SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Children's Aid Society of Cape Breton-Victoria v. L.D., 2010 NSSC 61

Date: 20100215
Docket: 58625; 58181
Registry: Sydney, N.S.

Between:

The Children's Aid Society of Cape Breton-Victoria

Applicant

v.

L.D. and B.S.

Respondents

- and -

J.S.

Applicant

v.

L.D. and B.S.

Respondents

Editorial Notice

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

Judge: The Honourable Justice Darryl W. Wilson

Heard: August 27, 2009, August 28, 2009, October 2, 2009, November 6, 2009, in Sydney, Nova Scotia

Counsel: Lee Anne MacLeod-Archer, Counsel for the Applicant, Children's Aid Society of Cape Breton-Victoria
Alan J. Stanwick, Counsel for the Applicant, J.S.
David J. Iannetti, Counsel for the Respondent(s), L.D. and B.S.

By the Court:

[1] This proceeding concerns the child, S.M.S., born November *, 2007. The Children's Aid Society of Cape Breton-Victoria, the Agency, applies for an Order of Permanent Care and Custody with no provision for access so that the child may be placed for adoption.

[2] The Respondent mother, L.D., who opposes the application, requests a dismissal of the protection proceeding and a return of the child to her care. The Respondent father, B.S., participated in the proceeding throughout, including the final Disposition Hearing. However, near the end of the proceeding, he instructed counsel, who had been representing both Respondents, to advise the court that he was withdrawing from further participation in the proceedings.

[3] During the proceedings, the paternal grandmother filed an application requesting custody of the child, S., pursuant to the *Maintenance and Custody Act, R.S.N.S. 1989, c. 160* This application was heard with the application for Disposition Review.

BACKGROUND

[4] The Respondents are the parents of two children, S.M.D. and S.M.S. For clarity, I will refer to S.M.D. as "D." and S.M.S. as "S.".

[5] The Respondent's child, D., was born prematurely at 30 weeks four days on March *, 2007. She was apprehended by the Agency on May 16, 2007 as a result of medical evidence diagnosing non-accidental micro fractures of her of tibia and patella, which could not be explained by the parents. A protection finding against both Respondents pursuant to s.22(2)(a) - a child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately - was entered by another court on September 10, 2007.

[6] S., who is the subject of this proceeding, was born prematurely at the IWK Hospital in Halifax, at 23 weeks gestation on November *, 2007. She faced many life threatening complications and remained in the neonatal intensive care unit at the IWK for many months after her birth. Eventually, with improved health, she was transferred to a regular pediatric floor at the I.W.K. Hospital in early May of 2008. The Agency decided to apprehend S. in May of 2008 based on the protection finding regarding D., S.'s transfer to a regular pediatric unit where the Respondents would not be supervised as closely in the N.I.C.U. during visits with her, a lack of progress in reducing the protection risk identified with D. and the Agency's intent to seek an Order of Permanent Care and Custody regarding D.

[7] In May 2008, S was discharged from the I.W.K. Hospital into the care of the Agency and placed in a foster home in Cape Breton, pending the hearing of the Agency's application.

COURT PROCEEDINGS

[8] The initial court appearance was on May 14, 2008 and an Order was granted based on affidavit evidence. The Respondents did not consent and requested an Interim Hearing, which was scheduled for June 4, 2008. This hearing was adjourned by consent to June 27, 2008.

[9] On June 27, 2008, evidence was presented and the court determined there were reasonable and probable grounds to believe the child was in need of protective services and the child was placed in the temporary care and custody of the Agency with supervised access to the Respondents.

[10] The Protection Hearing was held on August 7th, August 8th, September 5th and October 8th, 2008. The child was found in need of protective services pursuant to s. 22(2)(b) - substantial risk of physical harm.

[11] The Disposition Hearing was scheduled for January 29, 2009. The parties consented to a Disposition Order in which the child was placed in the temporary care and custody of the Agency with supervised access to the Respondents. The

Respondents consented to this finding on the understanding that the Agency was not seeking an Order of Permanent Care and Custody at this stage and the child would remain in temporary care and custody until the Respondents participated in an updated assessment with Mr. Michael Bryson, Clinical Psychologist.

[12] A Disposition Review was set for April 27th and 28th, 2009. Prior to that date, the parties agreed to an adjournment of the Disposition Review until June 1, 2009. The Respondents consented to a continuation of the Temporary Care and Custody Order.

[13] The final Disposition Review began August 27, 2009. It continued on August 28th, October 2nd, and November 6th, 2009.

[14] It should be noted that, while most of the Interim Orders and Disposition Review Orders proceeded by consent, the Respondents were contesting the protection proceedings regarding the child, D., in another court and were only agreeable to continuing the Temporary Care and Custody Orders regarding the child, S., on the understanding the Agency was not seeking an Order of Permanent Care and Custody at the time of each of those hearings.

EVIDENCE

[15] The evidence in this proceeding consisted of *viva voce* testimony of several witnesses on behalf of the Agency, the Respondent, L.D., and the paternal grandmother. These witnesses included Ainslie Kehoe, a Child Protection Worker and Michael Bryson, Clinical Psychologist, on behalf of the Agency; L.D., the Respondent, her mother, Ed Burke, Clinical Therapist with Family Services of Eastern Nova Scotia; and Alanna Brown, Clinical Therapist with Addiction Services on behalf of L.D.; J.S., the paternal grandmother, R.F., the paternal grandmother's sister, and S.L., a former foster child who was cared for by the paternal grandmother many years ago.

[16] The evidence also included the transcript of the evidence of various witnesses who testified in the protection proceeding regarding the child, D., on

March 8, 2009, June 8, 2009 and July 6, 2009. These witnesses included Ashley Rice and Dyan Degaust, Access Facilitators with the Agency; Mary Jo Church, Director with Family Services of Eastern Nova Scotia; Ed Burke, Clinical Therapist with Family Services of Eastern Nova Scotia; Alanna Brown, Clinical Therapist with Addiction Services; Michael Bryson, Clinical Psychologist who prepared two psychological assessments of parental capacity, and Cst. Lavin of the Cape Breton Regional Police.

[17] The oral evidence of Allana Brown, Ed Burke and Michael Bryson in this proceeding was an update on their involvement with the Respondents since their testimony in the prior proceeding.

[18] The evidence also included the tendering, by consent, of a number of exhibits including letters, certificates, Agency plans and two psychological assessments of Michael Bryson.

PROTECTION FINDING

[19] There was a contested Protection Hearing. The full text of the court's decision can be found at (2009), N.S.S.C. (47). The following is a brief summary of the court's review of the evidence and its' findings.

[20] D. was admitted to hospital on May 14, 2007 because of an apnea incident. In the course of diagnosis and treatment of the apnea incident, a full skeleton x-ray was ordered, which identified four fractures, two in the upper thigh bone and two in one of the cap bones. Dr. Isles, a radiologist, testified the kind of force necessary to cause these injuries is quite significant. The force usually entailed in creating these fractures is a shaking force, so that the limbs are flailing, creating a shearing across the metaphyses or a twisting or yanking force or the lifting of the child by one limb or both limbs. According to Dr. Iles, the person exerting the force would know it was excessive. According to Dr. Iles, the injuries suffered by D. were typical non-accidental injuries and were specific for the kind of trauma that occurs in the abuse of a child.

[21] According to Dr. Iles, the fractures can be difficult to date. They can heal as early as ten days and it is a rare fracture that is visible after four weeks. In Dr. Iles' opinion, the fractures D. displayed on her admission to hospital on May 14th occurred within two weeks of that date. D. was in the care of her parents from April 13th when she was discharged from hospital after birth until May 14th when she was admitted to hospital because of the apnea event. D. was examined at the I.W.K. Hospital on May 24, 2007. The examination included x-rays of her femur and tibia. Dr. Orenstein noted the x-rays indicated healing in the fractured areas, which provided documentation and verification of the original diagnosis of inflicted injuries.

[22] Both Respondents deny they had anything to do with causing the injuries to D. or were neglectful in caring for her. They have no idea how D. was injured. They offered the following suggestions:

> (1) She may have suffered the injuries while in hospital, after her birth, before discharge;
>
> (2) Others in their home were in a position to cause the injuries;
>
> (3) They may have inadvertently caused the injuries by massaging her legs;
>
> (4) S. may have had a pre-existing condition such as low calcium levels, weak bones or neurological muscular disorder which predisposed her to this type of injury.

[23] The court concluded the explanation by the parents that people other than themselves had an opportunity to injure D. was vague and imprecise. The Respondents acknowledged that D. was cared for only by either one or both of them and they were in the general vicinity of the child when others were visiting. According to Dr. Iles, the person inflicting the injuries would know that the force applied was excessive. According to the medical evidence, the child did not have

any pre-existing condition which would predispose her to this type of injury and a vigorous massage would not cause this specific injury. Based on the opinion of Dr. Iles and the healing noted in the x-rays taken by the I.W.K. Hospital on May 24, 2007, the court concluded the injuries were inflicted on D. during the period from April 14th to May 14th, 2007 when she was in the care of the Respondents.

[24] The court concluded that the fractures suffered by D. were the result of abuse. The court also determined that an explanation for the injuries is unlikely at this time and the person who caused the injuries is unknown. Although the Respondents were residing in separate residences, they presented themselves as a family unit and neither believed the other abused the child. Services accessed by the Respondents at the time of the Protection Hearing for S. had not been effective in addressing the risk that S. may suffer harm if returned to the care of a parent because the injuries to D. remained unexplained. Although S. has not been injured, she was born approximately six months after D. was abused while in the care of the Respondents.

FINAL DISPOSITION REVIEW

[25] The primary concern of the Agency at this time is that S. remains at substantial risk of physical harm, occasioned by the unexplained injuries to her sister, D., and the failure of the Respondents to adequately address this risk factor.

[26] The initial plan of care for the child, D., was for the Respondents to address the primary areas of concern which included the unexplained injury to D., B.S.'s anger, the Respondents' addictions and lack of a support network. The goal was for the Respondents to accept responsibility for the child's safety, work on and demonstrate improvements with anger management skills, maintain a drug free lifestyle and decrease isolation by developing a support network.

[27] The Agency requested both Respondents participate in a parental capacity assessment, random drug testing, addiction counselling/assessment and a "Parents Together" support group. The Agency also requested that B.S. attend for anger management counselling.

[28] The protection proceedings for D. and S. have been marked by conflict and confrontation between the Respondents and the Agency. The Respondents believed their anger at the Agency is justified because the Agency (1) did not have

any grounds for removing their children, (2) did not communicate with them in a timely manner about their children's health and well-being, (3) made it difficult for them to exercise access, (4) did not investigate other possible causes for D.'s injuries. Communication between the Respondents and the Agency staff was often confrontational, which included name-calling and accusations of lying. The hostility between the Respondents and the Agency made it difficult for the Agency to determine what services were being accessed by the Respondents, until they were reported in the Parental Capacity Assessment, or whether the services were effective in addressing the goals identified in the plan of care.

[29] Services provided to remedy the condition and situation on the basis of which the child was found in need of protective services included the following Agency services:

> (a) Protection caseworker who was responsible for arranging services to assist the family in addressing protection concerns, and monitoring the family's progress, supervising the child's placement and providing support and direction to the Respondents throughout the Agency's involvement;
>
> (b) Temporary care and custody caseworker who was responsible for arranging and monitoring services for the child and ensuring the child's overall needs were met while in temporary care and custody;
>
> (c) Access coordinator, who was responsible for developing access schedules and arranging and providing transportation for the child to and from the access visits with the Respondents;
>
> (d) Transportation - taxi approval - to facilitate attendance at access visits and counselling appointments;
>
> (e) Foster home program which provides a stable placement for the child where the child's needs are met;

[30] Community resources made available for the Respondents included:

> (a) A referral to a "Parents Together" group, which was a support group for parents in which they could decrease their social isolation and benefit

from the life experiences of others who were going through difficult times. The Respondents did not attend this course because L.D. was travelling to Halifax on Fridays when the course was offered. Also, L.D. believed a woman who had reported her to the Agency lived near the building where the course was offered and she did not feel comfortable going to that class. L.D. believed her attendance and participation in other programs such as the Family Place Resource Centre's program "You're a Better Parent Then You Think" and supportive counselling with Ed Burke and Alanna Brown provided the same benefits as the "Parents Together" group.

(b) Addiction Services - both parents have a prior history of substance use. At the time of D.'s birth in March, 2007, L.D. was participating in the Methadone Maintenance Program. D. was weaned from methadone without incident after her birth. L.D. consumed cannabis after D.'s birth and during her pregnancy with S. because it helped her appetite and relieved stress which enabled her to continue participation in the Methadone Maintenance Program. L.D. participated in the Methadone Maintenance Program in Cape Breton from January, 2007 until October, 2007. She was screened for the presence of other drugs while participating in this program. Cannabis was detected on at least 20 occasions during this period. L.D. began attending the Methadone Maintenance Program in Halifax upon her admission to the I.W.K. Hospital for the birth of S. in November, 2007. Her methadone dosage at that time was 25 mg. Her methadone dosage when she returned to Cape Breton in December, 2007, was 4 mg. She has not taken any methadone since that time. Also, she has abstained completely from inappropriate drug use or consumption since December, 2007. She attends appointments regularly with her Addiction Counsellor, Alanna Brown, who is pleased with her progress. Ms. Brown is satisfied that L.D. can deal with stress without resorting to drug use. She will continue to provide supportive counselling and will leave it to L.D. to decide when she wishes to stop seeing her. Random Drug Testing was an option in the plan but has not been implemented.

Since B.D. did not testify, we have no information about whether he has participated in Addiction Counselling or Narcotics' Anonymous programs or abstained from drug use as recommended by Michael Bryson in his assessment.

(c) Counselling and Assessment - The Respondents attended for personal and couples' counselling with Ed Burke of Family Services of Eastern Nova Scotia. Mr. Burke saw the Respondents on 10 occasions since August, 2008. Seven of those occasions were prior to March, 2009 and three sessions were after March, 2009. The primary focus of the sessions was stress reduction and assertive communication. The Respondents' anger towards the system was based on their children being apprehended. The purpose of these sessions was to help them find better ways to deal with their anger and aggression. In Mr. Burke's opinion, these sessions included supportive counselling and therapeutic counselling aspects.

B.S. participated in an "Options to Anger" program offered by Family Services of Eastern Nova Scotia, which he completed in November, 2008. The Agency was not aware of his participation until January, 2009, when B.S. provided a release of information to allow his file to be shared with the Agency.

L.D. made a self-referral to the "Options to Anger for Women" program offered by Family Services of Eastern Nova Scotia, which she completed in June, 2009. Initially, she was not requested to attend for anger management treatment. However, she was so upset with her involvement with the Agency, she felt the need to acquire more strategies to help her learn how to avoid conflict.

PARENTAL CAPACITY ASSESSMENTS

[31] Michael Bryson, Clinical Psychologist, completed two Psychological Assessments of Parental Capacity. The purpose of the first assessment dated

February 21, 2008, was to make recommendations in the best interests of the Respondents' daughter, D. At page 61 of his report, Mr. Bryson states:

> **The assessment focuses on what L.D. and B.S. have to offer their daughter, their strengths and weaknesses. S.'s medical status, including her diagnosis and causes of her alleged non-accidental injuries are not addressed. These issues are before the court and are beyond the scope of the referral. Neither L.D. or B.S. take responsibility for these injuries. They do not accept that they harmed her, intentionally or unintentionally.**

[32] Mr. Bryson made the following recommendations:

(1) B.S. attend and complete an anger management program;

(2) B.S. remain abstinent from alcohol, street drugs, and any medication that is not prescribed to him for a period of 24 hours prior to and during any contact with his children;

(3) L.D. remain absent from alcohol, street drugs and any medication that is not prescribed to her for a period of twenty-four (24) hours prior to and during any contact with her children;

(4) L.D. and B.S. attend supportive counselling, such as that offered by Family Services of Eastern Nova Scotia, to assist them with managing the emotions, concerns and stressors related to their children, involvement of the Applicant, and ongoing court proceedings;

(5) A Children's Needs Assessment of D. be completed to determine if she has any special needs;

(6) Should the court find that L.D. and B.S. are not responsible fro any harm caused to the infant child, D., that D. be returned to her parents' care pending completion of the above items;

(7) B.S. attend his family physician for assessment regarding his chronic sleep difficulties.

[33] During the course of his assessment, Mr. Bryson found the Respondents were child-focussed, aware of possible safety concerns, interacted with their daughter in a gentle and nurturing manner and enjoy spending time with her. The child was found to be energetic, responsive and mobile. The assessor did not note any concerns resulting from his observations of the Respondents with their daughter.

[34] The assessor noted that both Respondents had a history of psycho-active substance dependency with a high probability of a substance dependency disorder. B.S. was found to be an intense male, who admitted to difficulties managing his anger, who rationalized his behaviour and who had significant difficulty managing his use of psychoactive substances. Neither parent was found to be at high risk of physically abusing children in their care.

[35] The second assessment completed on March 16, 2009 was intended as a follow-up to the first psychological assessment. This assessment included a review of the psychological literature regarding child abuse and neglect. Mr. Bryson noted several limitations in his ability to deal with this issue. The Respondents denied having abused or neglected either of their children. Since the children were placed in care at a young age, the assessor was left with few collateral sources with direct information on the quality of relationship between the Respondents and their children as well as their demonstrated parenting strengths and weakness. The assessor was provided with a copy of a polygraph examination report administered to the Respondents on April 30, 2008. The assessor was not trained in interpreting these measures and attached no weight to them. The assessor noted that the literature identified two significant risk factors for the physical abuse of infant children, including post-natal depression of the mother and financial stress. The assessor noted that the Respondents did not meet either of these criteria. The Child Abuse Potential Inventory Form completed by the Respondents did not find either Respondent to have characteristics similar to known physical child abusers.

Parental substance abuse was identified as a risk factor for child abuse that was relevant in the case of both Respondents since both have a history of substance abuse. B.S.'s ongoing use of marijuana was considered a significant risk factor. The assessor also noted that both Respondents presented with many positive parenting behaviours identified by the literature. The deficient parenting behaviours identified by the literature, applicable to the Respondents, were substance use and abuse, inadequate self-control and impulsive behaviours, especially for B.S., although L.D. was also identified as a person who may have some difficulties with impulse control. Physical abuse of a child was also considered a deficient parenting behaviour but Mr. Bryson left it for the court to determine whether the Respondents physically abused their child.

[36] Mr. Bryson made the following recommendations:

> (1) Should the court decide to return D. and S. to the care of their parents, that B.S. have demonstrated an ability to maintain abstinence from psychoactive substances such as marijuana;
>
> (2) L.D. continue with anger-management counselling;
>
> (3) L.D. and B.S. continue with supportive family counselling with Mr. Burke of Family Services of Eastern Nova Scotia;
>
> (4) B.S. complete an addiction assessment through addiction services and follow all treatment recommendations;
>
> (5) B.S. attend Narcotics Anonymous on a weekly basis for a period of at least six months;
>
> (6) L.D. continue with her addiction treatment through Addiction Services, until she and her therapist mutually agree that no other treatment is warranted;

(7) B.S. abstain from alcohol, street drug use, and any medication that is not prescribed to him;

(8) L.D. abstain from street drug use, and any medication that is not prescribed to her;

(9) B.S. attend individual counselling to assist him with developing skills for impulse control.

[37] Mr. Bryson's second report did not recommend return of the children while the Respondents were accessing services. He stated that the Respondents needed time to address ongoing issues, including impulse control/anger, social supports, substance abuse and cooperation with the Agency. Mr. Bryson noted that B.S. continued to have difficulties with marijuana use and impulse control. He recommended anger management for L.D. because he was not sure the nature of the Respondent's counselling with Mr. Burke of Family Services of Eastern Nova Scotia was therapeutic counselling. Mr. Bryson's review of Mr. Burke's evidence and report at the prior hearing for D. led him to believe the counselling was more supportive, which essentially is a safe place for the Respondents to express their feelings about ongoing matters without the therapist's active involvement, than therapeutic. According to Mr. Bryson, therapeutic counselling requires the therapist to set goals and a specific treatment program. The purpose would be for the Respondents to develop insight or self-awareness so they can self-regulate their behaviour in the future.

[38] Mr. Bryson has not seen either of the Respondents since the completion of his second assessment in March, 2009. At that time, he felt additional time was needed to assess whether there was a pattern of enduring change in their behaviour. According to Mr. Bryson, people will often make short-term changes but because their environment, belief system, social supports, level of education and self-awareness remain the same, there is a high risk they will revert back to prior belief systems and behaviours. In order for him to make a proper assessment whether the Respondents had benefited from the services, he would want to see a period of

time in which they demonstrate under different situations the material accessed is understood and implemented and their behaviours, attitudes and emotional responses to different situations have changed.

PLAN OF CARE

[39] Until B.S. advised his counsel to inform the Court he was withdrawing from the proceeding, the Respondents' plan of care was for L.D. to raise her children living separately from B.S. She would reside in her own accommodations and B.S. would assist her financially and with childcare while residing with his mother or elsewhere. L.D. is in receipt of Social Assistance and B.S. is employed. They did not intend to reside together for financial reasons. L.D. testified that she was committed to remaining in the relationship with B.S. Her hope was to have both D. and S. in her care as well as an older child from another relationship, who has been cared for by her mother for several years. That plan changed when B.S. withdrew his involvement in the proceedings. Counsel for L.D. submits her plan is to care for the children with the support of family and she would exclude B.S. from future involvement in the life of the child.

SUBMISSIONS

[40] Counsel for the Agency submits that least intrusive measures including services to promote the integrity of the family have been attempted and failed or are inadequate to protect the child. Counsel for the Agency submits the Respondents failed to gain insight into the importance of accepting responsibility for the safety of a child who was abused while in their care. Counsel for the Agency submits the primary physical need of S. is safety and it cannot be assured in the care of the Respondents.

[41] In June, 2009, L.D.'s sister, who was residing with her, was the victim of a stabbing. Later that day, the Cape Breton Regional Police received a complaint that the Respondents had caused property damage and assaulted an individual. When the police arrived at L.D.'s residence, B.S. was loud, confrontational and verbally aggressive. When B.S. was arrested, L.D. became assertive and

confrontational with police. Both were arrested, charged with property damage and assault offences, and released pending their trial, scheduled for July, 2010.

[42] Counsel for the Agency submits that this incident is an example of the inability of the Respondents to benefit from anger management counselling.

[43] It is the Respondents' position that they are not responsible for D.'s injuries, they do not know how she was injured and they do not accept that either of them would intentionally injure D.

[44] It is the submission of counsel for the Respondents that the parties have cooperated fully in the preparation of two Parental Capacity Assessments and that L.D. has participated in and completed all the services requested by the Agency and recommended by the assessor. While B.S. has participated in the Parental Capacity Assessments and, to a lesser degree, in recommended services, he will not be involved in the future plan of care for S. if she is returned to L.D. and, therefore, poses no future risk of harm to her.

[45] Counsel for L.D. submits that the original plan of care of the Agency, which contemplated return of the child, D., while the Respondents were accessing services, has evolved into something completely different. Counsel for the Respondents submits that it does not matter whether they accessed remedial services because the Agency require an admission of guilt or an acknowledgement of responsibility by the Respondents for the injuries sustained by D. Counsel for L.D. submits that S. is in the care of the Agency because the parents are unable to explain how the injuries to D. were sustained and not because they were using marijuana or were angry at the Agency or did not participate in the "Parents Together" group.

[46] Counsel for L.D. submits that she is a loving mother who travelled on a weekly basis from Sydney to Halifax to care for S. while she was in the intensive care unit of the I.W.K. Hospital, and successfully completed all the services requested of her by the Agency, including those recommended in the report of Mr.

Bryson. She did not harm her child, she has the support of her family and the Respondent, B.S., will not be involved in the future care of S. Therefore, there are no current protection risks and it is in S.'s best interests to dismiss the protection proceedings and return the child to her care.

BURDEN OF PROOF

[47] The burden of proof in this proceeding is the civil burden on the balance of probabilities but one that must take into consideration the serious consequences of a request to have a child placed in the permanent care of an agency. The burden of proof is on the agency to show that a Permanent Care and Custody Order is in the child's best interest.

LEGISLATION

[48] The court must consider the requirements of *Children and Family Services Act, S.N.S. 1990, c. 5* in reaching its' conclusion. I have considered the preamble, which states:

> **AND WHEREAS children are entitled to protection from abuse and neglect;**
>
> **AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;**
>
> **AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;**

[49] I have also considered Sections 2(1) and 2(2), which provide:

> **Purpose and paramount consideration**
> **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.**

(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

[50] I have considered the relevant circumstances of Section 3(2), which provides:

3 (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;

(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;

(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;

(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;

[51] Other relevant Sections include Sections 42(2), which provides as follows:

(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.**

[52] I have reviewed the least intrusive alternatives, including services to promote the integrity of the family.

[53] Section 42(3) provides:

> **(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 child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.**

[54] J.S., the paternal grandmother, applied for custody of S. I have reviewed her evidence, including testimony from her sister and a former foster child, whom she cared for as a young child, approximately 12 years ago at the request of the Agency. J.S. is an active 70 year old. She takes medication for high blood pressure and a thyroid condition. She also has hearing difficulties and possesses a hearing telephone in addition to a regular telephone. She has two dogs who let her know by barking that someone is at the door. I am satisfied she has appropriate accommodations and adequate financial resources to care for S. Her sister will assist her with transportation needs. Her son, B.S., has not lived with her for two years. She believes he has been living with L.D. She has heard him get angry at the Agency, but does not believe he has an anger problem or an addiction problem at this time. While she does not believe the Respondents harmed their child, D.,

she will agree to follow any conditions in a court order which would restrict contact between the Respondents and S. She has visited S. on occasion with the Respondents but knows little about her needs or development.

[55] Section 42(4) provides:

> **(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.**

[56] The time-limits pursuant to the Legislation have expired and the Court must either place the child in the permanent care and custody of the Agency or dismiss the proceedings and return the child to the care of the Respondents, or L.D. alone.

CONCLUSION

[57] The child, D., was approximately two months' old when her injuries were discovered. She was in hospital for the first month of her life and in the care of the Respondents for the second month. The Respondents are the only persons who cared for her. They were not able to identify anyone who had the opportunity to harm her while she was in their care. Neither parent was able to explain how the injuries occurred. Their explanations suggest the injuries could have been caused by hospital staff or were injuries not caused by abuse.

[58] The Court finds that the injuries to D. occurred while in the Respondents' care. This finding is disputed by the Respondents. The medical evidence seems clear. The injuries to D.'s tibia and patella were non-accidental injuries specific for the kind of trauma that occurs in the abuse of a child. They were inflicted within two weeks of May 14, 2007, when the injuries were discovered by x-rays. There is no explanation for the injuries. The Respondents do not know how D. was injured or who may have injured her. They reject the possibility they were neglectful in caring for D. It is not likely that an explanation will be provided.

[59] S. was not physically abused as was D. However, D.'s injuries are a relevant factor in assessing the risk of future physical harm to S. The Respondents are the parents of both children. S. was born approximately six months after D. was abused, while in the care of the Respondent. A protection proceeding for S. overlapped a protection proceeding for D.

[60] Services have been provided. The Respondents' attitude continues to be one of distrust of the Agency and the medical personnel who reported the abuse. B.S. did not complete the services offered and withdrew from the proceeding. L.D. has been very successful in addressing her substance addictions. However, her relationship with B.S. is problematic as it relates to the risk of future harm to S. L.D. does not accept that B.S. would harm S. In October, L.D. testified that she was committed to a relationship with B.S., who would help her care for S. In November, 2009, B.S. ceased participation in these proceedings. L.D. now asks the Court to accept that she will raise S. on her own with help from family and will not allow B.S. to be part of the future care of S. Their credibility on the issue of future living arrangements is questionable. In earlier hearings, both led the Court to believe B.S. was residing with his mother. J.S. testified that B.S. has been residing with L.D. and not her for the last two years. J.S.'s sister testified that B.S. was not living with his mother.

[61] On the issue of whether services were effective in addressing the protection concern, I agree with the comments of Williams, J. in *Nova Scotia (Minister of Community Services) v. T.L.S.* (2003), N.S.J. No. 526 at paragraph 29, where he states:

> **Here there is not a service, there is not an assessment, there is not an exercise that has been identified that has not been attempted. At the heart of this decision I am concluding that in circumstances where I am satisfied that a child was seriously injured, abused while in the care of her parents and there is no explanation for that (and nor to be fair to each of them is there an indication that a specific one or other of them caused the injury), there is not**

an Order that could be made that could adequately protect the child or children in their care.

I find the child, S., continues to be in need of protective services.

[62] I find that is not possible to place the child, S., with her paternal grandmother, J.S. Although I find J.S. is well-intentioned and will not personally harm S., I agree with submission of counsel for the Agency that she is not in the position to provide long-term stable care for S., in which the child's physical needs would be met. I also find that it is unlikely she will be able to provide long-term care for S. on her own, without the assistance of other family members. S. requires a great deal of care. While she does not have any special needs, her overall level of development is delayed, there is a concern about her vision, she has difficulty breathing on occasion, and requires regular physiotherapy and ongoing medication. I find J.S. would not be able to assure the child's safety since she does not believe the Respondents were responsible for the harm suffered by D. and supported the return of the child to the Respondents care. Nor do I believe she would be able to resist the demands of B.S. and L.D. to visit with and care for their daughter.

[63] I have considered the relevant circumstances for determining the child's best interest. Although the Respondents have been limited in their contact with S. since her birth, I find they would be able to form an appropriate bond with the child and the child with them based on the reports of access facilitators who observed the Respondents and their children on many occasions. However, the risk of harm of returning S. to the care of her parents is significant since the injuries to D. remain unexplained. The Court cannot just ignore the fact that these injuries occurred. The focus of the Act is in protecting children from abuse, respecting the children's sense of time and only removing the children from the care of parents when all other measures are inappropriate. The focus of the Act is not protecting the rights of parents.

[64] The risk of future harm of returning S. to the care of the Respondents or L.D. alone is greater than the risk of her remaining in the care of the Agency and

placed for adoption. In the circumstances of this case, the degree of risk of future harm is high. A secure place as a member of a family is important for S.'s development.

[65] I find the Agency has met the burden of proof. It is in S.'s best interest that she be placed in a home in which her personal security and physical safety are assured. That is not possible in the home of the Respondents or L.D. Therefore, I find it is in S.'s best interests to be placed in the permanent care and custody of the Agency.

[66] Since a provision for access would impede the Agency's plan for a permanent placement through adoption, which is in the child's best interest, there will be no Order for access.

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J.