DOCKET: FKCFSA-054192

IN THE FAMILY COURT OF NOVA SCOTIA

Cite: Family & Children's Services of Kings County v. M.J.B., 2008 NSFC 12

BETWEEN:

FAMILY AND CHILDREN'S SERVICES OF KINGS COUNTY

-APPLICANT

AND

M. J. B. AND K. B.

-RESPONDENTS

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATE HEARD: APRIL 8, 2008

DATE OF DECISION: APRIL 22, 2008

APPEARANCES:

D. B. MACMILLAN FOR THE APPLICANT
PETER van FEGGELEN FOR THE RESPONDENT K. B.
SHARON COCHRANE FOR THE RESPONDENT M. J. B.
AND
ANITA HUDAK AS COUNSEL FOR THE CHILD D. B. WHO WAS NOT A PARTY

DECISION

By the Court:

1. This is the decision on a disposition hearing pursuant to section 42 (1) of the **Children and Family Services Act** (the Act). It replaces an interim decision previously issued which was made available to counsel earlier to enable them to prepare for an expected appeal, (a date having already been set for the hearing of an appeal on the protection finding). There are no changes of consequence in the reasoning or the result from the interim decision. What has been added is an *obiter dicta*.

2. The result is that the female child D. B., born November *, 1995, (* *editorial note- date removed to protect identity*) will be placed in the permanent care and custody of the Applicant agency, subject to the Respondents having a right of access to the child as determined from time to time by the agency having regard to the best interests of the child.

3. On January 24, 2008, after a three day hearing, the child was found to be in need of protective services. Specifically the findings as to the Respondent M.J.B., the child's mother, were under sections 22 (2) (a), (b), (c) and (d) of the Act. The finding as to the Respondent K.B., the child's father, separated from M.J.B. since 2004, was under section 22 (2) (d). The protection findings are under appeal.

4. Between them, the Respondents have three children, all girls. They are currently aged 22, 16, and 12. The oldest is the daughter of M.J.B., (K. B.'s step daughter), the younger two are the natural children of the Respondents. All three children were the subject of protection proceedings under the Act in 2000-2001 as a result of information that K.B. had engaged in some sort of sexual abuse of his

step daughter. Charges were laid but he was acquitted.

5. Ms. B. had reported, in relation to that same event or not I'm not sure, that she had witnessed Mr. B. emerge from the step daughter's bedroom with a visible erection. She has since then vacillated between saying that nothing happened or, according to agent Jennifer Davidson, (exhibit #2 of October 31, 2007 hearing, paragraph 35), that 'something may have happened but not to the extent that (the step daughter) said it did'. She is also reported to have said, (also paragraph 35), that the middle daughter, date of birth March *, 1992 (**editorial note- date removed to protect identity*), "...keeps her distance (from Mr. B., her father) because of what (the step daughter) did to Daddy." (Emphasis added)

6. Even though Mr. B. was acquitted, the agency took the position that he posed a risk to his daughters and step daughter and it insisted that he seek therapeutic help to eliminate/minimize the risk. He did enrol in a sexual offender treatment regime, (and was allowed to do so even though he had been acquitted of abuse), and attended faithfully over several years. In sessions with Dr. Boutilier, psychiatrist, the clinician, he made various admissions to her. She testified on January 22, 2008 that he told her, "I was acquitted but I did it", that he had indeed molested the step daughter on more than one occasion, that he acknowledged an interest in young children and forced sexual activity, that he was attracted to young girls and that he had sought out sex with teenage prostitutes.

7. By consent order dated October 11, 2001, (Exhibit #8 in January, 2008 proceedings), the agency's application was dismissed, based on an attached and

signed “Memorandum of Understanding” containing the following provisions:

> *1. (K.B.) shall continue counselling with Dr. Joan Boutlier and reside outside the home of the children...while following through with Dr. Boutilier’s recommendations and supplemental counselling where directed by her;*
> *2. (K.B.) shall not have overnight access to the children named in this proceeding nor shall he spend overnights at the residence of the children, whether they are present or not, until either circumstances otherwise approved by Dr. Joan Boutilier, (*sic*);*
> *3. Until such time as Dr. Boutilier is of the opinion that the children named in this proceeding are not at risk by unsupervised access to them by (K.B.), (M.J.B.) shall supervise all contact (K.B.) has with the children;*
> *4. It is understood and agreed by all parties that Dr. Boutilier shall forthwith report any breaches of the terms set out above and/or deterioration in (K.B.’s) status.*

8. Dr. Boutilier left the program in 2003 still feeling that Mr. B. presented “risks”. Thereafter Mr. B. continued with a “sex offender treatment program” for a time and then stopped attending. Ms. Reid, a probation officer and a program facilitator, understood that Mr. B. had been transferred out of province and concluded therefore that he would not present a risk to his daughters or step daughter. It turns out that he had not been transferred, and when she found out in early 2007 that he had been seen at the residence occupied by Ms. B. and the girls, she reported this to the Annapolis agency, (the family home was then in Annapolis County).

9. As there was still a concern about the risk he might pose to his daughters he was referred to a program to see if he might re-enrol in a treatment/counselling program. When he was being interviewed with a view to determining his suitability

for re-admission he denied ever having abused his step-daughter or that he had a sexual deviancy and he stated that all of his supposed confessions were fabrications made in order to be allowed to remain in the program. He said he did so, and he repeated this on the stand, solely because the agency had made his attendance mandatory as a condition of his being allowed to see his children, and, he said, that unless he confessed, and kept confessing, to having a problem, the program personnel would not let him continue in it.

10. Given Mr. B.'s position, it was determined that he would not be an appropriate candidate for re-admission to the program. Arrangements were then made to have a neighbour commence supervising his access as Ms. B. was then denying that anything untoward had happened or that any precautions were necessary and it was determined that she could not therefore be a safe supervisor.

11. In 2007 meanwhile there were serious problems revealed in the parenting being provided by Ms. B. to the then two remaining girls in her care. (The oldest, the step daughter, by then had moved out west with an aunt, Ms. B.'s sister.) In brief Ms. B. was cohabiting with a gentleman and his teenage son, the latter being, by all accounts, incorrigible, and involved in numerous and serious criminal offences. There was an allegation that he had encouraged the then 10 year youngest daughter, D.B., the subject of this decision, to engage in sexual touching.

12. In addition this boy had been allowed, apparently even encouraged, to have sexual relations with the second oldest daughter. That child even reported to her mother that he had raped her. It is abundantly clear from the evidence, which I will

not review in detail here, that far from shielding her daughter from this boy's predatory and violent behaviour she actively conspired to allow it to continue. For example, she took her and D.B. to visit him in the Waterville Youth Centre and even offered him a home with her and the girls on his release. The middle daughter eventually became pregnant, at age 15, with his child, and she has since had the child in January, 2008.

13. This proceeding was commenced in late July, 2007. The agency's position throughout as to the father has been that his teenage daughters would be at risk of sexual abuse were they in his care or even if he had unsupervised access. Equally, given his recantation and his claim of having manipulated the previous treatment program, and given that access to the sexual offender treatment program would not be an option, the agency took the position that there was no 'service' it could provide to him.

14. In the case of the mother, the agency simply recites the litany of abhorrent choices she has made with respect to the welfare of her children, not only with Mr. B. and her latest partner, and her apparent inability or unwillingness to shield them from sexual abuse or exploitation. She as well has not been offered any 'services' this time around, the agency noting her belief or ostensible belief that her actions or inactions were justified and that there are no problems requiring attention, and noting that a whole gamut of services provided to her in 2000 and 2001 were obviously without effect.

15. In the fall of 2007, the middle daughter, then seven months pregnant, elected

to go live with her aunt in Saskatchewan, the same one who took in the oldest girl. Her wish was consented to by all parties and an order was granted under the **Maintenance and Custody Act** placing her in the aunt's custody. At the same time the agency withdrew its application as to her, leaving just the youngest child as the subject of this proceeding.

16. Ms. B., citing housing difficulties, has not sought to have the child returned to her care. As of the disposition hearing date she continued to live with the mother of her ex-partner (who passed away last fall) and, from time to time, his incorrigible son. She backs Mr. B. in his wish to have the child reside with him and I gather that it is contemplated that she will be available to be at home with the child when he is at work.

17. Having had her testify twice now, I am left with no confidence whatsoever in her credibility or judgement. It seems that she is not merely oblivious to the welfare of her children, but has consciously made decisions that would put them at risk and, as inconceivable as it may seem, was even willingly complicit in the sexual exploitation of the middle child by the son of her ex-partner and unmoved by reports of his abuse of the then 10 year old D.B.. It was a gross dereliction of her duty to her children and there was little in the evidence or in her demeanour to suggest that she could, or would even necessarily be inclined to, protect them from abuse in the future.

18. The prospect of D.B. living with Mr. B., who lives alone, is hardly more comforting. At this point it is hard to know what, if anything, Mr. B. may have

done with his stepchild. He certainly made specific and graphic admissions to the personnel of the sexual offender treatment program and I am not prepared to discount them just because he now says his statements were fabrications. There is no basis for a belief that he now represents less of a risk and no basis to have any confidence in anything he says. One hardly needs expert evidence to draw the conclusion, as I do, that D. B. would be at "substantial risk" were she placed in his care.

19. Counsel for the Respondents argued vigourously that the agency had offered the Respondents no 'services', that therefore the agency had not discharged its statutory duty, that the matter should therefore be adjourned so that 'services' can be provided, and that there was plenty of time left on the clock for this to happen. Nothing particularly concrete in terms of what services they had in mind other than vague references to 'counselling' or some form of in-home parenting programs was offered. The problems presented by the Respondents were not broad based, rather they were specific as to the potential for abuse and/or the inability or unwillingness of Ms. B. to protect her children from abuse. There is certainly no obligation on this or any agency to offer services without some reasonable basis to conclude that they would be of benefit. I find that there is and was no reasonable basis to believe that any 'service' that could be provided for either Respondent would not be an utter waste of time and money.

20. There is also no reasonable prospect, given the mindset of the Respondents, that, with or without 'services', they will ever be able to erase their liabilities or reduce the risk they pose, let alone within the time limits imposed by the Act.

There is nothing to be gained by ‘running out the clock’. There is no alternative family placement, (D.B., being 12 years old, is adamant that she does not want to go with the aunt in Saskatchewan and no other family placement has been advanced or is apparent). There is therefore no alternative but to order that the child be placed in the permanent care and custody of the Applicant and it will be so ordered.

ACCESS

21. The agency indicated that it has no plans for this child to be placed for adoption. The child has made it repeatedly clear through her counsel that she will not agree to being adopted and her consent is necessary, s. 74(1) of the Act, for an adoption to be granted. The agency plans a “permanent placement” (foster home) by which is understood a ‘long term’ as opposed to a ‘short term or temporary’ foster home placement.

22. The child has also made it repeatedly clear, and the agency accepts this, that she misses her parents and wants continued contact with them. Thus, the agency’s plan includes court-ordered access between D.B. and her parents on terms and conditions agreed to by the agency. The agency accepts that if the access is monitored to protect D.B., and to assure that contact continues to be beneficial for her, that access would be justified. With the exception of once early on when M.J.B. was being a little too graphic in her accounts of her recent injuries in a car accident for the taste of the facilitator, there have been no reports of problems associated with the supervised access that there has taken place since this

proceeding commenced.

23. Counsel for the Respondents haven't said they agreed with this. In fact it was made clear that whatever was ordered would be appealed. That said, if this decision or the protection decision is not overturned on appeal, one assumes that they will be grateful for at least the opportunity for contact with their daughter.

24. There will be an order for access between the Respondents and D.B.. The Respondents, with all of their limitations, are obviously important to D.B.. She has suffered greatly through no fault of her own by the implosion of her family. That is a lot for any child to experience. She is 12 years old and entitled to have her voice heard. I believe that all the circumstances, in particular the child's wishes, there being no plan for adoption, the agreement of the agency, the past positive experience of access and the fact that access will be monitored by the agency to assure that it remains in the child's best interests, amount, cumulatively to the "special circumstances" justifying court-ordered access per s. 47(2)(d) of the Act. More to the point, as she is 12 years old and desirous of this contact, that is a specific ground, (47(2)(b)), to enable an access order to be granted even though a 'permanent placement' is the plan, as, for that matter is the fact that any placement will not include an adoption, (ss. (c) of 47(2)).

OBITER DICTA

25. If a judge, on the brink of retirement, cannot seek a little indulgence for ever so respectfully tilting at the odd windmill, then it is a hard world indeed.

26. The question is: May a judge, having just placed a child in the permanent care and custody of an agency, consider and order that there be access between parent and child even if there is an agency plan that the child be imminently placed for adoption? What role, if any, is there for an application of the principle of the 'best interests of the child' in that decision? Is a consideration of best interests inherent in s. 47(2)(d)?

27. In "all matters and proceedings" under the Act the best interests of the child is "paramount". A court must therefore be free, no matter what, to determine and give effect to that child's best interests even if that might mean ordering parental access when the agency plan includes an adoption or a 'permanent placement'. Not everyone sees it that way. The root of any uncertainty is the wording of s. 47(2), which in the words of Justice Bateman in **Children's Aid Society and Family Services of Colchester County v. E.Z and J.M.** 2007 NSCA 99, "...cries out for legislative clarification".

28. The relevant sections of the Act, with the 2005 amendments in bold faced type, are as follows:

Purpose
2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
Paramount consideration
(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. *1990, c. 5, s. 2.*

Best interests of child
(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:

(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
(b) the child's relationships with relatives;
(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
(d) the bonding that exists between the child and the child's parent or guardian;
(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
(f) the child's physical, mental and emotional level of development;
(g) the child's cultural, racial and linguistic heritage;
(h) the religious faith, if any, in which the child is being raised;
(I) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
(j) the child's views and wishes, if they can be reasonably ascertained;
(k) the effect on the child of delay in the disposition of the case;
(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
(n) any other relevant circumstances. (Emphasis added)

Disposition order
42 (1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:
(a) dismiss the matter;
(b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the agency, for a specified period, in accordance with Section 43;
© the child shall remain in or be placed in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency, for a specified period, in accordance with Section 43;
(d) the child shall be placed in the temporary care and custody of the agency for a specified period, in accordance with Sections 44 and 45;
(e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d) for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or © for a specified period, in accordance with Sections 43 to 45;

(f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.
(Emphasis added)

Order for access
47 (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
(a) permanent placement in a family setting has not been planned or is not possible and the persons access will not impair the child's future opportunities for such placement;
(b) the child is at least twelve years of age and wishes to maintain contact with that person;
© the child has been or will be placed with a person who does not wish to adopt the child; or
(d) some other special circumstance justifies making an order for access.

Variation or termination of order
(3) Any access ordered pursuant to subsection (2) may be varied or terminated in accordance with Section 48.

47 (8) At least thirty days prior to consenting to an order for adoption, the Minister shall inform any person who has been granted an order for access under subsection (2) of the Minister's intention to consent to the adoption.

Powers of court on application to vary access
*48 (7) On the hearing of an application to vary access under an order for permanent care and custody, the court may, <u>in the child's best interests</u>, confirm, vary or terminate the access. (*Emphasis added)

Adoption of person 12 or more
74 (1) Where the person proposed to be adopted is twelve years of age or more and of sound mind, no order for the persons adoption shall be made without the persons written consent.

Prerequisites to adoption
*76 (1**)** Except as herein provided, where the person sought to be adopted is under sixteen years of age, the court shall not make an order for the child's adoption*

unless
(a) notice of the proposed adoption has been given to the Minister not later than six months before the application to the court for an order for adoption, or where one of the applicants for adoption is a parent ***or relative*** *of the child, notice of the proposed adoption has been given to the Minister not later than one month before the application to the court for an order for adoption;*
(b) notice of the hearing of the application and a copy of the application and all material to be used in support of it ***with respect to a child in permanent care and custody or a child that is the subject of an adoption agreement*** *have been filed with the Minister not later than one month before the date of the application; and*
© the child sought to be adopted has for a period of not less than six months immediately prior to the application, lived with the applicant under conditions that, in the opinion of the court, justify the making of the order.

78 (5) Subject to subsection (6), where an order for adoption is made in respect of a child, any order for access to the child ceases to exist.

(6) Where an order for adoption is made in respect of a child, the court may, where it is in the best interests of the child, continue or vary an order for access or an access provision of an agreement that is registered as an order under the Maintenance and Custody Act in respect of that child.

29. Of equal importance to what is in the Act, in my opinion, is what was removed from the Act by the 2005 amendments. S. 70(3) was repealed. It read:

> *70(3) No child in permanent care and custody and in respect of whom there is an order for access pursuant to subs. (2) of s. 47 may be placed for adoption unless and until the order for access is terminated pursuant to s. 48.*

30. In **Nova Scotia (Minister of Community Services v. S.M.S. et al** (1992), 112 N.S.R. (2d) 258, the Court of Appeal in an often-cited case was dealing with a situation wherein permanent care and custody of six children had been awarded to the Minister. There was a plan of adoption for three of them. The trial judge had

denied access until various recommendations to address the mother's liabilities were met. The Court wrote:

> para. 44: *The burden is on the parent or guardian to show that access is in the best interests of the child.*
> para. 45: *Under s. 42 (2) (sic)* (should be 47 (2)) *the circumstances under which access will be ordered must, of necessity, be limited.*

Citing **S.M.S.** the Supreme Court of Canada in **Catholic Children's Aid Society of Metropolitan Toronto (Municipality) v. M. (C.)** (1994), 2 R.F.L. (4th) 313, said that the Ontario equivalent phraseology to our 47(2) created a "presumption against access" (para. 46) once a (permanent care and custody) order had been granted, a presumption subject to one of the exceptions, ss. (b) through (d), being proven.

31. In **A.J.G. v. The Children's Aid Society of Pictou County and J.G.**, 2007 NSCA 78. Justice Bateman, Justices Oland and Fichaud concurring, wrote, para. 33:

> "*It must be highlighted, however, that "special circumstances"* (section 47 (2) (d)) *are only available as a basis for access where "a permanent placement in a family setting has not been planned <u>or</u> is not possible <u>and</u> the person's access will not impair the child's future opportunities for such placement" (s. 47 (2) (a))* (Emphasis in the original)

32. In **E.Z. and J.M.**, again for the panel, Justice Bateman wrote of s. 47(2), para 56,

> *"It suffices to say here that, at a minimum, this is statutory recognition that permanent placement of the child (which is usually, but not always, accomplished through adoption) takes precedence over access and that an access order must not be made where it will*

impair a child's opportunity for permanent placement."

33. In these cases the Court after taking pains to review and assess that facts of the case, upheld the finding or, in the case of **E.Z. and J.M.** found, that there were no 'special circumstances' that would justify access in any event. It may be therefore that the observations as to whether and under what circumstances access might be ordered once a permanent care and custody order is made were *obiter*.

34. In **Children's Aid Society of Cape Breton-Victoria v. A.M.** (2005), 232 N.S.R. (2d) 121, the Court of Appeal was dealing with access in the context of a permanent care and custody order having been made. The agency plan was for adoption if possible but, for the two 'special needs' children, "*...there was little evidence as to what their realistic prospects for adoption were*". (para. 34)

35. Justice Cromwell, Justices Oland and Fichaud concurring, wrote for the Court. Justice Cromwell wrote, para. 37, that the trial judge was, "*...obliged to take into account the benefits of access...*" and, at para. 36:

> *First, I would note that once permanent care was ordered, the burden was on the appellant, (the respondent in the court below), to show that an order for access should be made: s. 47 (2):* ***Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) v. M.L. et R.L.*** *[1998] 2 S.C.R. 534...at para 44 and authorities cited therein. Second, I would observe that, as Gonthier, J., said in* ***L.M.*** *at para. 50, the decision as to whether o not to grant access is a "...delicate exercise that requires that the judge weigh the various components of the best interests of the child."...I would note finally that, in considering whether the appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access.*

36. In my respectful view it is difficult to reconcile the **A.J.C.** and the **E.Z.** cases with **A.M.**. The plan or objective of permanent placement or adoption was 'on the table' in all three cases. I read **A.M.** to require the court to have a realistic look at what will best serve the child, balancing the pluses and minuses of adoption against the pluses and minuses court-ordered access including whether an access order might impair the chances of an adoption. I'm not sure if the two quotes above from **A.J.G.** and **E.Z.** are saying the exact same thing, but I take them, or at least **A.J.C.** , to say that the prospect or plan of an adoption closes the door to any consideration of access being granted, at least under ss. (d) of 47 (2), ("some other special circumstance"), which is the subsection general enough to accommodate a consideration of best interests as such.

37. Where a statutory provision is unclear one has recourse to the principles of statutory interpretation. In *Sullivan and Driedger on the Construction of Statutes 4th ed.*, © 2002, Ruth Sullivan, Butterworths, Elmer Driedger's "modern principle" was repeated, page 1:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

This principle was expressly endorsed by the Supreme Court of Canada in **Re Rizzo and Rizzo Shoes Ltd.,** [1998] I S.C.R. 27 at p. 41, also **Bell Expressvu Limited Partnership v. Rex** [2002] SCC 42.

38. The decision of the Supreme Court of Canada in **Catholic Children's Aid**

Society of Metropolitan Toronto, (*supra),* mandates the approach to be taken if a given section of a statute seems to run counter to the overall objective and philosophy of the statute. At para. 30:

> *As a starting point for this analysis, one must look at the Act as a global legislative scheme whose purpose and rationale should not be overshadowed by an unduly restrictive and strict interpretation of the sections of the Act, which would be at cross purposes with the whole philosophy of the Act.*

39. The purpose and scheme of the Act are to, "*...protect children from harm, promote the integrity of the family and assure the best interests of children*." (s. 2(1)). S. 2(2) underlines the paramountcy of the best interests of the child by declaring unambiguously that those interests are to be the paramount consideration in "all proceedings and matters" pursuant to the Act. These sections, surely, set the tone for and identify the objectives of the legislation. If there is a statutory provision that would restrict or compromise this purpose or to foreclose an inquiry into the child's best interests, then, it should say so without ambiguity.

40. It is important that in sections 2(2) and 42 (1), the best interests to be protected are those of "the child", not children generally, not some generic child in need of protective services, but the particular child who is the subject of the proceeding. I trust that it is not and will never be the law that the courts must take a 'one size fits all' approach as to the children with whom we are dealing. Each child, and each child's circumstances and needs are different. It may very well be true, for all the well understood reasons, that access should give way to a permanent placement or adoption in most situations. There is a good deal of wisdom in holding that there is a presumption in favour of there being no court-

ordered access. But surely with the 2005 amendments we have moved beyond 'cookie cutter' approach to child welfare.

41. What, if anything, is to be made of the decision by the Legislature to repeal s. 70(3) of the Act so as to allow for access by the natural parents (or others) to co-exist with an adoption order and repeal of section 70(3)? Once again, it read:

> *70(3) No child in permanent care and custody and in respect of whom there is an order for access pursuant to subs. (2) of s. 47 may be placed for adoption unless and until the order for access is terminated pursuant to s. 48.*

In my view it is anachronistic to read s. 47(2) as absolutely precluding, (subject to subsections (b) and ©), what the 2005 amendments expressly contemplate, which is the possibility of access and adoption co-existing.

42. Speaking of s. 48, it is interesting that section 48(7), dealing with the powers of the court on an application to vary or terminate access, makes no reference whatsoever to the restrictive provisions of s. 47(2). Rather, it directs the court to consider only the child's best interests. What logic would support the child's best interests being relevant in one section but not the other? Why would adoption, or the prospect of adoption, trump access no matter what in s. 47(2), and not even be mentioned as a factor in s. 48(7)?

43. In **N.S. (Minister of Community Services) v. D.L.C. et al** (1994), 138 N.S.R. (2d) 243, (N.S. Fam. Crt., Williams, J.), para 154 and 156:

> *para. 154 (The child's) circumstances have been driven by this proceeding since November, 1993 and before. The agency and therapeutic plans for (the child) are for adoption. Any access*

> *provided should complement her therapy and should not impede development of a permanent placement for her. Placement plans should not have to await resolution of applications to vary or terminate access, no adoption being possible where there is an order for access - s. 70(3)* ***Children and Family Services Act****.* (Emphasis in original)
>
> *para. 156 I am not persuaded that a court order for access is appropriate. I conclude that court ordered access is not in (the child's) best interests.* (Emphasis in original)

44. I interpret (then) Judge Williams' observations, particularly in paragraph 154, to show that his reservations about access, in part at least, were because section 70(3) was an absolute bar to an adoption at least if an access order existed. He perceived, and rightly so, that because of s. 70(3), access and adoption, or even a placement for adoption, were mutually exclusive.

45. This thought is similarly expressed in the book *Child Welfare Law in Canada, second edition*, Bala et al (incl. Justice Williams), Thompson Educational Publishing, Inc., © 2004, at page 97:

> *In most provinces there is a statutory presumption that if a child is made a permanent ward, there will not be any access between a child and the birth family. This is because in most jurisdictions, an outstanding order for access to the birth family is a legal impediment to making an adoption order, and adoption is considered the preferred option for a permanent plan of care, especially for young children.*

And at page 98:

> *In jurisdictions where there is no option that would provide both the permanency of adoption and the opportunity for ongoing court-ordered contact with the birth family, courts increasingly express*

> *frustration with the inflexible options provided by law, which at times requires choosing not so much the "best" option, as the least detrimental alternative. As noted in one Ontario case**
>
> > *It is necessary to ask whether the risks of emotional and behavioural difficulties inherent in terminating R's access to his family members outweigh the benefits of placement in a permanent, stable, secure adoptive home. The Children and Family Services Act does not permit orders of access to continue after adoption. This is indeed unfortunate for children such as R.*
>
> ***Children's Aid Society of Ottawa v. D.K.** [2002] O.J. (Ont. Sup. Crt.)

46. Again citing Dreidger, a legislative section must take its meaning from the context, purpose and scheme of the Act. Now that 70(3) has been repealed, (and assuming for a moment that it was repealed for a reason), the underpinning of an inflexible rule has disappeared. Not only gone, but a strict reading of s. 47(2) is discordant with the scheme of the Act to the extent that it might be seen to preclude an examination or implementation of the child's best interests if those interests include access. (See again the quote from the Supreme Court of Canada in **Catholic Children's Aid Society of Metropolitan Toronto**, supra.)

47. Dreidger maintained as well that courts should, as need be, have recourse to the intention of the legislature. I understand that the Bill itself received next to no debate in the Legislature. However, the May 11, 2005 press statement of the then Minister of Community Services, the Honourable David Morse, when introducing the Bill is instructive as to intent. It reads in part:

> *More children will have loving, permanent homes under legislation introduced today, May 11, 2005, by Community Services Minister David Morse.*

The legislation allows children in permanent care to be adopted while maintaining contact with birth parents or other relatives such as grandparents.
Currently, there are about 1,100 children in permanent care in Nova Scotia. Children in permanent care often cannot return to their biological parents due to risk of abuse or neglect. Under existing legislation, a child cannot be adopted if there is an access order in place. An access order permits contact by birth parents or relatives if it is in the best interests of the child. To date, there are about 500 access orders in place.
"Every child needs a family of their own", said Mr. Morse. "The proposed legislation will help us place many more children in permanent and loving homes, while maintaining contact with their birth parents."
"The proposed legislation provides an opportunity for birth parents with access orders to continue contact–even as the child moves into a loving and permanent and loving adoptive family."

48. It is difficult to read that statement and conclude that the Minister didn't intend his amendments to serve the best interests of children by removing court-ordered access as a bar to an adoption proceeding. Obviously the Minister, and presumably the Legislature perceived that the change, "...provides an opportunity for birth parents to continue contact-even as the child moves into a loving and permanent and loving adoptive family..." and that, "...more children will have loving, permanent homes under (this) legislation...".

49. It is frequently argued that court-ordered access will limit the number of prospective adoptive homes and this would be contrary to the best interests of the child. That is an assertion in need of being tested. Limit by how much? 50%? 75%? Leaving how many potential adoptive homes? S. 47(2) does not speak of limiting the number of homes, but of 'impairing' the prospects of adoption. If the

number of potential, pre-approved adoptive homes is reduced from 100 to 50, or even 20 or 10, is that necessarily an 'impairment'? Not really. To have ten homes pre-approved, or five, to choose from suggests to me that the prospects for an adoption are very good indeed.

50. The Supreme Court of Canada was singularly unimpressed with that same argument in **New Brunswick (Minister of Health and Community Services) v. L.(M.)** (1998), 41 R.F.L. (4th) 339, saying, at para. 41:

> *In **G. (M.A.), Re**,supra,* (1986), 73 N.B.R. (2d) 443 (N.B.C.A.), *at p. 451, in the Court of Appeal, the Minister urged that owing to the fact that a guardianship is generally a prelude to adoption, and that potential adoptive parents may be discouraged by the existence of an access right, it would be illogical to grant access at the same time as a guardianship order. Hoyt, J.A. felt, with good reason, that these concerns were exaggerated.* (Emphasis added)

51. I agree that access, post care and custody order, should be rare and reserved for "exceptional circumstances", Justice Gonthier in **L.(M.)**, above, para. 44. Our legislation reads "special circumstance". Without attempting to enumerate what might constitute an "exceptional" or "special" circumstance, it surely has to be synonymous with the best interests of the child and of sufficient weight to counter any potential negative implications for a planned adoption. A weighing of the pluses and minuses is imperative.

52. My simple point is that either the best interests of the child are paramount throughout the Act or they aren't. If the duty on the court to see to those best interests is to be supplanted, it should surely take a legislative provision much less

linguistically challenged and much more to the point than is s. 47(2). It is a simple fact that some times, for some children, and however 'exceptional' or 'special the circumstances may be, their best interests can only be secured by court-ordered access.

53. Perhaps one might want to read **Children's Aid Society of Toronto v. T. (C.)**, (2006), 36 R.F.L. (6th) 443, (Ont. Crt. of Justice), admittedly with Ontario's equivalent of s. 47(2) mercifully having been put out of everyone's misery. It is a humane and common sense read, and a prime example of why our s. 47(2) needs to be jettisoned or interpreted in a manner more congruent with the philosophy of the Act.

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Bob Levy, J.F.C.