates removed to protect identity*)

[6] The Agency first became involved with the C's and their newborn child K. while Mrs. C was still in hospital for K.'s birth. A referral was made by hospital staff out of concern for the infant's safety, in light of Mrs. C's severe seizure disorder (a rare form of largely uncontrollable epilepsy), both parents' documented intellectual and cognitive deficits, as well as Mr. C's perceived emotional distance from both his wife and his child. The Agency then considered that the most

pressing concern was to ensure that Mrs. C would be continuously supervised with her baby after their discharge from the hospital.

[7] It was decided that this could be accomplished if the parents went to live with family. Although the appellants were not receptive to the idea, and indeed initially returned to their old apartment, eventually through the intervention of Mr. C's father the appellants were ultimately persuaded to move in with Mr. C's mother. The C's voluntary, if reluctant, acceptance of Agency involvement with K. meant that no protection application was commenced at that time.

[8] Fearing that the C's learning deficits affected their ability to understand the Agency's involvement, the Agency referred the appellants to Dr. Reginald Landry, a psychologist, for a parental capacity assessment. Dr. Landry's involvement with the couple spread over six months in 2003 and led to his report in which he confirmed that the C's presented with significant cognitive impairments "indicating rather significant difficulties in their abilities to solve problems effectively." This coupled with language comprehension difficulties caused Dr. Landry to opine that while the appellants appeared to have "the requisite capacity to develop the necessary skills to facilitate a secure attachment," they would "require consistent and likely intensive intervention in order to help facilitate appropriate parental care." Dr. Landry also recommended that the appellants be given instruction on "appropriate child development" and that close attention be paid to K. "to ensure that she is attaining her developmental milestones within normal limits."

[9] It is important to note that Dr. Landry's observations were made when Mr. & Mrs. C were still living with Mr. C's mother. However, that relationship soured and the C's left the home against Agency advice. They bounced around among relatives, including one adult relative about whom the Agency had protection concerns, before eventually settling into their own apartment.

[10] From that point on the Agency's assessment of the risks to K. in her parents' care, changed. With increasing alarm, caseworkers watched the family become more and more isolated, while Mr. C's suspicion of outsiders, including Agency officials, and family members, escalated. Regrettably, the appellants' relationship with Mr. C's parents had broken down completely, which effectively removed them from the circle of communication between the Agency and the appellants.

[11] In addition, the communication dynamic changed, with Mr. C replacing his wife as the primary spokesperson with the Agency. Mr. C appeared to want to shield Mrs. C (now pregnant with their second child) from contact with the Agency. He often claimed she was asleep or unavailable during Agency visits. On one occasion when a caseworker was able to reach Mrs. C directly by telephone, Mr. C became very angry upon learning of their contact with one another. Such incidents would then lead to weeks of negotiation in order to gain the appellants' cooperation with simple requests, for example, providing releases to disclose collateral information. Mr. C refused to allow the Agency to run the standard police checks on two grown men who were identified as occasional babysitters. He refused to seek a pediatric referral for K. from the family doctor. He refused offers of counselling or voluntary psychiatric intervention. He became fixated on the idea that Agency workers were stalking him, and perpetuating unpleasant rumours about him, and had deliberately sabotaged his application for regional housing. No amount of persuasion could change Mr. C's conviction that these things were happening.

[12] Of particular concern to the Agency was Mr. C's rigid opposition to unscheduled Agency visits. The Agency considered random unannounced home visits essential to ensure K.'s protection. Mrs. C's severe epilepsy required that her care of K. be supervised. The appellants would refuse to answer the door to Agency personnel every time an unscheduled visit occurred. Yet Mr. C acknowledged that he knew a court order gave the Agency such authority.

[13] Other serious concerns ensued. Well over a year old by June, 2004, K. was still not yet walking independently. Mr. C's mounting suspicions caused the family to become even more isolated. They stopped going outdoors because of Mr. C's fear that someone might "jump them." Much of the family's time was spent inside, in darkened conditions, with window blinds closed tightly against what Mr. C perceived to be the prying eyes of neighbours, Agency workers and potential thieves.

[14] Moreover, the appellants did not seem to be achieving even modest improvement to their own skills as parents. A new baby was on the way. Despite repeated efforts by Agency officials to encourage the appellants to take K. outdoors and provide her with stimulating play, more often than not she was left to stare at a television set, alone in her darkened room, or confined to a baby's car seat watching television with a parent.

[15] A formal protection application with respect to K. was finally brought in mid-2004, the principal objectives being to facilitate referring the little girl for early intervention and pediatric examination; obtaining a psychological assessment of Mr. C; and seeking an order authorizing unannounced Agency visits. Consent orders were granted in June, July and September that K. remain with the appellants under Agency supervision on specific terms.

[16] Mr. C was referred to Michael Bryson, a psychologist, for an assessment of his mental health and its impact on his parenting capacity. Conventional testing was considered unreliable since Mr. C functioned at a grade one language comprehension level although he reported having attended highschool. Mr. Bryson concluded that although Mr. C was often unable to communicate his thoughts, had poor insight into his own difficulties, and was much below average intelligence, there was no evidence of thought disorder or psychosis. Mr. Bryson confirmed Mr. C's paranoid ideations towards family members and Agency personnel, noting his conviction that they had lied to him, and spied on him, and were intent on causing his family harm. Mr. Bryson described his own observations during the visits he paid to the appellants' apartment. It was dark, the basement appeared to be a fire hazard, there was a strong odour of urine and feces in K.'s bedroom, and he noticed a dank smell throughout the home. Notwithstanding these observations Mr. Bryson described K. as "thriving" and said the appellants had sufficient social supports for help when needed.

[17] Several elements of the Bryson report caused the Agency concern. Most serious was Mr. Bryson's confirmation that Mr. C did leave his wife alone and unsupervised with K. Troubling too were Mr. Bryson's observations about the condition of the little girl's bedroom. Moreover, Mr. Bryson's conclusion that K. was "thriving" was thought to be inconsistent with the objective evidence. Agency personnel had never seen K. walk independently, although Mr. Bryson reported that "collaterals" said she had. In September, 2004 when K. was taken for her 18 month immunization shot, the public health nurse was alarmed to find K. to be significantly delayed in her development. Though chronologically about 19 months old, she tested at an age level of nine months. The nurse also found K. to be suffering from an acute infestation of head lice.

[18] Mrs. C gave birth to J. on November (*Editor's note- date removed to protect identity*), 2004. The Agency convened a risk conference prior to the baby's

discharge from hospital, and decided to apprehend both J. and K. The risk factors identified included the appellants' consistent refusal to permit unscheduled Agency visits despite court orders; Mr. C's lack of cooperation in treating K.'s head lice during the time that Mrs. C was hospitalized; Mr. C's acknowledgement and other reports that he left Mrs. C unsupervised with K., with the added risk that would present to a newborn; K.'s own serious developmental delays; the appellants' lack of progress with skills development; and the C's inability to eradicate K.'s severe infestation of head lice despite repeated help from Agency personnel and third parties.

[19] The children were apprehended on Friday, November 25, 2004 - K. from her parents' home, J. from the hospital. Police assistance was required as the C's refused to answer the phone or the door. Following the apprehension, K. was examined at the hospital emergency department. Her head lice was found to be so severe as to require her entire head to be shaved. Agency personnel noted K's lack of "separation anxiety" upon being taken from her parents' home, notwithstanding her unfamiliarity with the caseworker or the new environments presented by hospital and foster home.

[20] K. has since been referred to a pediatrician and to Early Intervention, who see her once a week. While she has formed healthy attachments in the foster home, she is still considered developmentally delayed, particularly with her speech. Her brother J. has been meeting his milestones appropriately.

[21] Initial court appearances occurred in early December, 2004. The case was adjourned on consent to December 29, so that a s. 39 hearing for J. and a disposition review hearing for K. could be completed. The Agency sought the temporary care of both children, while the parents sought their return. The two assessors, Messrs. Landry and Bryson testified, as did the case worker, the parties, and two other witnesses for the parents. The court found that J. was a child in need of protection, and that K. continued to be a child in need of protection, and granted temporary care orders in respect of each child. In addition, Justice MacLellan ordered a psychiatric assessment of the parents to be conducted by Dr. Brian Foley; allowed access and services to the parents; and gave certain directions to third parties with respect to the release of information concerning Mr. C. The matter was then adjourned for J.'s 90 day - protection hearing and a further disposition review on K.

[22] When the parties returned to court in February, 2005, the appellants consented to a finding that J. was a child in need of protection pursuant to s. 22 (2)(g) of the **Act**. Temporary care orders were continued and the proceedings were set over with, J's disposition hearing to be consolidated with his sister K's.

[23] Between the taking into care and the final disposition, the appellants had access to their children twice a week, while extensive help was provided through taping sessions, modelling and intervention. Agency personnel also met with the C's outside the access periods to discuss the visits and review the skill sets being taught. Little progress was noted. While the C's seemed compliant, they were unable to demonstrate skills improvement, independent of prompting. The C's were offered counselling (as they had been before the children were taken into care) but this was refused. They did, however, cooperate with Dr. Foley when preparing their psychiatric assessments. Dr. Foley noted that both appellants had cognitive impairment which impacted "on their ability to understand, learn and adapt to the varying needs of children and development however loving and well-intentioned they may be." Neither parent was found to be suffering from a psychiatric illness. Of Mr. C, Dr. Foley wrote:

> He is mentally challenged however he does not have a superimposed mental illness. He is inclined to attribute his difficulties to a variety of sources with a paranoid interpretation, which I feel is in keeping with the mild mental retardation and does not meet the criteria for a psychiatric illness.

Of Mrs. C, Dr. Foley opined:

> She is mildly mentally handicapped and has a history of a significant and difficult to control epileptic disorder. She is on a considerable anti-convulsant medication regiment (sic). At this time she appears somewhat slow, dulled and depressed. She is a poor historian. She attributes the loss of the children to jealousy on behalf of others. Her insight is limited.

Of them both, Dr. Foley wrote:

> The couple were seen jointly and appear loving and caring. They proudly showed photographs of their children; . . .
>
> Their problems they see as stemming from others in that they were picked upon by a variety of people including Children's Aid. . . . They wish to have custody

of the children and are unable to understand why the children were taken into care.

Mr. C has cognitive impairment as does Mrs. C, which impact on their ability to understand, learn and adapt to the varying needs of children and their development however loving and well-intentioned they may be. The details of these difficulties are in the psychological assessments done by both Dr. Landry and Mr. Bryson.

. . .

An area of concern is the increasing suspiciousness and social isolation with increasing reliance on their relationship; exacerbated by estrangement from family support and others and placing more reliance on more recent acquaintances. In this context the setting is right for an increase in the general suspiciousness and paranoid thinking to escalate and maybe tip over into a psychotic break; probably induced by stress, either individually or as a couple in a folie a deux type situation. If this were to occur it would further impinge on their already compromised coping strategies and make for an uncertain outcome.

The prognosis is not good as the information available suggests that despite all efforts at engaging the couple to date has been unsuccessful. This situation is unlikely to change anytime soon as they become more entrenched in their views.

Recommendations:

1. Mrs. C requires further assessment of her mood and treatment for her depressive disorder.

2. Both may benefit from a psychotherapeutic/counselling setting to try to help them understand and deal with their difficulties; not only including the cognitive impairments but also help in navigating the system.

3. They clearly enjoy the visits to the children and these, I think, are opportunities for them to engage appropriately and I think should be maintained if possible. However, the evidence to date may not support this and possibly be counterproductive. In any event, they will need help to deal with issues over the loss.

[24] After Dr. Foley's report was received, a revised Agency Plan of Care was filed with the court on May 11, 2005. The Plan called for the children to be left in the Agency's permanent care and to be placed for adoption as a sibling group.

Family placements were encouraged by Agency personnel, but by the time of the hearing on June 28, 2005 no family member had come forward with an actual plan, or request to be joined in the proceeding, despite being invited to do so by the Agency. The Agency Plan indicated that family placements would none the less be seriously considered if any were forthcoming after disposition.

[25] At the consolidated disposition hearing on June 28, 2005 the court heard evidence from Dr. Foley; Ms. Dyan Degaust, an access worker; Ms. Patricia Bates-MacDonald, the principal agency worker; and both appellants. The hearing resulted in the orders of permanent care without access, from which the present appeal is taken.

[26] The appellants alleged two errors on the part of the trial judge in their notice of appeal. In their factum those two blossomed into ten separate grounds covering a broad spectrum of mistakes in fact or in law ranging from misapprehension of the evidence to faulty application of statutory requirements and legal principle. Essentially the appellants launched a sweeping indictment of the trial judge's conduct of the case and her decision to place the children in the permanent care and custody of the Agency.

Issues

[27] While it is difficult to meaningfully organize the appellants' disparate submissions, their complaints may be more easily addressed if re-bundled as three principal grounds alleging that the trial judge erred:

(i) by failing to properly apply the **Children and Family Services Act**,

(ii) by ignoring or failing to give sufficient weight to evidence supporting the appellants' position, and

(iii) by failing to ensure that the trial proceedings were fair in light of the appellants' own personal circumstances.

[28] Later, in these reasons, at ¶ 82 *infra*, I will deal with a fourth point which I have raised on my own motion:

(iv) adequacy of reasons.

[29] Before addressing each of these submissions I wish to deal with two other complaints that featured prominently in the factum filed by counsel for the appellants.

Allegations of Bias and Incompetence

[30] Counsel for the appellants rather obliquely suggested that the trial judge lacked impartiality and that the appellants' trial counsel had not competently served their interests. As to the former, counsel resiled from her position and withdrew any suggestion of judicial bias when questioned by the panel. However, she did not unequivocally do so with respect to her suggestions of incompetent trial representation. These are very serious charges to level against a judge and a barrister. In his balanced and very able submissions, Mr. Crosby, counsel for the Agency quite properly criticized appellants' counsel for the cavalier manner in which such allegations were made. The panel reminded appellants' counsel that this was not the way to place such a serious matter before the court. There are well known procedures to be used whenever a complainant seeks to invoke appellate review of trial counsel's competence. See generally **GBD v. The Queen** (2000), 143 C.C.C. (3d) 289 (S.C.C.) (at ¶ 23-32), recently applied by this court in **R. v. Missions**, (2005) 232 N.S.R. (2d) 329; **Mallet v. Alberta (Motor Vehicle Accident Claims Act, Administrator),** [2002] A.J. No. 1551; **D.B. v. British Columbia (Director of Child, Family and Community Service),** [2002] B.C.J. No. 253; **Hallatt v. Canada,** [2004] F.C.J. No. 434; and **DW v. White**, [2004] O.J. No. 3441 (C.A.), leave to appeal refused [2004] S.C.C.A. No. 486.

[31] No such steps were taken in this case. Counsel for the appellants acknowledged her familiarity with such procedures but said she "didn't have time" to prepare a proper application or bring forward evidence to support it.

[32] Let me be clear: there is nothing in the record to support any complaint about the competence of trial counsel. I would observe that while counsel is entitled, if not duty bound, to raise every fairly arguable point which supports the clients' position, counsel for the appellants far exceeded the permissible bounds of advocacy in her written and oral submissions on appeal. She made vague and completely unsubstantiated allegations of judicial bias which she at least had the good sense to withdraw when challenged. She persisted in attacks on trial counsel

for which there was no support in the record before the court. So that there is no misunderstanding, those attacks had no foundation in the record and were highly inappropriate.

[33] Before turning to the appellants' other grounds of appeal I wish to briefly address the standard of review in matters such as this.

Standard of Review

[34] This is not the forum where the parties should expect to have their case tried over again. Our role is limited and much different. We review for error. We may only interfere with the decision of a trial judge if he or she erred in law or made a material error in determining the facts. Apprehension cases leading to permanent care and custody orders are inherently exercises in discretion. Such discretion vested in the trial judge permits a balanced evaluation. The principal determination to be made in custody cases is the best interests of the child. We are not in a position to say what we might consider to be the proper result from the evidence. That is the job of the trial judge. It is not our role to undertake our own assessment of the evidence, or second guess the exercise of a trial judge's discretion, or move to substitute our own discretion for that of the judge in first instance. The special advantages a trial judge has in hearing the parties and their witnesses directly, and being able to appreciate the special circumstances or nuances that may arise when applying the relevant statutory considerations, imparts a high level of deference to a trial judge's decision in child custody cases. Because of its fact-based and discretionary nature, trial judges are afforded considerable deference by appellate courts when their custody decisions are under review. **Gordon v. Goertz**, [1996] 2 S.C.R. 27; **Hickey v. Hickey**, [1999] 2 S.C.R. 518; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014; **Children's Aid Society of Halifax v. Ryder & Briand**, 2001 NSCA 99 at ¶ 1; **Nova Scotia (Minister of Community Services) v. J.G.B.** (2002) NSCA 86; **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; and **Hendrickson v. Hendrickson**, [2005] N.S.J. No. 145; 2005 NSCA 67. Absent error in law or palpable and overriding error of fact we must not intervene. While albeit expressed in a quite different factual context, the observations of Chipman, J.A. in **Nova Scotia (Minister of Community Services) v. J.G.B.**, supra, at ¶ 54 are nonetheless apt:

> It is clear to me that Williams, J. did specifically consider his obligations under s. 42(2) of the **Act** and found that less intrusive measures were not an option. The

> evidence which I have reviewed, as well as the entire record, fully supports his conclusion. Having regard particularly to the different sense of time of children and the young ages of these children, the time had come to make the order made by the trial judge and to address the needs of the children.

[35] In argument we were invited by counsel for the appellants to apply a different, more relaxed standard of review in cases where, as here, loving parents see their children apprehended and placed in permanent care. Such an approach would be contrary to law. See **Van de Perre**, supra at ¶ 12, 13 and 14.

Analysis

[36] Recalling these important principles I will now turn to a consideration of the three principal grounds of appeal.

(i) by failing to properly apply the Children and Family Services Act

[37] The appellants complain that there were available less intrusive measures which would have been adequate to protect the children at the time the orders for permanent care were granted, and that Justice MacLellan therefore specifically erred in concluding that the requisites of s. 42 of the **Act** had been satisfied.

[38] I respectfully disagree. Having thoroughly reviewed the record I find that the trial judge paid appropriate attention to the statutory requirements circumscribing the exercise of her discretion, and that she committed no manifest error in concluding that there were no further services that could be implemented by the court or by the Agency to resolve the serious parenting issues with which this family presented, within the permissible time frame, or at all.

[39] By all accounts this is a most unfortunate case. The appellants enjoy a loving and stable relationship. They have not set out to physically or mentally abuse their children. They are not deliberately neglectful of the children's physical needs or physical safety. They do not have substance abuse, or gambling issues. It is undisputed that they love their children.

[40] At the same time however, the appellants are developmentally delayed adults who present significant cognitive deficits that impair their ability to understand and respond appropriately as parents to the burgeoning emotional,

intellectual, safety, health and developmental needs of their (almost) three year old daughter and their infant son. The appellants' situation is further complicated by Mrs. C's epileptic seizure disorder, Mr. C's suspicion of other persons' actions and motives, and the couple's tendency towards mutual dependence upon, but later mistrust of, the Agency, family and friends.

[41] Cumulatively these factors created a socially isolated couple who could not, through their own resources or with the sustained help of the Agency, develop insight into nor overcome their inability to nurture and care for their children, despite two and one-half years of intervention.

[42] Section 42 of the **Act** provides in part:

> **Restriction on removal of child**
>
> **42(2)** The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.
>
> **Placement considerations**
>
> **(3)** Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the childs community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.
>
> **Limitation on clause (1)(f)**

> **(4)** The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

[43] While acknowledging that the trial judge had jurisdiction under s. 42 to make permanent care orders notwithstanding that time was left on the "statutory clock," Mr. & Mrs. C say the prerequisites to the exercise of that jurisdiction were not established on the evidence. Far from being responsive and appropriate to the appellants' needs, they say that the services extended were "meager" and not calculated to effectively communicate with them. The C's allege that the agency was insensitive to their needs and that the professional assessments garnered from the Agency's chosen experts were used to gather evidence against them as being "unfit" to parent, rather than to help identify remedial services. Moreover, the appellants assert that had additional, different services been provided, the disposition outcome would very likely have been different.

[44] I do not accept the appellants' submissions. Justice MacLellan's finding on June 28, 2005 that the appellants' circumstances were unlikely to change "within a reasonably foreseeable time not exceeding the maximum time limits" is amply supported by the record.

[45] All parties acknowledge that this is a very sad, unique and difficult case. Such complexities were not lost on the trial judge. Her decision, as well as her exchanges with counsel during the proceedings make it clear that she was well aware of how the appellants' personal challenges and limited intellectual abilities triggered the Agency's sustained but ultimately unsuccessful efforts to keep this family together.

[46] The trial judge regretfully - but correctly in my opinion - found that there was no reasonable prospect for the appellants' acquiring a sufficiently stable level of nurturing and parenting skills to keep the family together. She accepted the evidence of the psychiatrist, Dr. Brian Foley, that it would take a lifetime of support to allow the appellants to parent effectively. Justice MacLellan observed:

> [16] The *Act* does not anticipate a five or ten year involvement as outlined by the worker or a lifetime until the children are 18 as involved (sic) by Doctor Foley, that's why we have the time periods so that the children will be able to move on and form attachments that will allow (sic) **King v. Lowe** onus to be met so that they can reach their full potential.
>
> . . .
>
> [18] In any event and it is certainly with regret, I find that the efforts by the agency – not that I regret the agency's efforts but their efforts have been most appropriate and creative and responsive to the needs. They have been unsuccessful because of cognitive challenges by the respondents. I find that there are no other services that could be implemented and utilized to effect the serious problems we have.

[47] In these unfortunate circumstances no purpose could be served by postponing the inevitable permanent care orders pending delivery of additional, predictably futile, services. Indeed, as the trial judge pointed out, further delay would only harm the children's best interests in the circumstances.

> [11] I've reviewed the number of services put in which I found to be responsive and appropriate. Mr. Stanwick would say we should put more services and we should wait for a longer passage of time. The passage of time does not meet the children's *best interest* or their sense of time. We are to make determinations when the permanent care onus is satisfied on the evidence, not when we are against a deadline. Particularly where the child K. is learning to form attachments.
>
> [Italics for emphasis in original]

[48] The trial judge had before her several detailed Agency plans reciting the history of the Agency's involvement with the parents, the past and present circumstances of the children, and the catalogue of services that had been implemented and/or offered by the Agency in their efforts to precisely identify and respond to the appellants' particular parenting challenges. These services included:

- Parenting Capacity assessment by Dr. Reginald Landry (May - November 2003)
- Parental Capacity Assessment (Mr. C only) by Michael Bryson (November 2004)
- Psychiatric Evaluation by Dr. Brian Foley (March 2005)
- Parent Aid & Family Support Service (weekly visits)
- Agency Parenting Program
- Liaison with Public Health Services
- Third Party Care Service to eradicate the head lice
- Access facilitation
- Family Place Resource Centre programs - refused or no follow-through by parents
- Voluntary psychiatric services - refused
- Counseling services - refused (both before and after children taken into care)
- Daycare (for K.) - parents opposed; discussion ultimately thwarted by family's lice problem
- All-Kids Early Intervention (for K.) - thwarted by lice

[49] The purpose of the **Children and Family Services Act** is to protect children from harm, promote the integrity of the family, and ensure the best interests of children. The **Act** acknowledges the importance of family and requires the court to consider the least intrusive option that is available in the circumstances, but always keeping in mind the paramount consideration when applying the **Act**, that is ensuring the best interests of children.

[50] I am not at all persuaded that the trial judge erred in her understanding of the statutory requirements, nor in applying the legislation to the evidence before her. On the contrary, there was ample evidence to support Justice MacLellan's conclusion that throughout the two and one-half years of Agency involvement with this couple, both before and after apprehension, the Agency tried to intervene with the family in an effective and constructive way. Mr. & Mrs. C were told

repeatedly what they had to do. Despite these sustained and appropriate interventions, the problems which flowed from the appellants' constellation of challenges were simply insurmountable within any reasonably foreseeable time frame. Despite best efforts by Agency personnel the trial judge was satisfied that there had been little recognition of such problems, little acceptance of responsibility, and little demonstrable change in the ability of the appellants to parent. I see no error in the judge's finding and would dismiss the several complaints which fall into this ground of appeal.

(ii) by ignoring or failing to give sufficient weight to evidence supporting the appellants' position

[51] Here the thrust of the appellants' complaints is that the trial judge erred in failing to take appropriate action or give appropriate directions in light of the evidence and expert opinions of Reginald Landry, Ph.D.; by accepting the evidence of Ms. Patricia Bates-MacDonald, the social worker responsible for the appellants' file "even in areas where she had no expertise" (as expressed in the appellants' factum); and ignoring the positive elements while "selectively choosing only the negative elements" of the assessors' reports. Much of what I have said already in responding to the first principal ground of appeal, would apply under this head of complaint as well. In my respectful view there is no merit to the appellants' submissions.

[52] The cognitive deficits and intellectual challenges faced by both Mr. & Mrs. C were not the reasons for the judge's disposition. Many people facing similar challenges are excellent parents, by any standard. Here, regrettably, and notwithstanding very considerable and sustained professional efforts, the appellants were unable to improve upon their demonstrably poor skills at parenting, such that there was no basis for hoping K. and J. would receive adequate nurturing and stimulation to protect them from harm and ensure their own social and personal development.

[53] A careful reading of the entire record makes it clear that the appellants were unable to understand the Agency's child protection concerns. In the face of their own suspicions Mr. & Mrs. C withdrew from virtually everyone who tried to help.

And those whom they were prepared to approach - such as the MacKinnon brothers - were really in no position to act as reliable social support for this family, given their own circumstances.

[54] A review of the successive assessments illustrates the Agency's efforts to identify and deliver relevant assistance to the appellants to help them break down the barriers to their effective parenting. As Mr. C's paranoia progressed into what the Agency perceived to be irrationality, its officials sought explanations that might yield something "treatable," such as his rumoured head injury. In the face of "accounts" that J. had suffered such an injury - which stories appeared to emanate from Mr. C's own father, among others - the Agency was obliged to look into it, especially when Mr. C refused to either confirm or deny such reports. Later, after discounting the rumour, Agency assessors nonetheless concurred that Mr. C's mistrust of persons, and his hostility towards things which did not match with his own particular world view, was rooted in his cognitive impairment, and was highly resistant to change. Dr. Brian Foley, whose evidence the judge accepted, did not think that change was likely "anytime soon."

[55] The judge did not err in preferring the evidence of Dr. Foley as being more accurate and timely than that of Michael Bryson or Reginald Landry. Justice MacLellan found that the Bryson report did not accurately reflect the circumstances of the family at the time of the disposition hearing, and expressed some doubt as to whether it was accurate at the time it was written. One will recall Mr.Bryson opining that Mr. C had "the skills necessary to provide for his daughter's basic needs" and that K. was "thriving" with indications from "collaterals" that the little girl was "walking . . . about the apartment . . .". Justice MacLellan rejected that opinion declaring:

> [5] That report is dated November 15, 2004. I find on the totality of the evidence, particularly the evidence today that the report is not accurate, either it is not accurate at the time or it is not accurate today. Today we have a virtually socially isolated family and the worker has already indicated that there was flaws in relation to the level of K.'s thriving throughout and some of those delays continue today.

[56] Similarly, though the trial judge accepted Dr. Landry's observations as being "representative of that time," the circumstances of the family had demonstrably changed, in that the appellants no longer lived with, nor enjoyed the support of their extended family. Dr. Landry himself acknowledged the change in his December, 2004 testimony:

> Q. Can the parents live independently based on your observations?
>
> A. That would be sort of a difficult judgment to make since I hadn't assessed them when they were living independently without support from their families.

[57] While, it is true, the appellants could point to their contact with Ms. MacLean, a family support worker who met with them frequently, as being an example of effective communication and support, there is no evidence to suggest that had this kind of resource been more widely available to the appellants, they would have made greater strides towards independent parenting. To the contrary, while Ms. MacLean evidently enjoyed a good and constructive relationship with the appellants, the evidence was that her involvement made very little concrete difference to the appellants' parenting skills. As Ms. Bates-MacDonald testified in December 2004:

> ... with the family support worker going in once a week ... when you look through her notes she is really going over the same thing every single week ... and we are not seeing a whole lot of movement on putting that information into action by the parents. ... they do try they really do but a lot of it such as the stimulation, talking to her, letting her explore her environment, not having such a dark environment, getting her out of the crib, there is not a whole lot of movement on those issues ... maybe even equal to the issue that Mrs. C cannot be left alone ...

[58] It was certainly open to counsel representing the appellants at trial to subpoena Ms. Michelle MacLean as a witness. However, a decision not to call Ms. MacLean (by either side) may well have been prompted by the evidence that her positive relationship with the appellants might have deteriorated, had she been called as a witness in these proceedings. No inference ought to be drawn from the fact that Ms. MacLean did not testify.

[59] Consequently there was ample evidence before the trial judge, which she accepted, that the absence of nurturing and stimulation in K.'s life prior to her coming into care, had already contributed to her compromised development. At almost two years she did not walk independently. She resorted to head-banging when frustrated. Her speech was delayed. She had difficulty forming attachments, and showed little grief or anxiety at being removed from her parents.

[60] After living in the foster home for a few weeks, the change was remarkable. K. learned to walk. The head-banging was reduced or eliminated, and she started to show attachment to her foster parents. Testifying in December, 2004 both appellants agreed that they were pleasantly surprised to see K. walking without holding on to anything.

[61] While K. showed marked improvement after being removed from her parents' environment, there was no evidence before the trial judge that the C's had developed any greater capacity to provide nurturing and stimulation to their daughter in their environment, six months later. Against this evidence it was open to the trial judge to find, as she did, that the appellants' inability to meaningful engage with their children by providing nurturing and stimulation, would compromise "the safety of K. and would affect J. if he was returned to his parent's care."

[62] At the hearing counsel for the appellants emphasized that there was no evidence of any head injury or psychiatric illness suffered by Mr. C. While that is true, neither played any role in the trial judge's determination to place the children in the permanent care of the Agency.

[63] In deciding that the best interests of these two children could only be secured by ordering them into permanent care with plans for adoption, Justice MacLellan paid appropriate heed to the goals and principles embodied in the **Act**, and in particular properly considered the restrictions on her discretion as provided in s. 42.

[64] Finally, it is simply wrong for appellants' counsel to allege - as she does in her factum - that:

> 49. Family members came forward to the agency with a plan to adopt the children. This offer was ignored by the agency.

The evidence, including the testimony of the C's themselves, overwhelming supports the trial judge's findings that past services had had little effect on ensuring the protection of these two young children, and that there were no additional services that would adequately protect them from further risk or harm.

> [6] I look at the evidence today. . . . Doctor Foley advised that it would take a life time of support that is not there now if we were able to allow these parents to parent effectively. The difficulty is as put forward and as accepted on the evidence, and that's from hearing from the C's themselves. There is no problem with identification. To this day they don't know why the children are in care.
>
> . . .
>
> [15] The services that have been implemented have had minimum success over a two year period. The services have been appropriate.
>
> . . .
>
> [18] . . . I find that there are no other services that could be implemented and utilized to effect the serious problems we have.

[65] The fact is that the trial judge examined the possibility of extended family placements, and accepted the evidence of Ms. Bates-MacDonald that family members who had come forward initially to express interest, had been given appropriate information, and had been invited to offer a Plan and/or be joined in the proceeding. The Agency's only caveat was that any proposed Plan include both K. and J. Moreover, Mrs. C testified that several relatives who had at one point thought of offering to look after the children, had since reconsidered and Ms.

Bates-MacDonald testified that Mr. C's mother had been asked if she would be a possible placement, but had declined.

[66] The appellants complain that Ms. Bates-MacDonald testified as to subjects for which she had no stated expertise and that the trial judge erred in failing to either ensure that Ms. Bates-MacDonald was properly qualified or in relying upon her "expert opinions" in any event. I see no merit to this complaint. Ms. Bates-MacDonald used the phrase "separation anxiety" or more accurately the lack thereof, when describing her observations of K. during times when her parents visited her after apprehension while she was in the environment of the foster home. It's important to look at such comments in context. Ms. Bates-MacDonald testified:

> A. When we took her to the foster home she was still ... when she would stand she would hold on to things, but two or three days after he (sic) coming into the foster home she started walking independently. When the parents had a visit with her about a week and a half after she came into care, they were really surprised to see that she was walking independently, pleased and very surprised ... We've been taping the interviews just to see if there is anything else we could help the parents with, so they were just very surprised, very you know pleased but very happy that she was walking on her own now. I was concerned ...we were concerned about the lack of separation and anxiety. When she goes to the visits, it is not that, you know the parents, they are caring with her...they are careful with her, but there just doesn't seem to be an attachment there that she doesn't look to go to them when she goes into the visit and when they leave, or when she leaves she doesn't cry. ... so we were very concerned whether she could form attachments and whether this had a medical basis or if this was just a social basis. Dr. Lynk didn't go (sic) any testing right away when he saw her on ... she was actually addressed by a resident doctor and by Dr. Lynk...what changes would be brought about just by her environment within a month period and then he would be testing, but since then K. does seem to be ...she is forming attachment with the access worker when the access worker leaves her or goes she cries and so those things are looking up, that's not a medical basis. I don't know how much weight to attribute to that, but it was a concern of ours because a lot of problems we have in child in care later on are attachment based, so it was a concern when she came into care that there was no separation anxiety and seemingly the level of attachment, but in the visits there is very little interaction, very little hands-on so I am not sure what role that plays in that, but ...

> Q. Dr. Lynk saw K. on November 29th ..
>
> A. December 29th ...I am sorry November 29th yes, and he's going to see her again the second week of January. [Underlining mine]

[67] I do not take Ms. Bates-MacDonald's use of the words "separation and anxiety" or "separation anxiety" to connote terms of art or recognized diagnoses of behaviors known only to medical science, but rather simply an attempt to employ standard adjectives, in everyday parlance, to get across the idea that initially K. did not display any discomfort in seeing her parents leave while being left in the company of strangers. Such an observation strikes me as being highly significant and one you would expect a professionally trained social worker, like Ms. Bates-MacDonald to report. I see no need to qualify Ms. Bates-MacDonald as an expert before she would be entitled to use such words when testifying as to what she observed. In any event, there was no objection taken to Ms. Bates-MacDonald's evidence, nor do I see any error on the part of the trial judge in receiving it.

[68] It is important to recall that Ms. Bates-MacDonald testified, and the Agency Plan confirmed, that serious consideration will be given to any family adoption proposal that is advanced.

[69] Finally, appellants' counsel was critical of the manner in which Ms. Bates-MacDonald handled the appellants' file, implying that her own maternity leave interrupted appropriate supervision of the file, or that in any event the Agency's approach was "insensitive," "negligent," closed-minded, amateurish, and ill-advised. On the contrary, my review of the record satisfies me that Ms. Bates-MacDonald was very familiar with this file and the assortment of interventions by a variety of caseworkers, family members or experts who had dealings with the appellants, or acted as their intermediaries. She and her colleagues appear to have worked very hard to try and resolve this vexing and unfortunate case. To conclude on this point, the appellants' allegation that family placements were "ignored" by an "insensitive" or "negligent" Agency finds no support whatsoever in the evidence.

[70] The unique circumstance of this case presented the trial judge with a very difficult decision. There was no evidence to support a concern that the appellants would deliberately harm their children or intentionally place them at risk. On the contrary the evidence is that Mr. & Mrs. C love K. and J. From their perspective they do not "deserve" having their children taken away and placed for adoption. However, the Legislature has determined that in cases such as these the paramount consideration is the best interests of the children. That is the over-arching focus and will always trump the wishes and interests of the parents. See for example **Nova Scotia (Minister of Community Services) v. K.A.B.S.** [1999] N.S.J. No. 216 at ¶ 73; and **Children's Aid Society of Halifax v. T.A.**, [2004] N.S.J. No. 27, at ¶ 46. I would therefore dismiss this second ground of appeal, and will turn my attention to the appellants' third principal complaint.

(*iii) by failing to ensure that the trial proceedings were fair in light of the appellants' own personal circumstances*

[71] Here the thrust of the appellants' various submissions is that the trial judge failed to satisfy herself that the appellants understood the process in which they found themselves, or to carefully verify what had been communicated to them concerning steps they had to take to enhance their parenting skills or risk losing their children.

[72] When pressed by the panel for specifics, counsel for the appellants could not point to any persuasive examples in the record that established (as alleged) "with certainty that the C.'s did not understand what was happening in court."

[73] Much of what could be said in responding to that submission has already been explained in my reasons. See for example ¶ 51 - 56 supra.

[74] A careful reading of the trial judge's decision, as well as her exchanges with counsel on the record, make it clear that she was alive to the appellants' special needs and took appropriate steps to satisfy herself that they understood the court

proceedings to which they had been subjected, and that their trial counsel, family members, Agency personnel and experts retained on the file had all taken pains to communicate with Mr. & Mrs. C in a meaningful and effective way. Simply to illustrate, while it had been suggested that Mr. C balked at the idea of letting Agency workers into his home during unannounced visits because they had not "called ahead," he admitted under direct examination when testifying in December, 2004 to fully understanding that there had been a court order in place for months which permitted the Agency to go into his home without any notice and without scheduling ahead. Mr. C said he understood those specific directives and admitted "what I did was wrong."

[75] At all events I am not persuaded Justice MacLellan or trial counsel failed in their respective, and quite distinct, obligations towards the appellants. There is no merit to the complaint that the judge failed to ensure the trial proceedings were fair in light of the appellants' own personal circumstances.

(iv) Sufficiency of Reasons

[76] While the appellants do not complain explicitly about the adequacy of the trial judge's reasons, I do wish to add a few brief comments intended to be helpful in future cases of this type.

[77] In the case on appeal it would have been useful to know - without having to probe the record in detail - which provisions of the **Act** were triggered and how the judge came to consider them in the exercise of her judicial discretion. Similarly, it would have been easier to follow the judge's analysis, had there been a separate section presenting her overall view of the Agency's evidence, and plan, as well as her reasons for accepting those recommendations, especially had such portions of the judge's decision been kept separate and apart from her references to the appellants and her impressions of their evidence, their needs and failure to present a plan.

[78] Rather than simply expressing an "acceptance" of Ms. Bates-MacDonald's evidence and the Agency's plan followed by "I am going to place both children in permanent care" it would have been far more useful to the litigants in understanding the outcome, had the judge referred to specific features of the Agency's work as well as details of the plan itself to show why she was driven to accept the Agency's proposal as being in the best interests of these two children.

[79] It would have been useful for the trial judge to have commented upon the report (undated) and series of recommendations of Dr. Reginald Landry which were filed with the court at the hearing on December 29, 2004. Having stated that she would "incorporate (sic) his comments as appropriate at the" (time?) "that they were given" the judge does not comment upon them again except to say that "I've accepted the portions as they were given from Dr. Landry as representative of that time." It would also have been helpful had the trial judge gone on to explain why she thought those recommendations identified in December, 2004 would no longer prove to be appropriate or responsive to the needs of the family six months later, beyond simply stating her conclusion "I find that there are no other services that could be implemented and utilized to effect the serious problems we have."

[80] The reach of the Court's judgment in **R. v. Sheppard**, [2002] 1 S.C.R. 869, written in the context of a s. 686(1)(a) appeal against conviction has been dramatic. Any quick search will turn up a host of cases where the Court's directives have been applied or considered in a variety of legal domains. These include matters pertaining to divorce, custody, tax, probate, immigration, personal injury, wrongful dismissal, contractor's negligence and fiduciary obligations. As **Sheppard** makes clear, the requirement for reasons in any particular case is tied to their purpose and the purpose varies with the context. Our role as an appellate court is to decide the correctness of the trial decision. In doing that we apply a functional and pragmatic test which requires that the trial judge's reasons be adequate for that purpose. We, sitting on appeal, are in the best position to make that determination. **Sheppard**, supra, at ¶ 24 and 28.

[81] While the reasons in this case in no way failed the functional test, a different format would have led to a better understanding of the judge's analysis and its connection to the statutory framework under consideration.

[82] In the matter before us, when crafting and articulating the decision, it would have been more helpful to present: the issues, material evidence, facts as determined by the judge, application of the statutory requirements, analysis which led to the disposition, and a brief summary of the outcome, using a template or outline. By *template* I do not mean simple boilerplate or something so generic as to render the analysis meaningless. That would amount to nothing more than a rehash of conclusory points without the requisite explanation of fact finding and analysis which led to the judge's conclusions.

[83] What I do mean is an outline to guide the reader in understanding the evidentiary and statutory basis for the judge's decision, the reason why (if applicable) contradictory evidence was preferred or rejected, the legal principles which the judge applied when considering the evidence, and the resulting analysis which led to the decision-maker's conclusions.

[84] Use of headings and subheadings are often very effective and ought to be encouraged. Beginning with an introductory précis of what the case is all about; followed by a quick but informative summary of the background; then a review of the material evidence leading to a succinct explanation of the factual findings and inferences that resulted, together with an explanation of the acceptance or rejection of any significant contradictory evidence; an identification of the particular statutory requirements or jurisprudential principles that are engaged; a meaningful application of those principles and legislative provisions to the evidence so that in this segment the legal analysis will be apparent; and then leading to a conclusion which states the relief, remedy or disposition as the case may be.

[85] Such methodology would greatly assist appellate review, rather than oblige this court to plumb the depths of the trial record in order to discern the judge's rationale. The kind of approach I have described, while not lengthening the judgment appreciably, would provide clarity to the judge's reasoning and offer

much greater insight to the pathway through which those reasons led to the judge's conclusions.

[86] It would seem to me that cases under the **Children and Family Services Act** would be especially well suited to such a systematic approach in organizing and articulating reasons for judgment.

[87] These suggestions are no way intended to hamper the very personal qualities which mark a judge's often very difficult task of rendering judgment. Such individual styles, when used effectively, are to be commended. Rather, these observations are intended to offer assistance to those engaged in the often exacting process of judgment writing, as a way to improve the ease with which reasons for judgment may be expressed and understood. See for example **R. v. Braich**, [2002] 1 S.C.R. 903.

Conclusion

[88] Sadly - but certainly justified on this record - the trial judge found that the appellants lacked the capacity to change their approach to parenting or to understand why change was so vitally needed. As a result, Agency and family efforts at intervention - with few exceptions - were met with resistance, suspicion, and sometimes open hostility. In the absence of evidence showing any prospect that the parenting deficiencies which had already resulted in developmental harm to K., and created a risk of harm for J., could be remediated within the time limits, or at all, I see no error in the trial judge's conclusion that she had no alternative but to order the children into the permanent care of the Agency pursuant to s. 46(6) of the **Act**.

[89] Finally, I agree with the trial judge's conclusion that because adoption is a realistic plan for these two children, parental access ought to be denied. Obviously the very recent amendments to the **Act,** proclaimed in force on November 30, 2005 were not before the court.

[90] I would dismiss the appeal.

Saunders, J.A.

Concurring reasons for judgment:

[91] I agree with my colleague Saunders, J.A. for the reasons which he gives at paragraphs 1 - 75 and 88 to 90 that the appeal must be dismissed. However, I do not think it necessary or desirable to address the other matters discussed in his reasons as they were not raised as grounds of appeal or argued before us and they have no bearing on the disposition of the appeal.

Cromwell, J.A.

Concurred in:

Oland, J.A.